

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

PEDRO MONTELONGO, *Applicant*

vs.

**MANUEL CUEVAS, JR., AN INDIVIDUAL AND
MAJOR SHAREHOLDER OF MC ROOFING CORP. aka MC ROOFING;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ9001538
Santa Ana District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case.¹ We now issue our Opinion and Decision After Reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will amend the WCJ's decision as recommended in the report, and otherwise affirm the December 28, 2020 Findings and Order.

¹ Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist was appointed in her place.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 28, 2020 Findings and Order is **AFFIRMED, EXCEPT** as **AMENDED** below.

FINDINGS OF FACT

* * *

IT IS FURTHER ORDERED that Manuel Cuevas and MC Roofing, jointly and severally, pay costs of \$12,375.00, payable to LAW OFFICES OF J. FELIX McNULTY, P.O. BOX 1559, Santa Ana, California, 92702.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 3, 2023

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

**PEDRO MONTELONGO
LAW OFFICES OF J. FELIX MCNULTY
STATE COMPENSATION INSURANCE FUND
MANUEL CUEVAS
MC ROOFING
OFFICE OF THE DIRECTOR-LEGAL UNIT (LOS ANGELES)**

PAG/abs

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

**REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE
ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

- | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------|---|---------------------------------------|
| 1. Applicant's occupation | : | Laborer |
| Applicant's Age | : | 50 |
| Date of Injury | : | December 27, 2010 |
| Parts of Body Injured | : | Head, Face, Lower Extremity, and Back |
| Manner in which it occurred | : | Specific Incident |
| | | |
| 2. Identity of Petitioner | : | Applicant Pedro Montelongo |
| Timeliness | : | Petition is timely |
| Verification | : | Petition is verified |
| | | |
| 3. Date of Order | : | December 28, 2020 |
| | | |
| 4. Petitioner contends that the WCJ erred in: | | |
| | | |
| a) Calculating attorney fees and costs: and | | |
| b) Failing to find State Compensation Insurance Fund liable for the costs and sanctions awarded against Manuel Cuevas Jr. and MC Roofing Corp. | | |

**II
FACTS**

Pedro Montelongo filed an Application for Adjudication on July 1, 2013, which identified Manuel Cuevas as the applicant's employer.¹

On September 24, 2013, State Compensation Insurance Fund filed a notice of representation stating that they insured MC Roofing Corporation.² From that point on, MC Roofing was identified as the defendant.

State Compensation Insurance Fund denied the claim on the grounds of no employment, asserting, among other defenses, that they insured MC Roofing and not Manuel Cuevas.

On June 10, 2014, this matter proceeded to trial on the issue of employment. Unable to finish, the case was continued. On August 14, 2014, the matter again proceeded on the record, and additional testimony was taken. However, the case needed to be continued to another date to allow for the completion of testimony.

¹ Application For Adjudication EAMS Doc ID: 49011319

² Notice Of Representation EAMS Doc ID: 10856730

Testimony was completed on October 14, 2014. At the completion of testimony, it was evident that the deposition of the property owner, Mr. Hughes, would be required to resolve the issue of employment. As such, the matter was continued to allow the parties to complete the deposition. The deposition of Mr. Hughes was completed on November 6, 2014.

The matter was resubmitted for decision on February 19, 2015, and a Findings of Fact was issued on April 13, 2015, finding that MC Roofing Corporation employed Pedro Montelongo.

The matter was resolved by way of Compromise and Release, approved on February 16, 2017. The issue of the applicant's petition for sanctions under Labor Code Section 5813 and attorney fees from the applicant's retro TTD were not included.

The matter proceeded to trial on the issues of attorney fees from the applicant's retro TTD and Sanctions against State Compensation Insurance Fund on April 26, 2018. On June 22, 2018, a Findings of Fact was issued that found no sanctions against State Compensation Insurance Fund and that the applicant's attorney was not entitled to a fee from the applicant's retroactive TTD.

The applicant filed a petition for reconsideration to the June 22, 2018, Findings of Fact.

