WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

TINA MEDINA, *Applicant*

vs.

THE KROGER COMPANY, Permissibly Self-Insured, *Defendant*

Adjudication Numbers: ADJ957708, ADJ4234122
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Lien Claimant Ronald J. Nolan, applicant's current attorney, seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Orders of November 26, 2024, wherein it was found that Mr. Nolan was entitled to an attorney's fee of $23,500 in connection with the settlement of applicant's future medical treatment benefits. It was also found that "Ron Nolan made a misrepresentation to the Court to induce trial, and refused to comply with a lawful Court Order following denial of his appeal, without justification, and in violation of Labor Code §5813." The WCJ thus assessed Labor Code section 5813 sanctions against Mr. Nolan in the amount of $1,750 payable to the general fund. On May 10, 2021, applicant entered into a Compromise and Release agreement of her future medical treatment award in exchange for $160,000, from which $24,000 was held in trust as an attorneys' fee. In the decision currently under review, the WCJ divided the fee with petitioning lien claimant being awarded $23,500 and applicant's prior counsel lien claimant Robert Blinder being awarded $500. Previously in this matter, in a Compromise and Release approved on March 30, 2017, while represented by Mr. Nolan, applicant settled her claims for indemnity benefits against defendant in exchange for $83,000. Mr. Nolan was awarded an attorneys' fee of $10,450 with regard to the 2017 Compromise and Release, Mr. Blinder was awarded $1,500, and another prior attorney was awarded $500.

Mr. Nolan contends that the WCJ erred in awarding him an attorneys' fee of only $23,500, arguing that he should have also been awarded the $500 that was awarded to Mr. Blinder. Mr. Nolan also contends that the WCJ erred in imposing Labor Code section 5813 sanctions. We have

received an Answer from Mr. Blinder and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated in the Report, which we adopt, incorporate and attach hereto, we will deny lien claimant Mr. Nolan's Petition.

We note that 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 January 28, 2015 and 60 days from the date of transmission is Saturday, March 29, 2025. The next business day that is 60 days from the date of transmission is Tuesday, April 1, 2025.[1] (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Tuesday, April 1, 2025, so we have timely acted on the petition as required by Labor Code section 5909(a).

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[1] Monday, March 31, 2025 was Cesar Chavez Day.

[2] 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.

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 January 28, 2025, and the case was transmitted to the Appeals Board on January 28, 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 January 28, 2025.

Turning to the merits, as stated above, for the reasons stated in the WCJ's Report, which we adopt, incorporate, and attach hereto, we will deny lien claimant Ron Nolan's Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that Lien Claimant Ronald J. Nolan's Petition for Reconsideration of the Findings and Orders of November 26, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 1, 2025

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

TINA MEDINA
RONALD NOLAN
ROBERT D. BLINDER
BRADFORD BARTHEL

DW/oo

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

ST A TE OF CALIFORNIA
Division of **Workers' Compensation**
Workers' Compensation Appeals Board

CASE NUMBER: ADJ957708; ADJ4234122

TINA MEDINA	**-vs.-**	**RALPH'S GROCERY COMPANY; Permissibly Self-Insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES,**
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE:		**Adam D. Graff**

DATE: January 22, 2025

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

1.	Findings and Orders	11/22/2024
2.	Identity of Petitioner	Applicant's attorney
3.	Verification	Yes
4.	Timeliness	Petition is timely
5.	Petition for Reconsideration Filed	12/18/2024

Petitioner, applicant's counsel Ronald Nolan, has filed a Petition for Reconsideration alleging that the evidence does not justify the findings of fact, that the WCJ acted without or in excess of his powers, and that lien claimant former counsel lacked standing to proceed to hearing.

