WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA HEITMAN, *Applicant*

vs.

HCR MANORCARE, INC.;
Permissibly Self-Insured; Administered by BROADSPIRE, *Defendants*

Adjudication Numbers: ADJ11674512, ADJ11674513
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision after Reconsideration.

On-Time Interpreting (cost petitioner) and HCR ManorCare, Inc., administered by Broadspire (defendant), separately seek reconsideration of the Joint Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 16, 2020.[1] As relevant herein, the WCJ found that cost petitioner provided pre-deposition interpreting services on April 8, 2019. The WCJ ordered that cost petitioner was entitled to be paid for its pre-deposition services with the final amount to be adjusted by the parties; and reserved all issues not decided by the Joint Findings and Order.

Defendant contends that the evidence does not support the WCJ's Order, and that the Findings of Fact do not support an award for the imposition of interpreter fees.

Cost petitioner contends that the evidence does not support the WCJ's finding that defendant did not act in bad faith.

[1] We observe that the parties are battling over $225.00. While the parties are entitled to address or resolve issues in dispute through all available means allowed by statute and regulation, it is important to note that parties should be able to resolve issues with relatively minimal financial liability at stake without the assistance of the WCAB. It appears that the costs to adjudicate this issue before a WCJ and the Appeals Board pale in comparison to the amount at issue. We strongly urge the parties to find a way to resolve issues informally without involvement of the WCAB given its limited resources and the constitutional mandate that workers' compensation proceedings be expeditious.

Defendant and cost petitioner each filed Answers. The WCJ issued a Joint Report and Recommendations on Reconsideration (Report) recommending that we deny reconsideration of both petitions.

We have considered the allegations of the Petitions for Reconsideration, the Answers, 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 rescind the Joint Findings and Order and return the matter to the WCJ for further proceedings consistent with this decision.

FACTUAL BACKGROUND

Applicant, while employed on June 17, 2018, and during the period of February 1, 2005, to October 31, 2018, as a certified nursing assistant by HCR ManorCare Health Services, claims to have sustained injury arising out of and in the course of employment to her back. (Minutes of Hearing (MOH), August 13, 2020, p. 2:2-4.)

At the hearing on August 13, 2020, the parties stipulated: 1) that defendant notified applicant that a certified Spanish-speaking interpreter would be present at the April 8, 2019 deposition noticed by defendant to translate for deposition preparation and during the deposition; 2) that Silvia Esparza with MTI American Interpreting Services, the certified Spanish interpreter, appeared at 9:00 A.M. at applicant's attorney's office to offer deposition preparation services to applicant; and 3) that applicant's attorney did not request Ms. Esparza's interpreting services. (MOH, *supra*, at p. 2:10-17.)

The parties presented the issues, as relevant herein, to the WCJ as follows:

> 1. Per Labor Code sections 5710, 5811, and 8 CCR 9795[.]3, which party has the right or duty to provide an interpreter at a deposition of the Applicant noticed by Defendants?
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> 2. Does a right or duty to provide an interpreter include the deposition preparation prior to the start time of the deposition?
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> 3. If the Cost Petitioner prevails, is Petitioner entitled to collect its billed amount, plus costs, sanctions, and attorney fees per Labor Code Section 5813 and CCR Sections 9795.3, 9795.4, 10421, and 10545?
>
> (MOH, *supra*, at p. 2:19-25.)

DISCUSSION

A WCJ is required to "make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-22 [2010 Cal. Wrk. Comp. LEXIS 74] (Appeals Board en banc).) As required by section 5313 and explained in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Board en banc), "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." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (Citation omitted.) (*Id*. at p. 476.)

The WCJ's decision "must be based on admitted evidence in the record." (*Hamilton*, *supra*, at p. 476.) In *Hamilton*, we held that the record of proceeding must contain, at a minimum, "the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence." (*Ibid*.) Part of the WCJ's responsibility is to "frame the issues and stipulations for trial." (*Id*. at p. 475.)

We begin by noting that the F&O deferred all issues other than the payment of $225.00 to cost petitioner. Accordingly, the WCJ's comments regarding defendant's bad faith in his Opinion on Decision are not binding on either party, and there has been no final order on that issue. Consequently, cost petitioner is not actually aggrieved by the decision. (See Lab. Code, § 5900.) However, we did not dismiss cost petitioner's Petition for Reconsideration as it is conceivable that cost petitioner was confused as to whether a decision had been made on the issue.

The WCJ's rationale for allowing applicant's attorney to procure the interpreter for applicant's pre-deposition preparation can be summed up as follows: as the party "producing" the witness with its notice of deposition of applicant, defendant is responsible for arranging applicant's interpreter pursuant to Labor Code section 5811(b)(1)[2]; defendant's responsibility for arranging

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

the interpreter is limited to the period noticed in the deposition, which does not include the period prior to the time set for the deposition; the statutes and regulations do not require that defendant provide an interpreter for pre-deposition preparation; and the statutes and regulations, including AD Rule 9795.3(a)(4)(i), only require defendant to pay for the interpreter for pre-deposition preparation. The WCJ concluded that, "After review of the relevant codes and the regulations, there is no authority in the context of delegated authority or power, as permitted to parties involved in legal proceedings, which says the applicant is required to use the defendant-furnished interpreter for pre-deposition preparation." (Report, *supra*, p. 11.) However, under this analysis, the burden of proof has been placed on the defendant instead of cost petitioner.

Pursuant to section 5705, "[t]he burden of proof rests upon the party or lien claimant holding the affirmative of the issue." (Lab. Code, § 5705.) Thus, cost petitioner has the burden of proving all elements necessary to establish the validity of its petition for costs. Here, this includes proving that the pre-deposition preparation interpreting services it claims to have provided were actual, reasonable, and necessary. (See Lab. Code, § 5811(b)(2).)

In the notice of deposition, defendant informed applicant that it would provide an interpreter for both the deposition and pre-deposition preparation, and that it would not pay a second interpreter for deposition preparation. (Ex. A, Notice of Deposition, January 16, 2019.) There does not appear to be any evidence that applicant's attorney addressed or objected to using the interpreter arranged by defendant for pre-deposition preparation. Lastly, section 5811(b)(2) provides, in relevant part, "[t]he duty of an interpreter is to accurately and impartially translate oral communications and transliterate written materials, and not to act as an agent or advocate. An interpreter shall not disclose to any person who is not an immediate participant in the communications the content of the conversations or documents that the interpreter has interpreted or transliterated unless the disclosure is compelled by court order. An attempt by any party or attorney to obtain disclosure is a bad faith tactic that is subject to Section 5813." (Lab. Code, § 5811(b)(2).) This portion of section 5811(b)(2) appears to address the role, duty, and impartiality of the interpreter. Thus, cost petitioner has the burden of proof that providing its pre-deposition preparation interpreting services were actual, necessary, and reasonable given these circumstances and in light of section 5811(b)(2). Upon return to the trial level, cost petitioner should address these and any other pertinent issues in the first instance to establish its burden of proof.

Accordingly, we rescind the Joint Findings and Order and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the November 16, 2020 Joint Findings and Order is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 30, 2021

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

MARIA HEITMAN
ON TIME INTERPRETING
LITIGATION AND CONSULTING ASSOCIATES
FINETE LAW
BROADSPIRE

SS/abs

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