An Opinion and Order Granting Petition for Reconsideration, Decision after Reconsideration issued on September 14, 2018. The Opinion and Order Granting Petition for Reconsideration affirmed the trial courts finding that the applicant's attorney was not entitled to a fee off the applicant's retroactive TTD. The order of no sanctions against State Compensation Insurance Fund was also affirmed, but the findings were amended to defer the issue of sanctions against Manual Cuevas.

At the applicant's request, the matter was placed back on calendar on the issue of costs and sanctions against Manual Cuevas. The matter was ultimately placed on the trial calendar of the undersigned Judge on October 14, 2019. The initial trial setting was continued due to a lack of notice of the hearing on Manual Cuevas. The subsequent hearing date was continued due to insufficient time to commence the trial.

The parties appeared before the undersigned Judge on February 20, 2020. The matter was continued again as the applicant had recently amended the petition for costs and sanctions but inadvertently not served the amended petition on Manual Cuevas.

The trial was continued two more times to allow for service of the pleadings and notice of the hearing to be effectuated on Manual Cuevas.

The matter was finally submitted for decision without testimony or appearance by Manual Cuevas on September 30, 2020.

The undersigned Judge issued his findings and award on December 29, 2020, finding that Manual Cuevas's testimony that he had not been hired and paid for the trenching job when the evidence demonstrated that his testimony was false and was a bad faith action or tactic. The undersigned judge further sanctioned Manual Cuevas and MC Roofing Corporation and awarded costs to the applicant to be paid by Manual Cuevas and MC Roofing Corporation.

On January 21 2021, the applicant filed a petition for reconsideration to the undersigned Judges Findings and Award.

III DISCUSSION

CALCULATING ATTORNEY FEES

The applicant asserts that the undersigned Judge failed to correctly calculate fees incurred by the applicant due to Manuel Cuevas's bad faith action.

The Applicant's Attorney offers the figure of \$38,240.00, representing 89.6 hours at the hourly rate of \$400.00.

No evidence of costs was submitted other than that stated in the applicant's petition for costs and sanctions.

The appeals board may order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

The imposition of reasonable expenses, including attorney's fees and costs, is meant to control burdensome and unnecessary legal tactics and not as compensation to the prevailing party.

With that in mind, the undersigned Judge looked to the litigation required as a direct result of Manuel Cuevas's bad faith actions.

According to the applicant's petition for Costs and Sanctions, the applicant's attorney had spent thirty-nine point three (39.3) hours working the applicant's case as of the October 14, 2014, trial. It was the October 14, 2014 trial at which it was determined that the homeowner's deposition was required to fully adjudicate the issue as to whether or not the applicant was an employee of Manuel Cuevas or MC Roofing Corporation. However, in looking at the issues in this matter, even had Mr. Cuevas not claimed to have not employed the applicant, there was still an issue as to whether the applicant was an employee of Manual Cuevas personally or MC Roofing.

Therefore the litigation before this date would have been required regardless of the false testimony provided by Manual Cuevas. The fees incurred as of this date were not incurred due to Manual Cuevas's bad-faith actions.

In addition, the applicant's attorney did receive a fee per the compromise and release and, as such, has been compensated for these efforts.

The matter was resubmitted for determination on February 19, 2015, and a Findings of Fact was issued on April 13, 2015.

During this period applicant's attorney asserts that he expended an additional twenty point five (20.5) hours. These hours included the deposition of the homeowner and the subsequent trial

date. The petition stated that the applicant's attorney spent six (6) hours attending the deposition and four and a half (4.5) hours to attend each subsequent trial date of November 6, 2014, and February 19, 2015.

The deposition of the homeowner, and the two subsequent trial appearances, were required by the bad-faith actions of Manual Cuevas.

After April 13, 2015, the applicant's attorney began pursuing attorney fees from retroactive TTD and for costs and sanctions against State Compensation Insurance Fund.

According to the applicant's attorney's petition, the applicant's attorney spent 29.8 hours pursuing attorney fees from retroactive TTD and for costs and sanctions against State Compensation Insurance Fund.