II
FACTS

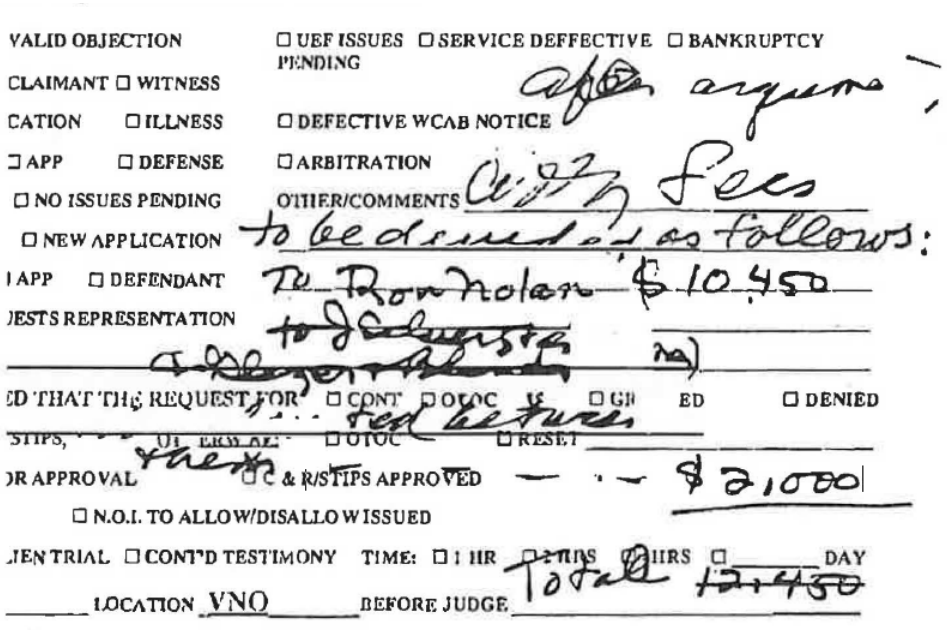
This matter concerns a fee dispute between applicant's former counsel, Robert Blinder, and her present counsel, Ronald Nolan. As stipulated between the parties, Mr. Blinder formally substituted in as counsel on March 5, 2004, and represented Applicant until Mr. Nolan substituted in as counsel on December 26, 2005 . Mr. Nolan continues to represent the applicant.

On or about March 30, 2017, applicant and defendant entered into a Compromise and Release Agreement and Stipulated Award. The Compromise and Release Agreement[1] states, in the comments to paragraph nine:

> "THE INTENTION OF THIS SETTLEMENT IS TO RESOLVE ALL CLAIMS FOR INDEMNITY BENEFITS THAT ARE OWED TO THE APPLICANT AND ALL PENALTY CLAIMS THAT MAY EXIST AT THIS TIME ... "

Hence, the Compromise and Release Agreement resolved *indemnity only*, with a separate Stipulated Award for future medical treatment.

On September 18, 2017, the parties appeared at Status Conference before then-Presiding Judge Linda Morgan on the issue of division of fees. Judge Morgan's minutes of hearing[2] contain the following notations in the comments:


VALID OBJECTION ☐ UEF ISSUES ☐ SERVICE DEFFECTIVE ☐ BANKRUPTCY PENDING
CLAIMANT ☐ WITNESS
CATION ☐ ILLNESS ☐ DEFECTIVE WCAB NOTICE
☐ APP ☐ DEFENSE ☐ ARBITRATION
☐ NO ISSUES PENDING OTHER/COMMENTS
☐ NEW APPLICATION
APP ☐ DEFENDANT
JESTS REPRESENTATION
ED THAT THE REQUEST FOR ☐ CONT ☐ OTOC ☐ GR ED ☐ DENIED
☐ RESET
OR APPROVAL ☐ C & R/STIPS APPROVED
☐ N.O.I. TO ALLOW/DISALLOW ISSUED
IEN TRIAL ☐ CONT'D TESTIMONY TIME: ☐ 1 HR ☐ HRS ☐ DAY
LOCATION VNO BEFORE JUDGE

[1] Exhibit "1"
[2] Exhibit "5"

PWCJ Morgan issued a Minute Order regarding division of attorney fees at conference; this was not a negotiated agreement between the parties. The Order was not appealed. Neither party has introduced any additional evidence of a separate Order or written agreement regarding division of attorney fees. As relayed to the undersigned by way of a letter[3] submitted during the course of the proceedings, and as confirmed by Mr. Blinder at the time of the 2/13/23 MSC, Mr. Blinder resolved prior counsel Mr. Wagner's lien for $500.00, retaining $1,500.00 as the Glazer and Blinder portion of the attorney fee on the indemnity settlement.

Years later, on or about March 30, 2021, applicant entered into a second Compromise and Release Agreement[4], this time resolving her entitlement to future medical treatment in exchange for payment of $160,000.00 new money. The lien affidavit attached to this Compromise and Release Agreement lists "Glazer Blinder Calabasas" as a known lien claimant. The First Order[5] Approving this Compromise and Release issued by WCJ Pollak on April 12, 2021, and contained the language, "less approved applicant's attorneys fee ($24,000) to be withheld by the defendant pending written agreement between the applicant's attorneys or further order of the court."

Mr. Nolan and defense counsel exchanged what appear to be unsolicited emails with WCJ Pollak relating to language regarding the Medicare Set Aside Arrangement and Mr. Nolan's arguments regarding accord and satisfaction of any prior attorney's claims for fees.[6] The Order Approving was twice amended, with the final version issuing[7] on May 10, 2021, containing the same language regarding withholding of attorney fees.

