

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

**NELSON SAMPLE (deceased); BRENDA MORALES, dependent and guardian ad litem
for ARIA CARMEN SAMPLE, ad litem (a minor), *Applicant***

vs.

**AUTOMOTIVE CLUB OF SOUTHERN CALIFORNIA; OLD REPUBLIC
GENERAL INSURANCE COMPANY, administered by CCMSI, *Defendants***

**Adjudication Number: ADJ12139553
Van Nuys District Office**

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

Applicant's attorney seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on January 9, 2024, wherein the WCJ found in pertinent part that "applicant's attorney's services are assessed at 12% of the temporary disability and death benefits set forth above under Cal. Code of Regs. sec. 10844. Attorneys' fees are commuted laterally as set forth in the commutation worksheet attached."

Applicant's attorney contends that the WCJ erred in not awarding attorney fees 15% of the benefits awarded because he and his client, applicant, entered into a fee agreement stating that the attorney's fees normally range from 9% to 15% of the benefits awarded. Applicant's attorney further contends that he assumed responsibility; exercised care in the representation; expended considerable time; and obtained favorable results for his client.

We have not received an answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition and the contents of the Report with respect thereto.

Based on our review of the record, and for the reasons discussed below, we will grant the Petition, affirm the Findings and Award, except that we will amend it to defer the issue of attorney fees, and we will return the matter to the WCJ for further proceedings consistent with this decision.

BACKGROUND

The sole issue before us is the award of attorneys' fees. The following brief history of the case is set forth in the WCJ's Report:

The Applicant claims dependency benefits on behalf of her daughter, Aria. The Application for Adjudication of Claim was filed on 4/25/19.

The Applicant retained the services of the Petitioner. ... Defendant petitioned for Dismissal under Cal. Code of Regs. 10550. However, the parties then obtained a panel in internal medicine and procured a complete medical file. Dr. Stewart Lonky acted as PQME in internal medicine who wrote two reports (Exs. X and Y). His deposition was taken (Ex. Z).

The issue of aoe/coe was tried before the undersigned on 8/15/2022 when [guardian ad litem Brenda Morales] testified. The trial was completed on 9/26/2022

The undersigned issued a Findings of Fact and Orders on 10/17/2022 finding the injury and resulting death to be industrial per the QME's opinions. ...

The Defendant filed a Petition for Reconsideration from this decision. The Petitioner did not file a response. Reconsideration was denied on 1/13/2023 leaving only the dependency issue unresolved. A Petition for Writ of Review was filed by the Defendant. It is unknown what if anything was filed in response or if a fee was awarded under Cal. Lab. Code sec. 5801.1.

The Aria's dependency issue was tried on 12/13/2023

On 1/9/2024 the undersigned issued a Findings and Award in favor of the guardian ad litem for dependency benefits ... [An attorneys' fee of 12% (\$104,071.24) was awarded.

...

Petitioner claims that the amount of work coupled with the complexity of the issues and the results obtained warrants an attorneys' fee of 15%.

(Report dated February 6, 2024, pp. 1-3.)

As noted by the WCJ above, on December 13, 2023 the matter proceeded to trial the following issues:

1. Dependency of Aria Carmen Sample (a minor).

2. Death benefits.
3. Attorney fees.
4. Temporary disability 7/10/18 through 8/19/18.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), December 13, 2023 trial, p. 2.)

The Findings and Award issued on January 9, 2024, and applicant’s attorney seeks reconsideration only of the WCJ’s award of attorneys’ fees.

DISCUSSION

The Appeals Board has exclusive jurisdiction over fees to be allowed or paid to applicants’ attorneys. (*Vierra v. Workers’ Comp. Appeals Bd.* (2007) 154 Cal.App.4th 1142, 1149 (*Vierra*)). In calculating attorney’s fees, our basic statutory command is that the fees awarded must be “reasonable.” (Lab. Code, §§ 4903, 4906(a) & (d).) Pursuant to Labor Code¹ section 4906, in determining what constitutes a “reasonable” attorney’s fee, the Board must consider four factors: (1) the responsibility assumed by the attorney; (2) the care exercised in representing the applicant; (3) the time involved; and (4) the results obtained by the attorney. (Lab. Code, § 4906(d); see also Cal. Code Regs., tit. 8, § 10844.)

Although not binding, WCAB/DIR Policy & Procedure Manual, section 1.140 also provides guidance in our analysis of this matter. Under section 1.140, 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 hearings are involved.

Based on the procedural history, this case involved highly disputed factual issues, including the dispute over whether decedent’s injuries arose out of and in the course of employment (AOE/COE) and disputed dependency issues. We cannot comment on the complexity of the issues raised before other courts, but we note that there were actions before the Superior Court, a motion for modification of child support, and responding to a petition for a writ of review at the Court of Appeal. Based on applicant’s petition for reconsideration and the WCJ’s Report, however, applicant’s attorney did participate in – and presumably prepare for – hearings in multiple forums. Further, we note that appearances require preparation, irrespective of whether they are telephonic

¹ All statutory references are to the Labor Code unless stated.

or in person. We also observe that under some circumstances, settlement of a case may be beneficial to an applicant and may be a positive result.

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, 621-622 (Appeals Bd. en banc) (*Blackledge*)). 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.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*), citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

Here, the opinion on decision is silent as to the WCJ’s basis for the determination that 12% is a reasonable attorney fee and thus we are unable to evaluate the basis of the WCJ’s Order. Therefore, we must return this matter to the trial level for further proceedings.

With respect to the requirement set forth in WCAB Rule 10842 that “requests for an increase in attorney's fee shall be accompanied by proof of service on the applicant of written notice of the attorney's adverse interest and of the applicant's right to seek independent counsel” we note that the proof of service does list applicant’s guardian ad litem. Moreover, WCAB Rule 10842 does not require dismissal. (Cal. Code Regs., tit. 8, § 10842 [“Failure to notify the applicant *may* constitute grounds for dismissal of the request for increase in fee.”].) There is a strong public policy favoring disposition of cases on their merits rather than on procedural grounds. (*Bland v. Workers Comp. Appeals Bd.* (1970) 3 Cal. 3d 324 [35 Cal.Comp.Cases 513].)

Accordingly, we grant the Petition, affirm the Findings and Award issued by the WCJ on January 9, 2024, except that we amend it to defer the issue of attorney fees, and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant’s attorney’s Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the *Decision After Reconsideration* of the Workers' Compensation Appeals Board, that the Findings and Award issued by the WCJ on January 9, 2024 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

4. The issue of attorneys' fees is deferred.

AWARD

3. The issue of attorneys' fees is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 2, 2024

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

**BRENDA MORALES
LAW OFFICES OF WILLIAM J. TOPPI
BRADFORD & BARTHEL
LAW OFFICES OF PARKER & IRWIN**

JB/cs

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