Litigation on the issues of attorney fees off of retro TTD, and State Compensation Insurance Fund culpability under Labor code 5813, were completed on September 14, 2018, when the Appeals Board upheld the Findings of Fact that denied an attorney fee off of retro TTD and found that State Compensation Insurance Fund had not acted in bad faith in its defense of the claim.

The fees incurred for this period resulted from the applicant's pursuit of fees from retroactive TTD and for costs and sanctions against State Compensation Insurance Fund for, State Compensation Insurance Fund's, alleged bad faith actions. They were not as a result of Manual Cuevas's bad-faith actions. As such, the applicant's attorney is not entitled to an award of costs for that litigation.

However, the Appeals Board did remand the matter back to the trial court to determine if sanctions were appropriate against Manuel Cuevas. All litigation after remanding the case back to the trial court was the applicant's attorney's pursuit of costs and sanctions against Manuel Cuevas. According to the applicant's petition, this required seventeen (17) hours.

The applicant's attorney asserts that as a result of the bad faith actions of Manual Cuevas, the applicant has incurred \$38,240.00 attorney fees, representing eighty-nine point six (89.6) hours at the hourly rate of \$400.00

This is not the case. The applicant's attorney spent fifty-two point three (52.3) hours litigating his entitlement to attorney fees first from the applicant's retroactive TTD and for costs from State Compensation Insurance Fund and then from Manuel Cuevas and MC Roofing.

However, upon further review, the undersigned Judge, though not agreeing to the time claimed by the applicant, does find merit in the petitioner's assertion that the calculation of attorney fees is incorrect.

According to the applicant's petition, the applicant's attorney spent fifteen (15) hours attending the homeowner's deposition and the two subsequent trials due to Mr. Cuevas's actions.

After the ruling on the applicant's petition for costs and sanctions against State Compensation Insurance Fund, the applicant's attorney was required to send four and a half (4.5)

hours to attend the April 8, 2019 status conference, four and a half (4.5) hours to attend the August 19, 2019, mandatory settlement conference, four and a half (4.5) hours to attend the October 18, 2019 trial and four and a half (4.5) hours to attend the September 30, 2020 trial on the issue of cost and sanction against Manuel Cuevas and MC Roofing. This is a total of thirty-three (33) hours spent litigating the applicant's entitlement to costs and sanctions for Manuel Cuevas's bad faith tactics.

The undersigned judge finds, given the attorney's experience and the nature of the issues, that an hourly rate of \$375.00 is reasonable.

Wherefore the applicant would be entitled to costs, in the form of attorney fees, of \$12,375.00.

For the reasons stated above, the undersigned Judge recommends that the applicant's petition for reconsideration be granted in part and that the award be amended to state that: IT IS FURTHER ORDERED that Manuel Cuevas and MC Roofing pay costs of \$12,375.00. Payment to issue to: LAW OFFICES OF J. FELIX McNULTY, PO BOX 1559, Santa Ana, California, 92702.

LIABILITY FOR COSTS AND SANCTIONS

State Compensation Insurance Fund has already been found not to have acted in bad faith in defending this claim.³ The Appeals Board has confirmed this determination.⁴

As such, this Judge does not have the authority to impose sanctions and costs upon State Compensation Insurance Fund for its actions in this matter.

However, the applicant is asserting that State Compensation Insurance Fund, though not liable for bad faith actions in their handling of this matter, is financially responsible for any Labor Code Section 5813 sanctions and costs incurred due to their insured's actions.

The applicant relies on California Insurance Code §11651 and §11654.

California Insurance Code §11651 requires that every policy shall contain a clause to the effect that the insurer will be directly and primarily liable to any proper claimant for payment of any compensation for which the employer is liable.⁵

California Insurance Code §11654 provides that every such contract or policy shall contain a clause to the effect that the insurer will in all things be bound by and subject to the orders, findings, decisions, or awards rendered against the employer under the provisions of the law imposing liability for compensation.⁶

³ Findings and Fact EAMS Doc ID: 67413060

⁴ Opinion and Order Granting and Decision After Reconsideration EAMS Doc ID: 68133919

⁵ California Insurance Code § 11651

⁶ California Insurance Code § 11654

Manuel Cuevas testified at trial that he did not know if Mr. Hughes (the property owner) hired the applicant to work on his home. Mr. Cuevas further testified that he never paid the applicant for any work and never hired the applicant for work. He never paid the applicant by cash or by check, and that he never paid the applicant either as MC Roofing or as an individual.