At trial, Mr. Blinder argued that he provided heretofore uncompensated labor for applicant in the form of development of the medical record, and that he was entitled to a fee on the second Compromise and Release Agreement which settled applicant's right to future medical care. The Court agreed and awarded an additional $500.00 in satisfaction of that claim.

At trial and on Reconsideration, Mr. Nolan argued and again argues that any claim that Mr. Blinder may have had for attorney's fees was satisfied and extinguished as of the date that PWCJ Morgan issued her Minute Order dividing the fees previously withheld from the first Compromise and Release Agreement. Then and now, Mr. Nolan offers no legal authority in support of his

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3 EAMS doc ID 44317434
4 EAMS doc ID 36240701
5 EAMS doc ID 74128090
6 *See e.g.* EAMS doc ID 74128113
7 Exhibit "4"

position that the Minute Order dividing the fee on the indemnity settlement extinguished Mr. Blinder's potential right to a fee on a later settlement of the future medical Award.

As set forth in the opinion on decision, this matter has unfortunately proven to be quite contentious. The many separate trial settings at which this matter has come before the undersigned have all been noteworthy for the parties' utter unwillingness to cooperate with one another and to follow basic rules of trial procedure. These difficulties are reflected in the various minutes of hearing and the presently existing summaries of evidence.

When the matter finally proceeded with the taking of testimony on August 15, 2023, Mr. Blinder called Mr. Nolan as a witness. Mr. Nolan consistently testified that he did not recall salient details about the applicant's case, to include the mechanism of her injury, the opinions and conclusions expressed by medical-legal evaluators, and potentially relevant testimony that the applicant offered during her depositions.[8] Neither the PQME reports nor applicant's deposition transcript had been previously provided to Mr. Blinder.

Thereafter, on September 25, 2023, the day before the next trial setting, Mr. Blinder filed a Petition to Compel[9] Mr. Nolan to serve the PQME reporting in question and the applicant's deposition transcripts. The parties appeared at Trial the following day, and the undersigned discussed with the parties the fact that the matter had already been pending at trial status for over a year, that the matter seemed to be continuing to evolve in only a more litigious and acrimonious direction, and that the undersigned was going to make one final attempt to help the parties reach a resolution of the matter. Accordingly, in a manner similar to the Minute Order issued by former Presiding Judge Morgan, the undersigned issued a Minute Order, dated September 26, 2023, which divided the fee between counsel, allocating 91.25% of the fee to Mr. Nolan. The undersigned read the Minute Order from the bench, hand-served it to the parties, and informed the parties that if either party were dissatisfied with the result, he could exercise his remedies and the undersigned would rescind the Order. Neither party challenged or otherwise expressed dissatisfaction with the Order at the time that the WCJ provided it.

On October 9, 2023, Mr. Nolan filed a Petition for Reconsideration of the Minute Order. Accordingly, consistent with 8 C.C.R. 1096l(b) and the prior conversations with the parties, the undersigned rescinded the Minute Order. This Order rescinding was served on October 16, 2023.

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[8] *See* e.g. 8/15/23 MOH/SOE at pgs 5-7.

[9] EAMS doc ID 48343504

The undersigned also issued an Order[10] compelling Mr. Nolan to serve the PQME reports and deposition transcripts requested by Mr. Blinder. Mr. Nolan filed a written objection, arguing that the Order was burdensome, oppressive, not calculated to lead to the discovery of admissible evidence, and impermissible following the closure of discovery. The undersigned entertained oral argument regarding this subject at the November 8, 2023 status conference. The undersigned noted that Mr. Blinder's request for these documents was based upon Mr. Nolan's trial testimony[11], and that it did not appear to the Court that it would be particularly "oppressive" or "burdensome" to direct an applicant 's current attorney to provide copies of the deposition transcript and med-legal reporting upon which her two settlements were based, particularly in light of the fact that the medical reporting should have already been on file in EAMS to support the settlements, but was inexplicably not filed. The undersigned did not withdraw the Order.

Mr. Nolan filed a Petition for Removal of this Order, which was denied by Order of the WCAB on March 5, 2024. However, as set forth in detail[12] in the Minutes of Hearing/Summary of Evidence of the Trial on May 9, 2024, Mr. Nolan never complied with the Order, and Notice of Intention was given to consider the imposition of §5813 sanctions of up to $2,500. Mr. Nolan was given 30 days to file any written response to the Notice of Intention, and a ruling regarding sanctions was deferred pending a response and giving Mr. Nolan an opportunity to be heard. Mr. Nolan did not tile a response or take any other action regarding the Notice of Intention.

