

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

AAMIR KHAN, *Applicant*

vs.

**DENNY'S RESTAURANT; THE HARTFORD,
Administered by GALLAGHER BASSETT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ8396740
Long Beach 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.

The Hartford, administered by Gallagher Bassett Services, Inc., (defendant) seeks reconsideration of the Findings, Award, and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 20, 2020. As relevant herein, the WCJ found that the bill of Qualified Medical Evaluator (QME) Dr. Matthew J. Steiner (cost petitioner) for \$11,250.00 was reasonable; that cost petitioner was entitled to a 10% penalty as well as 7% interest per year retroactive to the date defendant received lien claimant's bill and report; that defendant engaged in bad faith actions and tactics regarding cost petitioner's claim; that cost petitioner is entitled to costs and attorney's fees; and that sanctions of at least \$500.00 was appropriate due to defendant's bad faith actions and tactics. The WCJ awarded cost petitioner \$11,250.00 for his bill; \$1,125.00 for the 10% penalty; 7% interest from the time defendant received lien claimant's bill and report until the bill is paid in full; and reimbursement of cost petitioner's costs and attorney's fees. The WCJ ordered defendant to pay \$500.00 into the General Fund as sanctions.

Defendant contends that cost petitioner failed to prove the reasonableness of its billing based on the medical-legal report and the billing; and that Labor Code section 5813 sanctions,

penalties, and attorney's fees should not be awarded because Labor Code section 5813 was not raised as an issue by the WCJ or cost petitioner.¹

Lien claimant filed an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, 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 affirm the F&O, except amend it to defer the issue of sanctions, costs, and attorney's fees, and return the matter to the WCJ for further proceedings consistent with this decision.

FACTUAL BACKGROUND

Applicant, while employed from April 4, 2011, to April 4, 2012, as a manager by defendant, claims to have sustained injury arising out of and in the course of employment to his head, upper and lower extremities, and psyche. (Minutes of Hearing (MOH), August 7, 2019, p. 2:5-7.)

On October 3, 2013, cost petitioner issued a psychological medical-legal evaluation and charged \$11,250.00. Cost petitioner detailed his billing as follows: 2 hour for "face-to-face" time with applicant; 13.75 hours reviewing records; 13 hours of research; and 16.25 hours preparing and editing his report. Cost petitioner served his medical-legal evaluation and invoice on October 9, 2013. Lastly, cost petitioner signed his medical-legal report under penalty of perjury that "the contents of the report and bill are true and correct to the best of his knowledge." (Ex. 2, Report of QME Dr. Steiner, October 3, 2013.)

On August 7, 2019, at a hearing, the parties stipulated that defendant's Explanation of Review (EOR) was untimely. (MOH, *supra*, at p. 2:12-13.)

On October 15, 2019, the WCJ issued a F&O. This F&O is essentially the same as the November 10, 2020 F&O, discussed above, except for one important difference; that cost petitioner was **entitled** to payment in the amount of \$11,250.00. (Finding 6, Findings and Award and Order, October 15, 2019, emphasis added.)

Defendant filed a Petition for Reconsideration of the October 15, 2019 F&O.

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

On January 13, 2020, we issued our Opinion and Decision After Reconsideration. (Decision After Reconsideration.) In the Decision After Reconsideration, we rescinded the October 15, 2019 F&O. We agreed with the WCJ's findings regarding the 10% penalty and 7% interest. However, we disagreed with the WCJ's analysis that cost petitioner was entitled to the full amount of his bill when defendant failed to object timely with an EOR. We sent the issue of the reasonable value of cost petitioner's services back to the trial level.

On September 1, 2020, the parties stipulated that the QME's hourly rate is \$250.00; and that the remaining issue is whether the billing of QME Dr. Steiner was reasonable.

Also on September 1, 2020, the parties resubmitted their cases on the same record with the additional stipulation and issue. (MOH, September 1, 2020.)

On November 10, 2020, the WCJ issued a F&O, as discussed above. The only significant difference from the October 15, 2019 F&O is that the November 10, 2020 F&O found that cost petitioner's bill of \$11,250.00 was reasonable.