Mr. Cuevas testified that he had no contract to work on the homeowner's house (Mr. Hughes) where the applicant's accident occurred.

The evidence demonstrated that, at the time of testifying, Mr. Cuevas knew that he had been hired and paid for the trenching job. The same trenching job at which the applicant was injured.

Mr. Cuevas was found to have knowingly provided false testimony. His testifying was a willful act that resulted in a loss to the applicant in the form of attorney fees incurred in litigating the statement's veracity. It is this willful bad faith act for which Mr. Cuevas was sanctioned pursuant to California Labor Code Section 5813 and was the basis of the applicant incurring attorney fees.

California Insurance Code §533 provides that an insurer is not liable for a loss caused by the willful act of the insured.

Furthermore, California Insurance Code §533 is an implied exclusionary clause in every insurance contract and reflects a fundamental public policy of denying coverage for willful wrongs and discouraging willful torts.⁷

Manual Cuevas's bad faith actions were willful acts.

As such, the implied exclusionary clause in California Insurance Code §533 would preclude the application of California Insurance Code § 11654 and § 11651 to require a carrier to assume financial liability for the sanctions and costs awarded under Labor Code Section 5813. Furthermore, such an application would frustrate the public policy of denying coverage for willful wrongs.

In addition, California Labor Code Section 5813 was designed to protect against litigation abuses. Imposing liability on State Compensation Insurance Fund for the sanctions and costs incurred as the result of Mr. Cuevas's bad faith actions would frustrate the statute's intent.

Doing so would allow an employer to act in bad faith, without repercussions, as another would pay any sanction and costs that resulted therefrom. This would not discourage litigation abuses as was intended.

As previously stated, State Compensation Insurance Fund had been found not to have acted in bad faith in defending this claim, and the Appeals Board confirmed this finding.

⁷ Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 739, 15 Cal. Rptr. 2d 815, 830, 1993 Cal. App. LEXIS 44, *25, 93 Cal. Daily Op. Service 457, 93 Daily Journal DAR 945

It would be inequitable to impose liability for the bad faith action of Manuel Cuevas when it has already been found that State Compensation Insurance Fund did not act in bad faith when defending against this claim.

The applicant also argues that pursuant to Insurance Code Section 11662, the defendant has an absolute right and has a remedy against its insured for any payments made to the applicant resulting from its bad faith conduct.

Insurance code section 11662 provides that whenever an employer is insured against liability for compensation with any insurer, such insurer is subrogated to the employer's rights to recover losses.

Subrogation is the principle under which an insurer who has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party regarding the loss covered by the policy.⁸

Mr. Cuevas would have no rights or remedies against a third party for the costs and sanctions imposed on him for his, the insured's, bad faith actions. Therefore, there are no rights or remedies to which State Compensation Insurance Fund would have subrogation rights to enforce.

Insurance code section 11662 is not an absolute right to collect from the "insured employer" as the applicant would suggest but establishes the insurer's subrogation rights.

Based on the above, the undersigned Judge was not in error when he found that State Compensation Insurance Fund was not liable or financially responsible for the bad faith actions of Manuel Cuevas.

IV RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the applicant's petition for reconsideration be denied in regard to the Judge's findings that State Compensation Insurance Fund is not liable or financially responsible for the bad faith action of Manuel Cuevas.

Furthermore, for the reasons stated above, it is respectfully recommended that the applicant's petition for reconsideration be granted as to the calculation of attorney fees and that the award be amended as follows: IT IS FURTHER ORDERED that Manuel Cuevas and MC Roofing pay costs of \$12,375.00. Payment to issue to: LAW OFFICES OF J. FELIX McNULTY, PO BOX 1559, Santa Ana, California, 92702.

DATE: February 2, 2021

Oliver Cathey
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

⁸ Black's Law Dictionary, 8th ed