At trial on June 11, 2024, Applicant Tina Medina offered testimony. Ms. Medina testified that she had come voluntarily to Court to offer testimony, because she had found it infuriating that Mr. Blinder was claiming additional attorney fees beyond what he had already been paid. Ms. Medina testified that she did not personally communicate with Mr. Blinder except for on one occasion, and that all of her communication with his office was with "Yvette". [13]

Ms. Medina vividly recalled a telephone conversation that she had with Yvette while she was driving on Ventura Blvd. Ms. Medina testified that Yvette had conveyed that the case was going to be closed for $25,000, and that in response, she "lost it", became distraught, and had to pull over to the side of the road . She testified that she felt like she would never get relief, and that this was "one

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10 EAMS doc ID 77261422

11 *See e.g.* Kuykendall v. Workers' Comp. Appeals Bd., 79 Cal. App. 4th 396

12 *See* 5/9/24 MOH/SOE at pg 2

13 *See* 6/11/24 MOH/SOE at 4 :10- 18

of the worst days".[14] This was the impetus for her decision to dismiss Mr. Blinder as her attorney and seek new counsel.[15] A client of hers recommended Mr. Nolan, who then sent her out for more treatment and work-up.[16] Ms. Medina's testimony on these points was credible, and un-rebutted.

Petitioner has filed the instant Petition for Reconsideration, arguing once again that Mr. Blinder's lien was extinguished at the time of the indemnity fee division of September 18, 2017, that the Court somehow lacked jurisdiction to issue an Order of division of the $24,000 held in trust, that Mr. Blinder's office did not earn the additional $500.00 awarded herein, and that the WCJ should not have imposed sanctions against Mr. Nolan. Mr. Blinder has filed an untimely[17] Answer to this Petition, wherein he argues that his fee should be increased on Reconsideration. Mr. Blinder did not file his own Petition for Reconsideration of the Findings and Orders and thus cannot now challenge the Findings and Orders on appeal.

III
DISCUSSION

Jurisdiction and viability of attorney fee lien

WCJ Pollak's May 10, 2021 Order[18] approving the future-medical Compromise and Release specifically Ordered that "approved applicant 's attorneys fee ($24,000) to be withheld by the defendant pending written agreement between the applicant's attorneys or further order of the court." Petitioner's suggestion for the first time on Reconsideration that the Court lacks jurisdiction to divide this fee because of Judge Morgan's September 18, 2017 Minute Order regarding a separate Compromise and Release agreement is, frankly, a frivolous argument.

Petitioner has repeatedly argued that the instant fee division is *res judicata* - it is not. In order for collateral estoppel[19] or res judicata[20] to apply, an issue must have actually been adjudicated. As to the division of fees on the first "partial" Compromise and Release agreement[21] dated March 30, 2017, this is true; this fee division as set forth in PJ Morgan's Minute Order was

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14 *See* 6/11/24 MOH/SOE at 4: 18-23; 6: 1-12
15 *See* 6/11/24 MOH/SOE at 8:15-17
16 *See* 6/11/24 MOH/SOE at 5:1-9; 6:12-15.
17 Labor Code §5905 requires that an Answer be filed within 10 days of the filing of the Petition for Reconsideration; respondent's Answer was filed 27 days later, on 1/13/2025.
18 Exhibit "4"
19 *See e.g.* California State University- Fullerton v. WCAB (Miranda), (2012) 77 CCC 550 (writ denied).
20 *See e.g.* Busick v. WCAB . (1972) 37 CCC 641, 643-44
21 Exhibit "1"

never appealed and became final. However, the first "partial" Compromise and Release agreement[22] did not resolve all issues. A review of paragraph 9 of the Agreement reveals that, as all parties are keenly aware, "future medical treatment" is excluded from the settlement. The comment section on that page provides, "THE INTENTION OF THIS SETTLEMENT IS TO RESOLVE ALL CLAIMS FOR INDEMNITY BENEFITS THAT ARE OWED TO THE APPLICANT... THIS SETTLEMENT DOES NOT EXTINGUISH DEFENDANT'S LIABILITY FOR FUTURE MEDICAL CARE... " Petitioner's attached Hartman Formula similarly purports to break down and allocate the settlement and explicitly notes that "Future Medical Treatment non-MSA" and "MSA allocated future medical" are "F/M Remains Open".