DISCUSSION

I.

Former WCAB Rule 10451.1(f)(1)(A)(i)(I) provided that a defendant has waived all objections to a medical-legal provider's billing, except for compliance with section 4620 and 4621, if a defendant failed to serve an EOR within 60 days of a provider's properly documented billing. (Cal. Code Regs., tit. 8, former § 10451.1(f)(1)(A)(i)(I).)² Here, as stipulated to by the parties, defendant failed to serve timely its EOR. Thus, defendant waived all objections to the billing at issue, and one of the issues that needed to be resolved was the reasonable value of cost petitioner's billing.

In our January 13, 2020 Decision After Reconsideration, we remanded this issue to the trial level. Cost petitioner submitted his October 2013 medical-legal report and billing in support of the reasonableness of his billing, which the WCJ found as substantial evidence to support the amount of \$11,250.00 as the reasonable value of cost petitioner's evaluation. In its Petition, defendant raised various arguments and objections to the reasonableness of cost petitioner's billing:

The billing statement is a claim for charges based on time. It is not proof of those actual charges based on time. The lien claimant did not provide any testimony or evidence on why the report preparation and edits would take 16.25 hours or why the doctor had to spend 13 hours in research on a subject he should already know

² Effective January 1, 2020, former WCAB Rule 10451.1 is now 10786.

as a medical doctor who passed the psychiatric QME requirements. He does not explain why he thought this case was so difficult or complex. The doctor did not offer any evidence to demonstrate it would take 13.75 hours to review records or that he was the one who physically reviewed the records. How many pages were those records? The doctor failed to provide an itemization for charging extra on “complex psychiatric issues” above the \$750 allowed under ML 103.

In the itemized bill, the doctor claims that he spent 13 hours of research. The only evidence of alleged research is a list of articles on pages 104 to 105. This appears to be a boilerplate list that defendant suspects get attached to most of the QME reports issued by the doctor. There is no explanation on how these articles assisted the doctor in performing his examination or render a diagnosis. Defendant is unable to locate any reference to these articles in the body of his report or how they assisted him on this case above what he should already know as a workers' compensation doctor in California. The doctor fails to state why he needed that research above his prior training at a psychiatric QME for California workers' compensation system. It appears to be fluffed. The research school lesson he provides on pages 94 to 100 it totally unnecessary fluff to the report and not part of the reporting requirements for a med/legal report.

The itemized bill states that the doctor spent 16.25 hours to prepare the medical report. He fails to state why it would take him that long to prepare the report. The body of the report is 46 pages. The remaining 78 pages are attachments. On page 17 to 22 of the report he simply repeats word for word the testing explanations made in MMPI, Hamilton and Beck that were also repeated in attachments. On page 24 to 27, he simply provides the general GAF chart that is found in the AMA Guides (although we are required to use the one in the Schedule for Rating Permanent Disabilities) and a general chart on levels of permanent disability impairment. The doctor essentially repeats verbatim in his record reviews what was stated in those records without any analysis. He spends 44 pages on alleged record review (page 49 to page 93) but those pages are actually less than half page each and in many of the pages, only a third of a page.

The “record review” is an attachment from page 49 to 93. However, this is a mirage. Half of almost every page is blank while the other half of the page is a few short paragraphs. In almost every record, it is a word for word copy of the actual record or a simple paraphrase without any analysis. He does not provide any information or itemization on the number of pages he actually reviewed. The doctor does not appear to provide any analysis of those records in his report. On page 38 of the report, he only has less than a page discussing the records and only mentions Dr. Ferra of Kaiser.

(Petition, *supra*, pp. 5:1-6:19.)

We note that cost petitioner's report is approximately 113 pages and that there were approximately 45 pages of record review summary; the medical-legal report, itself, tends to support the reasonableness of cost petitioner's billing. However, we do not disagree with defendant that some of cost petitioner's billing could be construed as unreasonable. The issue is that defendant failed to submit any evidence in support of its arguments and objections that the invoices were unreasonable.

