

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

ERNESTO SERNAS GOMEZ, *Applicant*

vs.

**NEIGHBORHOOD ITALIAN CAFE, INC.; MIDCENTURY INSURANCE, administered
by FARMERS INSURANCE, *Defendants***

**Adjudication Number: ADJ15017749
Van Nuys District Office**

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

Defendant seeks reconsideration of the Findings, Award and Orders (“F&A”) issued on June 30, 2025, wherein the workers’ compensation administrative law judge (“WCJ”) found that cost petitioner was entitled to payment for the preparation of three medical-legal reports in connection with applicant’s case. Defendant contends that the WCJ erred by refusing to consider evidence it had failed to file with the WCAB prior to trial, and in finding that the October 25, 2021 report was a medical-legal report.

We received an Answer from cost petitioner Physical Rehabilitation Services, Inc. We also received a Report and Recommendation on Petition for Reconsideration from the WCJ, recommending that reconsideration be denied.

We have reviewed the Petition, the Answer, and the Report, as well as the record. For the reasons discussed below, we will grant reconsideration and affirm the F&A, except that we will find that the award is subject to a credit for payments made by defendant after the filing of the cost petition and prior to the trial date, in an amount subject to adjustment by the parties, with jurisdiction reserved to the WCJ in the event of any dispute. We will also admonish defendant for improperly attaching evidence to the Petition for Reconsideration that is not part of the adjudication file.

FACTUAL BACKGROUND

Applicant filed an Application for Adjudication, alleging a cumulative trauma injury to multiple body parts sustained from July 1, 1996 to July 5, 2021 while employed by defendant as a bus boy. On August 18, 2023, applicant's case was resolved via a compromise and release.

On August 29, 2024, cost petitioner filed a Petition to Resolve Non-IBR Medical-Legal Dispute, seeking payment for a number of medical reports prepared by Arbi Mirzaiaans, D.C., as well as penalties, interest and sanctions for late or non-payment.

After several continuances, the matter came on for trial on June 10, 2025. According to the stipulations of the parties, applicant's claim was denied on August 26, 2021. (Minutes of Hearing / Summary of Evidence ("MOH/SOE") 6/10/2025, at p. 2.) An exhaustive list of issues was memorialized: (1) injury arising out of and in the course of employment ("AOE/COE"); (2) liability for self-procured medical treatment; (3) the lien of Physical Rehabilitation Services and PTP Dr. Mirzaiaans; (4) defendant's compliance with 8 Cal Code of Regulations section 10786; (5) penalties, interests, costs, and sanctions; (6) reasonability and necessity of treatment; (7) request for second bill review; (8) untimely request for second bill review; (9) untimely request for independent bill review; (10) improper med-legal charges; (11) no request for authorization; (12) official medical fee schedule / bill review; (13) invalid coding and PCP codes; (14) no request from the applicant attorney for additional med-legal services; (15) non-filed timely lien; (16) statute of limitations; and (17) unreasonable demand for attorney's fees. (*Id.* at pp. 2–3.)

Cost petitioner's exhibits were admitted. (*Id.* at pp. 4-5.) Defendant's exhibits were not admitted because defendant failed to file the exhibits listed on the Pre-trial Conference Statement in the Electronic Adjudication Management System ("EAMS").

According to the Opinion on Decision, defendant requested a continuance based on its failure to file exhibits, which the WCJ denied because defendant was not willing to pay cost petitioner's costs for having appeared at the trial date. (Opinion on Decision, at p. 5.) Defendant then elected to proceed to trial without exhibits. (*Ibid.*) The WCJ also denied a request by cost petitioner to sanction defendant for failing to file its exhibits and for proceeding to trial without evidence, in violation of the holding of *Tito Torres* (2012 en banc) 77 Cal. Comp. Cases 1113. The matter was therefore taken under submission. (MOH/SOE 6/10/2015 at p. 4.)

On June 30, 2025, the WCJ issued his F&A, finding, in relevant part, that cost petitioner was due payment for three of the five reports Dr. Mirzaiaans produced. (F&A, at p. 2, ¶¶ 5, 7 & 9.)

The F&A also found defendant had raised “multiple frivolous issues and is subject to costs and sanctions,” deferred to be set on calendar on the court’s own motion. (*Id.* at pp. 2–3.)

This Petition for Reconsideration followed. Three exhibits are attached to the Petition for Reconsideration, purporting to show proof of payment related to two of the three reports at issue, as well as a copy of defendant’s exhibit list from the Pre-trial Conference Statement.

DISCUSSION

I.

Former Labor Code 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, Labor Code 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)

(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.