The fee portion of this agreement is exactly 15% of the gross $83,000 settlement. This is what was Ordered[23] divided by P J Morgan at the September 18, 2017 conference. Nowhere do the Minutes purport to specify that this division of fees was to be forevermore in full and final satisfaction of any and all claims of attorney fees. There was no agreement between the parties as to the fee division; the division was Ordered, and the Minute Order is the only existing Order to that effect. Furthermore, at the time that he entered into the second, future-medical Compromise and Release, as evidenced[24] by the listing of "Glazer Blinder Calabasas" on the lien affidavit as a known lien claimant, Petitioner knew that Respondent was still asserting a lien. Moreover, Petitioner exchanged unsolicited e-mails[25] with WCJ Pollak about this exact subject, and despite this, WCJ Pollak still Ordered[26] that the fees "be withheld by the defendant pending written agreement between the applicant's attorneys or further order of the court." Notwithstanding this Order, petitioner did not file a Petition for Reconsideration of the Order Approving, and that Order then became final[27] prior to the initiation of these proceedings.

While not a common occurrence, nothing in law or in fact forbids prior counsel from still asserting a lien for uncompensated services after the approval of a partial settlement. It is abundantly clear that future medical benefits were not resolved as part of the partial, March 30, 2017 Compromise and Release Agreement[28] . Thus, to the extent that respondent prior counsel had an illiquid fee interest in the future medical benefits awarded to applicant, he maintained the right to

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22 Exhibit "1"
23 Exhibit "9"
24 Exhibit "3"
25 *See e.g.* EAMS doc ID 74128113
26 Exhibit "4"
27 *See* Foster v. Performance Holdings, Inc., 2024 Cal. Wrk. Comp. P.O. LEXIS 249, at 10.
28 Exhibit "1"

litigate it following the liquidation of those benefits in the second, subsequent agreement. Petitioner does not now and never has offered any authority to the contrary, despite literal years of litigation herein. Respondent's lien was not extinguished by Judge Morgan's September 18, 2017 Minute Order, and this ensuing litigation was not without merit.

Mr. Nolan's Testimony under threat of adverse inference

Petitioner argues that the WCJ acted without or in excess of his powers by presenting Mr. Nolan with the choice that he could either take the stand when called as a witness or suffer the possibility of an adverse inference as to the substance of any testimony he might have offered. To wit, both attorneys Blinder and Nolan listed each other as witnesses on the joint Pre-Trial Conference Statement[29] completed at sufferance on April 26, 2023. Neither party raised any objection at that time to the possibility of their being called by their opponents to testify as percipient witnesses.

When Mr. Blinder attempted to do so, as set forth in detail on pages 4-5 of the August 15, 2023 Minutes of Hearing/Summary of Evidence[30] , Mr. Nolan refused to take the stand, insisting that lien claimant had no standing to proceed, as his lien was extinguished. Mr. Nolan insisted that the question of whether lien claimant's lien had been extinguished, an ultimate subject of the trial, needed to be decided as a threshold issue before he could be called to testify.

It is the WCJ's purview to decide whether all issues should be tried concurrently, or if certain issues should instead be bifurcated. 8 C.C.R. § 10787. As stated, despite having not previously raised an objection as to the propriety of being called as a witness at trial, and despite having participated in a prior trial proceeding on July 12, 2023 where that issue was explicitly set forth as issue #3 to be adjudicated amongst 6 other issues, Petitioner stated that he was refusing to testify and attempted to force the WCJ to adjourn the trial and adjudicate the sole issue of his choosing.

Rather than holding petitioner in contempt, the undersigned decided to give petitioner the choice of either willingly taking the stand, or otherwise maintaining his refusal to testify on the strength of his conviction that Lien Claimant's lien had been extinguished by operation of law.

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29 EAMS doc ID 76677121

30 EAMS doc ID 77097804

However, the undersigned cautioned petitioner that if he were to refuse to testify, and the Court ultimately found that Lien Claimant's lien was not extinguished, the Court might instead draw an adverse inference as to the substance of testimony petitioner could have offered. This is consistent with the WCJ's ability to "make inquiry in the manner ... which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division," as provided in Labor Code §5708, as well as the WCJ's power to preserve and enforce Order in its proceedings pursuant to CCP § 128(a), as adopted by section 1.155 of the WCAB/DIR Policy & Procedure Manual.

In this way, although it could have done so, the Court did not compel petitioner to testify. Petitioner maintained the choice to abstain from participation, with the understanding that his silence could potentially lead to an outcome that he might not prefer. Petitioner had no legal right to refuse to testify; petitioner has yet to present any authority in support of his earlier position that he could abstain from testimony despite having been named as a witness, without objection, in a trial that concerned the division of an attorney fee, based on the labor he personally performed and the results he personally obtained. Ultimately, this was and remains a non-issue, as petitioner chose to testify, including[31] as his own witness.