Sections 4622 and 4603.3 provide the parties a framework to address the objections raised by defendant. Pursuant to section 4622, defendant has sixty (60) days to issue an EOR if it decides not to pay the full amount of cost petitioner's invoice. (Lab. Code, § 4622(a).) In the EOR, defendant is required to explain the reasons why it failed to pay the invoice in full consistent with section 4603.3. (Lab. Code, § 4622(e).) Section 4603.3 provides, as relevant herein, that the EOR shall include "[t]he basis for any adjustment, change, or denial of the time or procedure billed"; "[t]he additional information required to make a decision for an incomplete itemization"; and the reason for the denial "if a denial of payment is for some reason other than a fee dispute." (Lab. Code, § 4603.3(a)(3)-(5).) A purpose of the EOR is to allow the provider an opportunity to respond to any perceived issues, deficiencies, or errors in the invoice by defendant. Had defendant raised its concerns or questions in a timely EOR, defendant would have had a response from cost petitioner.³ This response could have been submitted as evidence by defendant.

In this case, cost petitioner's medical-legal report and invoice are substantial evidence to support the finding that the amount of \$11,250.00 as reasonable for cost petitioner's services. Thus, the burden of proof shifted to defendant to provide evidence to demonstrate that cost petitioner's billing was unreasonable. Here, defendant has only provided arguments and speculation; defendant did not produced any evidence.⁴ Thus, defendant failed to satisfy its burden of proof.

III.

Section 5906 provides that "[u]pon the filing of a petition for reconsideration . . . the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers'

³ We note that a provider may fail to provide a response or provide an inadequate response to a defendant's EOR. Section 4622(c) provides a remedy in those situations. Furthermore, as suggested by the WCJ, defendant could have also deposed cost petitioner or cross-examined cost petitioner at a hearing to obtain information on the billing.

⁴ We recognize that a verified medical-legal report and billing may not, by themselves, always be sufficient to support the reasonableness of the provider's invoice.

compensation judge” (Lab. Code, § 5906.) “After the taking of additional evidence and a consideration of all of the facts the commission may affirm, rescind, alter, or amend the original order, decision or award.” (Lab. Code, § 5908.)

A grant of reconsideration has the effect of causing “the whole subject matter [to be] reopened for further consideration and determination” (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of “[throwing] the entire record open for review.” (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level.

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 Labor Code 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.*)

Here, the January 13, 2020 Decision After Reconsideration rescinded the October 15, 2019 F&O. Thus, the findings, awards, and order related to sanctions against defendant were rescinded. When the case returned to the trial level after the January 13, 2020 Decision After Reconsideration, the parties should have formally submitted the issues and stipulations to the WCJ at the

September 1, 2020 hearing to satisfy our holding in *Hamilton*. Instead, the parties simply re-submitted the cases. For this reason, we return the sanctions, costs, and attorney's fees issue to the trial level for the parties to provide a proper record.

Accordingly, we affirm the F&O, except amend it to defer the issue of sanctions, costs, and attorney's fees, and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that November 10, 2020 Findings and Award and Order is **AFFIRMED, EXCEPT** as **AMENDED** as follows:

FINDINGS

* * *

10. The issue of whether defendant engaged in bad faith action or tactics regarding the QME's claim is deferred.

11(a). The issue of whether the QME is entitled to an award of costs and attorney's fees is deferred.

11(b). The issue of sanctions against defendant is deferred.

* * *

AWARD

* * *

d) The issue of the reimbursement of the QME's costs and attorney's fee is deferred.

* * *

ORDER

e) The issue of sanctions pursuant to section 5813 and former Appeals Board Rule 10451.1 is deferred.

* * *

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 22, 2021

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

**AAMIR KHAN, C/O PERONA LANGER
GALLAGHER BASSETT
SLADE NEIGHBORS
EXPEDIENT PSYCHIATRIC, ATTN: MATTHEW STEINER, M.D.
TAPPIN & ASSOCIATES
PERONA LANGER**

SS/abs

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