

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

MARIA LOMELI, *Applicant*

vs.

**DUDA FARM FRESH FOOD;
XL SPECIALTY INSURANCE COMPANY,
ADMINISTERED BY GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ11421538
Oxnard District Office**

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

Defendant Duda Farm Fresh Food, insured by XL Specialty Insurance Company, administered by Gallagher Bassett (defendant) has filed a petition seeking removal from the December 22, 2021 Order Vacating Submission and setting the matter for status conference to address development of the record. The WCJ found that cost petitioner failed to submit evidence to support the hourly rates alleged and requested, and set the matter for status conference to address development of the record.

Defendant's Petition for Removal (Petition) contends cost petitioner failed to meet the burden of substantiating its alleged costs at trial, and that it was error for the WCJ to vacate the submission to allow for development of the record.

We have received an Answer from cost petitioner. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending that the Petition be denied.

We have considered the Petition for Removal, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Removal, rescind the Order Vacating Submission, and return this matter to the WCJ for further proceedings and decision.

FACTS

Applicant Maria Lomeli, while employed during the period August 10, 2017 through August 1, 2018, as a packer at Oxnard, California, by Duda Farm Fresh Foods, claimed injury arising out of and in the course of employment to the neck and bilateral upper extremities. At the time of injury, the employer's workers' compensation carrier was XL Specialty Insurance Company, administered by Gallagher Bassett. The case-in-chief settled by way of Compromise and Release, approved September 10, 2019.

On August 30, 2021, Mission Collections for Santana Lopez & Associates filed a petition for Labor Code section 5811 costs for interpreting at a deposition reading, a medical evaluation, and a mandatory settlement conference.¹ (Petition for Interpreter Fees, Costs, & Sanctions, dated August 30, 2021, at 1:18.) The petition sought \$650.00 in interpreting fees, additional penalties and interest, and \$1,020.42 in costs that included preparation and filing of the petition and time spent in "case analysis." The parties proceeded to hearing on September 22, 2021, at which time the matter was set for mandatory settlement conference (MSC). Following the September 22, 2021 hearing, defendant paid the principal amount of \$650.00, leaving claimed penalties, interest, and costs unresolved.

On October 20, 2021, defendant filed its response to the petition for costs, averring, inter alia, the itemization of costs was unreasonable and unsupported. (Response to Petition for Interpreter Fees, Costs and Sanctions, dated October 20, 2021, at 4:16.) On the same day, the parties also completed a pre-trial conference statement in which defendant raised issues including "unreasonable expenses and attorney's fees based on disputed issues." (Pre-trial Conference Statement, p. 3.) The parties attended an MSC on October 21, 2021, at which time they were unable to resolve their differences. The WCJ set the matter set for trial over defendant's objection. (Minutes of Hearing, dated October 21, 2021.)

On November 2, 2021, cost petitioner refiled the August 30, 2021 cost petition, including the claimed "Costs Itemization" related to invoicing, "re-billing," document preparation and appearance at the September 22, 2021 status conference.

The parties proceeded to trial on November 16, 2021, at which time the only issue presented was the August 30, 2021 cost petition. Lorena Ortiz testified on behalf of the cost

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

petitioner to her professional experience, and further explicating the various costs listed in the exhibits to the cost petition. Ms. Ortiz Scheider indicated her intent to amend the Cost Petition to reflect fees arising out of MSC and trial appearances. The parties submitted the matter for decision.

On November 29, 2021, cost petitioner filed a “First Amended Petition for Interpreter Fees, Costs and Sanctions per Labor Code § 5811 and § 5813.” Therein, the cost petitioner claimed 2.5 hours of costs at \$250.00 per hour for the trial appearance on November 16, 2021. Cost petitioner further claimed an additional 13.1 hours of costs at \$400.00 per hour arising out cost petitioner’s retention of legal counsel and related appearances. (First Amended Petition for Interpreter Fees, Costs and Sanctions, dated November 29, 2021, Ex. F, p. 26.)

On December 22, 2021, the WCJ issued an Order Vacating Submission, noting the need to develop the record to address that fact that, “no evidence [was] submitted to support the hourly rates alleged and requested by either Lorena Ortiz Schneider or Phillip Newell, Esq., in the First Amended Petition for Costs dated 11/29/2021.” (Order Vacating Submission and Notice of Status Conference, dated December 22, 2021.)

On January 12, 2022, defendant petitioned for removal of the matter to the WCAB, citing *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986] for the proposition that the WCJ may not require development of the record under section 5701 to “rescue a party that does not present evidence by the time of the MSC.” (Petition, at 4:6.) The Petition sought rescission of the order vacating submission, and further requested that the Appeals Board issue a decision based on the evidence offered at trial and related petitions. (Petition, at 6:4.)