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

Under Labor Code 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 August 1, 2025 and 60 days from the date of transmission is September 30, 2025. This decision is issued by or on September 30, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 August 1, 2025, and the case was transmitted to the Appeals Board on August 1, 2025. 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 1, 2025.

II.

Three exhibits were attached to the Petition for Reconsideration. Defendant's hearing representatives are admonished that documents that are not part of the adjudication file may not be attached to a petition for reconsideration unless a ground for the petition is newly discovered evidence, which is not the case here. (Cal. Code Regs., tit. 8, § 10945(c); see Cal. Code Regs., tit. 8, § 10803 [record of proceedings].) Copies of documents that have already been made part of the adjudication file may not be attached (*id.*) and doing so may subject the offending party to sanctions. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421.) We trust that defendant's hearing representatives will take more care in future to avoid violation of these rules.

Accordingly, we have not reviewed the exhibits and they played no role in our determination of this matter, though we have, where appropriate, considered the assertions in the Petition itself related to those exhibits to the extent that they can be interpreted as offers of proof.

III.

Code of Civil Procedure section 473(b) states, in pertinent part:

The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.

Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties.

(Code Civ. Proc., § 473(b).) The Court of Appeal has made it clear that the protections afforded under Code of Civil Procedure section 473(b) are applicable in workers' compensation proceedings. (*Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196 [57 Cal. Comp. Cases 149].)

Initially, we note that although defendant seeks relief under Code of Civil Procedure section 473(b), defendant's hearing representative makes no attempt to actually explain how its failure to upload exhibits into EAMS was the product of mistake, inadvertence, surprise, or excusable neglect, nor does the Petition include an affidavit of fault. Instead, the Petition focuses on an alleged lack of prejudice to cost petitioner, given that defendant had listed the exhibits in question on the Pre-trial Conference Statement. (*Id.* at p. 7.)

Although a lack of prejudice may be a relevant factor in determining the terms under which relief may be granted pursuant to Code of Civil Procedure section 473(b), it does not itself indicate entitlement to relief. In the absence of any explanation for defendant's failure to file its exhibits, we cannot find fault with the WCJ's decision not grant relief. Furthermore, we note that the WCJ was apparently willing to grant relief subject to the payment of reasonable compensatory legal fees and costs, but that defendant's hearing representative appears to have rejected that offer, electing instead to proceed to trial without exhibits. Under the circumstances, we find no abuse of discretion.

Similarly, we reject defendant's argument that, notwithstanding its failure to file exhibits, it was nevertheless entitled to produce and introduce rebuttal evidence on the day of trial based upon Labor Code section 5704. Contrary to defendant's contentions, Labor Code section 5704 by its own terms is limited to evidence added to the record "otherwise than during the course of an

open hearing,” and therefore has no application to a trial setting. (Lab. Code, § 5704.) We therefore affirm the WCJ’s decision to decide the matter based on cost petitioner’s exhibits alone.

We turn to defendant’s other contentions with this unexcused failure to introduce evidence in mind. With regard to defendant’s contention that the March 8, 2022 report was not a medical-legal expense, and instead should have been reimbursed via the filing of a lien, we find that the evidence supports the WCJ’s finding that the report was a medical-legal expense. Defendant’s basis for contesting whether the report was a medical-legal expense appears to be the billing codes utilized. (See Petition for Reconsideration, at p. 6.) Defendant fails to develop this argument, however, either by citation to the record or to the law to support its argument that the billing codes in question per se preclude a finding that the report was a medical-legal report. As noted by the WCJ, one of the billing codes used appears appropriate when generated by a primary treating physician. (See Report, at p. 5; Cal. Code Regs., tit. 8, § 9789.14(b)(3).) We therefore agree with the WCJ’s determination that the report is properly considered a medical-legal expense not subject to the filing of a lien.

Second, we address defendant’s contention that cost petitioner’s Exhibit 5 demonstrates proof of payment for the March 22, 2022 report. Contrary to defendant’s assertions, our review of Exhibit 5 shows that it is the March 22, 2022 report itself. Quite how defendant believes that the March 22, 2022 report itself is proof that defendant paid for said report escapes us.