An error as to sequence of presentation of testimony is harmless and is being improperly raised for the first time on Reconsideration

Petitioner notes that he initiated the trial proceedings with respect to the division of attorney fees by way of applicant's Declaration of Readiness on July 26, 2021, and that more than two years later on August 15, 2023, the undersigned erroneously referred to lien claimant as the "moving party" and allowed him to present his case in chief first. It does appear that petitioner is correct that he was the original moving party and that the Court was in error; however, petitioner never once raised this issue at trial or sought to correct the error at any point during the proceedings. Had petitioner raised this at trial, the Court would have acknowledged the error and allowed petitioner to present his case first. However, petitioner was silent on this point until the filing of the instant Petition for Reconsideration.

[31] *See e.g.* 6/11/2024 MOH/SOE at pgs 9-10.

It is improper that petitioner has raised this for the first time in this appeal, without having given the Court an opportunity to correct the error during the trial. Petitioner did not even raise this issue in his October 9, 2023 Petition for Reconsideration or November 13, 2023 Petition for Removal. Nonetheless, this error was harmless, as petitioner had a full and unencumbered opportunity to be heard and present his case. Petitioner makes no showing that he was prejudiced by the sequence of the presentation of each party's respective case-in-chief. Petitioner's failure to raise this issue at trial constitutes a waiver of this issue on appeal.

The Court properly rescinded the prior minute Order and explained that it would do so if either party were dissatisfied with the outcome.

Petitioner once again refers to the rescinded Minute Order, dated September 26, 2023, as if it remains in effect or was improperly rescinded. 8 C.C.R. 10961 provides:

"Within 15 days of the timely filing of a petition for reconsideration, a workers' compensation judge shall perform one of the following actions:

(a) Prepare a Report and Recommendation on Petition for Reconsideration in accordance with rule 10962;

(b) Rescind the entire order, decision or award and initiate further proceedings within 30 days; or

(c) Rescind the order, decision or award and issue an amended order, decision or award. The time for filing a petition for reconsideration pursuant to Labor Code section 5903 will run from the filing date of the amended order. decision or award.

Following Mr. Nolan's timely October 9, 2023 Petition for Reconsideration, the undersigned did exactly what the Rule says that the WCJ "shall do" and rescinded the entire Order and decision and initiated further proceedings within 30 days. As of the rescinding of the Minute Order, until the issuance of the Findings and Orders from which Mr. Nolan has petitioned for Reconsideration, there existed no Order or decision on the merits of the case which defined the rights or responsibilities of either party to the dispute.

The Court has previously explained, and petitioner is aware, that the rescinded Minute Order was the Court's final attempt to help the parties achieve closure and avoid further acrimonious litigation. The Court invited both parties to file a Petition for Reconsideration in the event that either party were dissatisfied with the result. The Court stated that if that were to happen, it would rescind

the Minute Order. That is exactly what happened.

The ultimate decision of the Court with respect to the division of the attorney fees was that petitioner was actually entitled to a larger share of the fee than the Court had previously awarded in the earlier rescinded Minute Order. The Court did not punish petitioner for challenging the Minute Order; the Court agreed with petitioner that the earlier Minute Order did not properly allocate the fees.

The Court properly allocated the attorney fees in its Findings and Orders

As stated in the Opinion on decision, the Appeals Board has exclusive jurisdiction over fees to be allowed or paid to applicants' attorneys.[32] In calculating attorney fees, the Labor Code requires that the fees awarded must be "reasonable."[33] Pursuant to Labor Code §4906, in determining what constitutes a "reasonable" attorney fee, the Appeals Board must consider four factors: 1) the responsibility assumed by the attorney; 2) the care exercised by the attorney; 3) the time expended by the attorney; and 4) the results obtained by the attorney.[34] Additionally, although not binding legal authority, the WCAB/DIR Policy & Procedure Manual section 1.140 states that the WCJ may also consider the complexity of the issues, whether the case involved highly disputed factual issues, and whether detailed investigation, interrogation of prospective witnesses, and/or participation in lengthy proceedings are involved.

In the instant matter, the division of fees set forth in PJ Morgan's September 18, 2017 minutes of hearing related to applicant's resolution of *indemnify only.* That future medical care remained open was known to all and provided the basis for the second Compromise and Release agreement. Contrary to petitioner's assertion, as noted *supra,* the first Compromise and Release agreement awarded no fee for the medical treatment award; future medical treatment was explicitly excluded from that agreement. Neither does the stipulated Award[35] provide for separate fees.