Cost petitioner’s Answer averred defendant failed to establish significant prejudice or irreparable harm. The Answer also indicated cost petitioner’s belief that the WCJ “would take judicial notice of the several orders issued by him to defendants to pay costs and fees at the same rates as in this case.” (*Id.* at 2:10.) The Answer further averred other judges in the Oxnard district office had issued similar orders at similar hourly rates, and that \$400.00 was the commonly accepted hourly rate for section 5710 fees. (*Id.* at 2:15.)

The WCJ’s Report observed that the decisions of the WCAB must be based on substantial evidence, and that the court has an obligation to develop the record if it concludes that neither side has presented substantial evidence to support a decision. (Report, at p. 3.)

DISCUSSION

The Appeals Board's power to remove a case to itself under Labor Code section 5310 is discretionary and is generally employed only as an extraordinary remedy. (See *Butte County v. Workers' Comp. Appeals Bd. (Stultz)* (1991) 56 Cal.Comp.Cases 312 (writ denied); *Swedlow, Inc. v. Workers' Comp. Appeals Bd. (Smith)* (1985) 48 Cal.Comp.Cases 476 (writ denied).) To obtain relief under this provision, WCAB Rule 10955 requires that a party must establish either that "[t]he order, decision or action will result in significant prejudice" or "irreparable harm," and that reconsideration would not be an adequate remedy. (Cal. Code Regs., tit. 8, § 10955.) In this case, we are persuaded that the order vacating submission and for the creation of a supplement to the record after cost petitioner has had multiple opportunities to sustain its burden of proof will significantly prejudice defendant.

The WCJ correctly notes that the WCAB has an affirmative obligation to develop the record in cases where no party has offered the evidence necessary to a complete adjudication of the matter, and that under those circumstances, development of the record is consistent with due process. (*M/A Com-Phi v. Workers' Comp. Appeals Bd.* (1998) 65 Cal.App.4th 1020 [63 Cal.Comp.Cases 821]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal. Comp. Cases 924].) The court of appeal in *San Bernardino Community Hosp. v. Workers Compensation Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 935 [64 Cal.Comp.Cases 986] held that "[t]he Board may act to develop the record with new evidence if, for example, it concludes that *neither* side has presented substantial evidence on which a decision could be based." However, here, based on the record before us, we do not believe that further development of the record is appropriate.

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.) Cost petitioner has the burden of proving all elements necessary to establish the validity of its petition for costs. This includes the reasonable value of the professional services claimed by Ms. Ortiz Schneider on behalf of Mission Collections, and cost petitioner's counsel Mr. Newell. Cost petitioner has had multiple opportunities in which to carry this burden, including the filing of the initial claim for costs on August 30, 2021, the refiling of the "Costs Itemization" filed on November 2, 2021, in its presentation of trial evidence on November 16, 2021, and again in its First Amended Petition on November 19, 2021. Notwithstanding these opportunities, the WCJ has determined that "no

evidence [was] submitted to support the hourly rates alleged and requested by either Lorena Ortiz Schneider or Phillip Newell, Esq.” (Order Vacating Submission, dated December 22, 2021.) Accordingly, we conclude that cost petitioner has had ample opportunity to offer evidence responsive to its burden of proof, and that allowing additional evidence now would circumvent the mandated closure of discovery pursuant to section 5502, significantly prejudicing defendant.

Additionally, we note cost petitioner’s asserted belief that the WCJ would, *sua sponte*, take judicial notice of prior orders for the payment of costs and fees in other cases. (Answer, at 2:10.) Evidence Code section 452(d) provides, in part, that judicial notice may be taken of “[r]ecords of any court of (1) this state or (2) any court record of the United States or of any state of the United States.” However, Evidence Code section 453 further requires that judicial notice shall only be taken if it is requested by a party and the party sufficiently notifies the adverse party and gives the court sufficient information to enable it to take judicial notice. Here, none of these conditions were met, as cost petitioner failed to request judicial notice, failed to provide notice to the adverse party, and failed to provide sufficient identifying information at trial to enable the WCJ to take judicial notice.²

Accordingly, we will order that this matter be removed to the Appeals Board, and as our Decision After Removal, will rescind the December 22, 2021 Order Vacating Submission, and return this matter to the WCJ for further proceedings. Any party newly aggrieved may thereafter seek reconsideration.

² Even were the WCJ to take judicial notice of the three orders granting cost petitions cited by cost petitioner, none of the orders cited in the Answer are persuasive evidence of hourly rates established after submission in a contested hearing. All of the example orders appended by cost petitioner involved the award of costs by the WCJ after defendant failed to appear at a noticed hearing.

For the foregoing reasons,

IT IS ORDERED that the defendant's Petition for Removal, dated January 12, 2022, is **GRANTED**.

IT IS FURTHER ORDERED that as our Decision After Removal, the Order Vacating Submission, dated December 22, 2021, is **RESCINDED**, and the matter **RETURNED** to trial level for further proceedings and decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 23, 2022

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

**MISSION COLLECTIONS
LAW OFFICE OF PHILLIP NEWELL
ALBERT AND MCKENZIE**

SAR/abs

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