

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

LONNIE SMITH, *Applicant*

vs.

**LEE'S CONCRETE MATERIALS, INC., MARKEL INSURANCE COMPANY;
administered by FIRSTCOMP INSURANCE, *Defendants***

**Adjudication Number: ADJ8681155
Fresno District Office**

**OPINION AND AWARD
OF ADDITIONAL
ATTORNEY'S FEES
(LABOR CODE § 5801)**

In its July 18, 2019 Order denying defendant's Petition for Writ of Review (F078584) (Order), the Fifth District Court of Appeal, remanded this matter to the Appeals Board to make an award of reasonable attorney's fees to applicant's counsel for services rendered in connection to defendant's Petition for Writ of Review (Writ):

Under Labor Code section 5801, this court concludes the petition lacked a reasonable basis for raising an issue not first addressed by the Workers' Compensation Appeals Board. (*Klee v. Workers' Comp. Appeals Bd.* (1989) 211 Cal.App.3d 1519, 1524.) The matter is therefore remanded to the Workers' Compensation Appeals Board to award reasonable attorney's fees for services rendered in connection with the petition. (Order, *supra.*)

The Court's order has become final.

Applicant's attorney, Todd R. Tatro, submitted a verified petition for attorney's fees pursuant to the Court's Order. (Verified Petition for Reasonable Attorney's Fees Pursuant to Labor Code § 5801 (Verified Petition), served September 3, 2019, filed September 5, 2019.) The Verified Petition included an itemization of time spent by Mr. Tatro in connection with the preparation of and filing of applicant's Answer to Defendant's Petition for Writ of Review, Memorandum of Points and Authorities and Exhibits. (*Id.*, Applicant's Attorneys Time Statement for Answer to Writ of Review (Time Statement), p. 1.) Mr. Tatro states that the time requested represents his own work, and that no clerical or paralegal work time was included in the Time Statement. (*Ibid.*)

Mr. Tatro requested a rate of \$400.00 per hour¹ for 74.8 hours, for a total requested fee of \$29,920.00. (*Id.*, Time Statement, p. 3.)

Mr. Tatro states that he is a certified specialist in workers' compensation with 33 years experience litigating workers' compensation cases, and is a certified specialist in workers' compensation. (*Id.*) Mr. Tatro avers that in addition to researching appellate Rules of Court, Fifth District Court of Appeal local rules, and appellate review standards, he was required to review, research, and respond to a writ petition that raised new issues and attached new evidence not raised prior to the writ. (*Id.*, pp. 2-3; see Time Statement.) We note that the Time Statement requests 16 hours for administrative tasks associated with formatting the documents, including video trainings on TrueFile and bookmarking documents, bookmarking the writ response, photo copying, mailing, etc. (Time Statement, p. 3.)

Counsel for petitioner, defendant in this action, filed an Objection to Applicant's Attorney's Petition for Reasonable Attorney's Fees (Objection) on September 12, 2019, responding to the Verified Petition and Time Statement by stating that the parties were pursuing mediation of the case in chief and the Labor Code² section 5801 attorney's fee issue. (Objection, p. 2.) The Appeals Board suspended action on issuing an award of additional attorney's fees pending the parties' mediation.

On November 20, 2020, the Appeals Board informed the parties that it could no longer defer compliance with the Court's Order, and would issue an award of fees. On February 2, 2021, the Appeals Board gave counsel for petitioner 10 additional days, i.e., until February 12, 2021, to serve and file a supplemental objection to the Verified Petition and Time Statement. As of the date of this decision, no supplemental objection has been received by defendant.

The touchstone of a fee awarded pursuant to section 5801 is reasonableness. (2 Cal. Workers' Comp. Practice (Cont. Ed. Bar, March 2019 Update) Judicial Review, § 22.15.) The issue of reasonableness includes consideration of the fact that the fee must be based on services rendered in connection with the petition for writ of review. For instance, a reasonable fee does not include attorney time spent on "inefficient or duplicative efforts" or on clerical tasks. In such a

¹ We note that the Board is not required to determine or specify a reasonable hourly rate in any case. Rather, the Board considers the attorneys' time, effort, care, experience and results in determining a reasonable section 5801 attorney's fee.

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

case, the Appeals Board has discretion to award less than what otherwise would be a “reasonable” fee or to award nothing, if the fee request appears to be “unreasonably inflated.” (*Mota v. Allgreen Landscape* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 272.)

In determining an award of appellate attorney’s fees, we also consider the attorney’s time, effort, care, experience, skill and results in opposing the writ. We also consider the complexity of the issues raised by defendant requiring a response by applicant’s attorney, the length of the reply, and the number of cases cited. Where the issues are novel, for example involving the interpretation of a new statute requiring an analysis of legislative intent, or an area of law which has published appellate cases containing holdings in opposition, or a complex issue of law intertwined with a complex factual pattern, or where the issues are numerous, a higher fee may be awarded because the case is of above average complexity. Thus, we determine the overall amount of a reasonable appellate attorney’s fee based on the merits of the appellate work, on a case-by-case basis.

Here, the Court denied the Writ because defendant raised “an issue not first addressed by the Workers’ Compensation Appeals Board...” (Order.) The newly raised issue related to whether defendant should be subject to section 5814 penalties for unreasonably delayed or denied benefits; defendant also requested review of the Appeals Board’s decision to calculate applicant’s average weekly rate based only on the 29 weeks preceding the industrial injury (Lab. Code, § 4453), and whether there was substantial evidence to increase that rate by 11%. Applicant’s counsel filed a 48-page Answer to Petition for Writ of Review (Answer), including a detailed fact section to establish substantial evidence for use of the 29 week period; the 11% increase in applicant’s average weekly rate; as well as an exhaustive analysis of the various methods to calculate an applicant’s average weekly rate. Applicant’s counsel objected to defendants’ inclusion of the section 5814 penalty issue, but did not address the merits of the new issues raised in the Writ. Based on our review of the Writ and the Answer, we find there were no complex legal issues, nor a complex factual pattern involved in the Writ.

Therefore, given that defendant filed no objection to the Time Statement despite being given sufficient opportunity to do so, we find Mr. Tatro’s request for attorney’s fees for the review, research, drafting, and revision of the Answer to be mostly reasonable. However, given that the Answer responded to a Writ without novelty or complexity, the hours requested are excessive, and we will adjust the award accordingly.

Also, we find that Mr. Tatro's request for 16 hours of administrative tasks associated with formatting the documents, including video trainings on TrueFile and bookmarking documents, bookmarking the writ response, photo copying, mailing, etc., constitutes clerical work and are therefore not compensable in an award of attorney's fees. Thus, we will adjust the award accordingly.

Finally, we acknowledge that Mr. Tatro has 33 years of practice litigating workers' compensation cases, and is a certified specialist in workers' compensation.

Accordingly, and pursuant to the Court's Order, we grant Mr. Tatro's an award of reasonable attorney fees commensurate with the merit of his Answer in the amount of \$18,000.00.

For the foregoing reasons,

AWARD IS MADE in favor of Todd R. Tatro of appellate attorney's fees in the amount of \$18,000.00, with interest and penalties waived if payment is issued within 30 days of service of this Award, and which fees are payable in addition to the amount of any compensation otherwise paid or payable to the applicant.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 2, 2021

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

**LONNIE SMITH
STOCKWELL HARRIS
TODD TATRO**

AJF/bea/abs

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