The liquidated value of that medical treatment Award was later negotiated[36] to be $ 160,000.00. Mr. Blinder's admitted exhibits demonstrate [37] that he did in fact secure the agreement

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32 *See Vierra v. Workers' Comp. Appeals Bd.,* (2007) 72 Cal.Comp.Cases 1128; Cal. Code Regs., tit. 8, § 10840.
33 *See* Labor Code §§ 4903, 4906(a), (d).
34 *See also* Cal. Code Regs., tit. 8, § 10844.
35 EAMS doc ID 63558800
36 *See* Exhibit 3
37 See e.g. Exhibit 11

to utilize Dr. Ainbinder as AME, and that several demands were made for authorization of treatment and diagnostics. Mr. Blinder's efforts were not without value; Mr. Blinder's involvement at a critical stage of the litigation laid a key piece of the early foundation for applicant's medical treatment Award.

However, as set forth in the decision, Mr. Blinder already received a fee[38] for his efforts to restart TTD benefits and obtain retro-TTD, and he was again compensated in the amount of $1,500 from the March 20, 2017 indemnity-only C&R. Mr. Blinder's admitted exhibits also demonstrate[39] that he was willing to recommend complete resolution of the case for substantially less money than the case ultimately proved to be worth, and applicant Ms. Medina provided very convincing and credible testimony that this is exactly why she substituted out Mr. Blinder in favor of Mr. Nolan. Mr. Nolan then performed many years of additional valuable labor on applicant's behalf, culminating in the two C&R agreements, worth a grand total of$243,000 ($83,000 + $160,000).

For these reasons, weighing the aforementioned factors, the Court awarded Lien Claimant an additional $500.00, and gave the balance of $23,500.00 to Petitioner. Such represents the reasonable value of Lien Claimant's heretofore uncompensated labor. Further, as stated in its decision, the Court need not differentiate between the two filed ADJ cases in allocating the future medical attorney fee; the March 30, 2021 Compromise and Release agreement filed in EAMS (EAMS doc ID #36240698) resolved both claims concurrently and does not include any allocation of proceeds between the two filed claims. Petitioner's award of 97.9% of the withheld attorney fee recognizes the relative value of each office's efforts in bringing the medical treatment award and the $160,000.00 new money settlement to bear.

Petitioner's conduct in misrepresenting his intentions and deliberately disobeying the Court's Order to Produce is absolutely worthy of the imposition of sanctions

Finally, Petitioner argues that he should not have been sanctioned, as he claims that he complied with the Court's Order of production to the extent that he could, that lien claimant ultimately obtained the documents from other sources, and that the Order was improperly obtained. Petitioner alleges that the Order to produce was obtained "ex parte", and that the Court violated petitioner's right to due process by issuing said Order.

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[38] See Exhibit 9

[39] See e.g. Exhibit 20, 22

As an initial point of clarification, there was no "ex parte" Order to produce; respondent filed a petition along with proof of service, and without an objection filed as set forth in 8 C.C.R. §10510(c), the requested Order issued. Even thereafter, following petitioner's objection to the Order, petitioner was given an opportunity to be heard, and he was[40]. Moreover, contrary to petitioner's argument here, the Court did not reopen discovery, but instead exercised its duty to develop an adequate record and Ordered[41] a party to produce evidence for which the need did not become apparent until after that party offered sworn testimony[42] claiming not to know or remember specific details that the requested documents might have provided.

But this discussion and argument misses the forest for the trees. In the instant case, the primary reason for the Court's imposition of sanctions was that petitioner made a misrepresentation to the Court that he would comply with the Order when he clearly had no intention of doing so.

To wit, petitioner first formally objected to the Court's Order that he produce documents that absolutely should have been readily available within his possession. The medical-legal reporting in question was the foundation of the settlements at issue and should have been filed concurrently with the settlement documents. With litigation ongoing, no reasonable argument can be or was even attempted to be made as to why the applicant's current counsel did not have possession of applicant's deposition transcripts. Following oral argument, the Court declined[43] to rescind the Order. In response, petitioner filed a new objection[44] and a Petition for Removal[45] , seeking in part to void the Court's Order. The Petition for Removal was denied[46] on March 4, 2024. Short of the filing of a Writ Petition, petitioner otherwise exercised and exhausted his appellate rights and was denied.