Next, we consider defendant’s protestation that sanctions pursuant to the holding of *Torres, supra*, 77 Cal. Comp. Cases 1113 for insisting on proceeding to trial on issues for which it had no evidentiary support are inappropriate here because defendant “merely raised cogent legal arguments to meet his obligations as a defense representative.” (Petition for Reconsideration, at p. 7.) The Petition goes on to allege that the burden of proof on these issues lay with cost petitioner. (*Ibid.*)

Because the WCJ deferred any imposition of sanctions, this issue is, properly speaking, premature, and should be addressed by the WCJ in the first instance after a properly noticed hearing. We observe, however, that a party proceeding to trial on an issue that it knows that it cannot possibly prevail on given the state of the evidence can validly be found to have engaged in frivolous litigation and sanctionable behavior, even if the burden of proof nominally lies with the other party. We leave the question of whether such behavior occurred here to the sound discretion

of the WCJ in the first instance. We will amend the F&A to make clear that the issue of sanctions is deferred pending a final order by the WCJ.

Finally, we turn to the most troubling aspect of the Petition, defendant's assertion that it made a series of payments to cost petitioner related to two of the reports that the WCJ found compensable as medical-legal expenses, after the filing of the Petition to Resolve Non-IBR Medical-Legal Dispute but prior to trial, and that cost petitioner in fact cashed such payments. (See Petition, at pp. 2–3.) The Petition also alleges that cost petitioner's representative was actually aware of these payments via emails exchanged between the respective representatives prior to trial. (*Ibid.*)

Although we disregarded the exhibits attached to the Petition in support of these contentions because they are not part of the adjudication record, we will accept the representations in the Petition for Reconsideration itself as an offer of proof that these payments were made. Moreover, we note that the Answer does not dispute these representations or otherwise contest that cost petitioner did in fact receive and cash these checks. Accordingly, it appears there is no reason to question that these payments were in fact made prior to the submission of the issue at trial, or that cost petitioner's hearing representative was actually aware of them at the time of trial.

Defendant's hearing representative doubtless bears the lion's share of the fault for failing to introduce evidence of these payments. However, under the specific circumstances of this case, we also believe that cost petitioner's representative had a certain affirmative duty to advise the court that such payments had been made. Defendant's failure to file its exhibits does not, in other words, permit cost petitioner to be unjustly enriched via a double recovery when cost petitioner's hearing representative was apparently actually aware that cost petitioner had been paid in part for some of the reports for which it sought payment in full by submitting the issue for decision.

Accordingly, we will amend the WCJ's order to provide that defendant's liability shall be reduced by any payments it made to cost petitioner after the filing of the Petition to Resolve Non-IBR Medical-Legal Dispute but prior to trial. Although we will reserve jurisdiction to the WCJ in the event of a dispute between the parties as to the proper amount due to cost petitioner, given the representations in the Petition it should be a simple matter for the parties to determine the amount tendered, and to subtract it from the amount awarded by the WCJ. We therefore strongly encourage the parties to resolve the matter among themselves without further need for judicial intervention. We also caution defendant's representative that our leniency on this matter should

be not be interpreted as either an endorsement of the past course of conduct in this matter, or as license for future similar violations.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the June 30, 2025 Findings, Award and Orders is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 30, 2025 Findings, Award and Orders is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

10. The issue of sanctions is deferred.
11. Defendant is entitled to a credit for any payments made after the filing of the Petition to Resolve Non-IBR Medical-Legal Dispute but prior to trial, with jurisdiction reserved in the event of a dispute as to the proper amount creditable.

AWARD

AWARD IS MADE in favor of **ARBI MIRZAIANS, D.C.** against **MIDCENTURY INSURANCE**, as follows:

- (a) Costs, penalty and interest as set forth in finding five above, less any payments made as set forth in finding eleven above;
- (b) Costs, penalty and interest as set forth in finding seven above, less any payments made as set forth in finding eleven above;
- (c) Costs, penalty and interest as set forth in finding nine above, less any payments made as set forth in finding eleven above.

ORDERS

IT IS HEREBY ORDERED that defendant pay Arbi Mirzaiaans, D.C. the sum of \$2,438.15 plus interest at the rate of 7% per annum from October 25, 2021 until the amount is paid, less any payments already made as set forth in finding eleven above.

IT IS FURTHER ORDERED that defendant pay Arbi Mirzaian, D.C. the sum of \$1,447.88 plus interest at the rate of 7% per annum from April 18, 2022 until the amount is paid, less any payments already made as set forth in finding eleven above.

IT IS FURTHER ORDERED that defendant pay Arbi Mirzaian, D.C. the sum of \$1,543.03 plus interest at the rate of 7% per annum from April 5, 2023 until the amount is paid, less any payments already made as set forth in finding eleven above.

IT IS FURTHER ORDERED that sanctions and costs are deferred to be set on calendar on the court's own motion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 25, 2025

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

**AV MANAGEMENT COLLECTION
FARMERS INSURANCE**

AW/kl

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