But then, rather than complying under protest or otherwise advising the Court of the impossibility of compliance, at a Mandatory Settlement Conference where the parties wished to have the matter returned to the trial calendar, petitioner made a misrepresentation to the Court that he would "serve depo transcript today."[47] The Court does not and did not find it credible that petitioner was not aware *at that time* that he did not possess those documents. That petitioner never once mentioned in his multiple written objections and Petition for Removal that he did not possess the

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40 *See* 11/8/2023 MOH, EAMS Doc ID 77353262
41 *See e.g.* Kuykendall v. Workers' Comp. Appeals Bd., 79 Cal. App. 4th 396.
42 8/15/23 MOH/SOE at pgs 5-7
43 EAMS Doc ID #77353262
44 EAMS Doc ID #49063449
45 EAMS Doc ID #49065370
46 EAMS Doc ID #77706641
47 EAMS Doc ID# 77830109

documents, represented to the Court that he would "serve the documents today", and only thereafter realized that he did not have those documents strains credulity. It further strains credulity that he would even claim not to have those documents in the first place, especially considering that the undersigned observed him in Court with several redweld folders full of papers. Based on this behavior, the Court inferred and continued to believe that petitioner misrepresented that he would comply with the Order specifically to induce the Court to re-set the matter for Trial.

When Mr. Nolan stated on the record at the May 9, 2024 Trial setting that he "did not have possession or control of the deposition transcripts[,]" [48] , the Court gave Notice of Intention to:

> "consider the imposition of 5813 sanctions based upon this course of conduct in an amount of up to $2,500. Mr. Nolan, will be given 30 days from today to file any written response should he choose to do so in supplementation of any argument that has been made on the record. The Court will withhold decision on that pending any response by Mr. Nolan and giving him the appropriate opportunity to be heard." [49]

But Mr. Nolan did not avail himself of the opportunity to be heard. He did not file a response of any kind. He did not offer any further oral explanation or argument at that trial setting, or at the three additional hearings that followed on May 28, 2024, June l l, 2024, and September 3, 2024. Mr. Nolan was silent.

Petitioner once again argues on Reconsideration that he could not comply with the Order because he did not have possession or control over any of these documents. This is simply not credible. Mr. Nolan continues to represent the applicant and entered into two Compromise and Release agreements based upon these documents. Giving Mr. Nolan the benefit of every doubt, if it were true that Mr. Nolan thought that he had the documents in his possession and intended to serve them, only to later discover that he was mistaken, he could have explained this orally, or he could have provided a written explanation within the 30 days that the Court provided for him to be heard. He did neither.

The Court did not make this inference lightly, but the Court has no other explanation for this behavior. The Court gave Mr. Nolan ample opportunity to explain himself, and Mr. Nolan declined to do so.

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[48] 5/9/2024 MOH/SOE at 1-18.
[49] 5/9/2024 MOH/SOE at 2:21-25

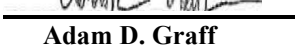
Moreover, this explanation is consistent with other such conduct that Mr. Nolan has engaged in since the very first trial setting before the undersigned on August 17, 2022, all of which reveals Mr. Nolan's apparent disregard and disrespect for the Court and proper procedure. On August 17, 2022, without even attempting to obtain permission, Mr. Nolan did not appear in-person and instead called in to the WCJ's teleconference line. From the time of the origin al MSC before WCJ Pollak on June 16, 2022, through subsequent hearings on August 17, 2022, November 15, 2022, February 13, 2023, and several Minute Orders, he refused to complete a joint Pre-trial Conference Statement until the Court forced him to do so[50] on April 26, 2023. As set forth in detail on the various minutes of hearing, despite having claimed to have done so, Mr. Nolan also never filed any exhibits.

That this behavior is sanctionable is specifically set forth in 8 C.C.R. § 10421 (b)(4). Notice of Intention and an opportunity to be heard having been given, the Court issued an Order of Sanctions against attorney Ronald Nolan, California State Bar # 141645, in the amount of $ 1,750 .00, for his misrepresentation to the Court to induce trial, and for his refusal to comply with a lawful Court Order following denial of his appeal, without credible justification. ln order to deter any future such behavior and to send a message to the community at large that this conduct will not be tolerated, the Court recommends that this sanction be upheld.

IV
RECOMMENDATION

For the reasons stated above, it is respectfully recommended that applicant's Petition for Reconsideration be DENIED.

DATE: 1/22/2025



Adam D. Graff
WORKERS' COMPENSATION
ADMINSTRATIVE LAW JUDGE

TRANSMITTED TO RECON: January 28, 2025

[50] See MOH 4/26/23, EAMS Doc Id#76677407