

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

MARIA ANA TAYROS, *Applicant*

vs.

**CITY OF GREENFIELD, permissibly self-insured, administered by ACCLAMATION
INSURANCE MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ14275855
Salinas District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks removal of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on August 24, 2022, wherein the WCJ found in pertinent part that pursuant to Administrative Director rule 979, qualified medical examiner (QME) Rex Lockwood, D.C., is entitled to additional advanced payment of a minimum of two hours for his deposition.

Defendant contends that Dr. Lockwood has been paid \$910.00 and has not provided any medical-legal testimony, so he is not entitled to an additional deposition fee.

We received a Report and Recommendation on Petition for Removal (Report) from the WCJ recommending the Petition for Removal (Petition) be denied. We received an Answer from applicant.

We have considered the allegations of the Petition and the contents of the WCJ's Report. Based on our review of the record and based on the WCJ's analysis of the merits of defendant's arguments, as explained in the WCJ's report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we deem the Petition a petition for reconsideration, and we will deny the Petition as one seeking reconsideration.

BACKGROUND

Applicant claims injury to her neck, bilateral shoulders, arms, elbows, wrists, hands, fingers, back, hips, right lower extremities, right foot, nervous system, and psyche, and in the form of stress while employed by defendnat as a senior accountant during the period from April 7, 2016, through October 8, 2020.

QME Dr. Lockwood evaluated applicant on December 19, 2020. He determined that applicant had not reached maximum medical improvement/permanent and stationary status, and he requested that she undergo additional diagnostics. (Joint Exh. J6, Rex Lockwood, D.C., January 16, 2021, pp. 8 – 9.)

Dr. Lockwood submitted four supplemental reports (See Joint Exhs. J2 – J5) and his deposition was scheduled to occur via a Zoom/videoconference on September 27, 2021. The Certificate of Nonappearance states that “there was no appearance made by REX LOCKWOOD D.C....” (Def. Exh. D2, p. 2, uppercase in original.) Dr. Lockwood’s deposition was subsequently scheduled for May 19, 2022. At the deposition he stated, “... I do not have to proceed without payment having been received, and that has been an issue.” (Joint Exh. J7, Dr. Lockwood, May 19, 2022, p. 5 [EAMS p. 3], deposition transcript.) The subsequent discussion between defense council and Dr. Lockwood included:

Q. Okay. And you did not provide med-legal testimony that day; correct?

A. I prepared an hour, and I got on the number that was provided me by yourself, your office. And I attempted numerous times to connect, and it failed, and I called both your office and applicant's office and did not receive anyone and then left voice mails for both offices that I was having difficulty.

¶ I continued to wait through some of the time, probably at least a half an hour, 40 minutes of the deposition's scheduled time. Nobody contacted me, and therefore I was unable to testify.

Q. Okay. So confirming, you did not testify that day?

A. No.

(Joint Exh. J7, pp. 6 – 7 [EAMS p. 3].)

Q. Did you review anything in preparation for today's deposition?

A. Of course.

Q. What did you review in preparation for today?

A. I reviewed my prior reports.

Q. Okay. So at this point the issue with regards to whether you're entitled to a second fee for a deposition is in dispute, and Defendants intend to proceed with your deposition today, at which point we can deal with the fee dispute

after. It's up to you to decide whether you want to proceed today or if you're going to refuse to testify.

A. I think we need to resolve the issue of payment prior to. My understanding is that that's -- I'm entitled to that being received prior to or on today's date. And I'm not in receipt of payment in spite of several attempts to come to you and ask for that.

(Joint Exh. J7, pp. 9 – 10 [EAMS p. 4].)

The parties proceeded to trial on August 11, 2022. The issues submitted for decision were whether defendant was required to pay Dr. Lockwood an additional \$910.00 prior to taking his deposition and whether defendant had waived its right to depose Dr. Lockwood. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 11, 2022, p. 2.)

DISCUSSION

As a preliminary matter, defendant's Petition is timely. Defendant filed the Petition on September 7, 2022. However, the Petition did not come to the attention of the Appeals Board until November 20, 2022. Defendant's Petition was not timely acted upon by the Appeals Board, which has 60 days from the filing of a petition for reconsideration to act on that petition. (Lab. Code, § 5909.) Here, through no fault of Defendant, the timely-filed Petition did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due process, and in keeping with common sensibilities, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a petition for reconsideration begins no earlier than the Appeals Board's actual notice of the Petition, which occurred on November 20, 2022. (See *Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal.Comp. Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd. (Felis)* (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622, 624].)

Initially, we note that review of an interim, nonfinal order may be obtained by filing a petition for removal pursuant to Labor Code section 5310. (See also Cal. Code Regs., tit. 8, § 10955.) A petition for reconsideration may only be taken from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals*

v. Workers' Comp. Appeals Bd. (Kramer) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) If a party challenges a decision that resolves an issue of liability of those involved in the case, the petition seeking relief is treated as a petition for reconsideration. Here, defendant disputes the determination of its liability as to Dr. Lockwood and the Petition will be treated as a petition for reconsideration.

California Code of Civil Procedure states in relevant part:

In a worker's compensation case arising under Division 4 (commencing with Section 3201) or Division 4.5 (commencing with Section 6100) of the Labor Code, a party desiring to depose any expert on another party's expert witness list shall pay the fee under this section.
(CCP § 2034.430(f).)

The party taking the deposition of an expert witness shall either accompany the service of the deposition notice with a tender of the expert's fee based on the anticipated length of the deposition or tender that fee at the commencement of the deposition.
(CCP § 2034.450 (a).)

Pursuant to Labor Code section 5710(a) any party to a workers compensation proceeding may depose a witness, "... in the manner prescribed by law for like depositions in civil actions in the superior courts of this state under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure." (Lab. Code, § 5710.) Administrative Director rule 9795 requires a medical-legal witness to be paid a minimum of two hours, at the hourly rate of \$455.00. (Cal. Code Regs., tit. 8, § 9795 [ML204 7].)

At his May 19, 2022, deposition, Dr. Lockwood testified that he spent an hour preparing for the first deposition and that he spent 30 to 40 minutes attempting "numerous times to connect" but he was ultimately unable to log in. (Joint Exh. J7, pp. 6 – 7 [EAMS p. 3].) He also stated that he reviewed his prior reports in preparation for the May 19, 2022, deposition, but that he did "not have to proceed without payment having been received." (Joint Exh. J7, p. 5 [EAMS p. 3].)

In its petition, defendant cites no legal authority, either in statute or caselaw, supporting its argument that payment of the advance fee for a prior deposition abrogates its obligation to make a payment prior to or at the time of a second scheduled deposition. The time Dr. Lockwood spent preparing for and attempting to log in to the September 27, 2021, Zoom/videoconference

deposition warranted the \$910.00 payment he received. Subsequently, his preparation for, and attendance at the May 19, 2022, deposition entitled him to receive payment for “a minimum of two hours,” at the hourly rate of \$455.00. (Cal. Code Regs., tit. 8, § 9795 [ML204 7].)

Under these circumstances, Dr. Lockwood is correct that he is entitled to receive \$910.00 payment for the May 19, 2022, deposition, and he will be entitled to payment pursuant to AD rule 9795 prior to, or at the time of his deposition if it is taken in the future.

Accordingly, defendant’s Petition is deemed a petition for reconsideration, and the Petition is denied.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Order issued by the WCJ on August 24, 2022, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 20, 2023

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

**MARIA ANA TAYROS
SPRENKLE, GEORGARIOU & DILLES, LLP
ACCLAMATION
MICHAEL SULLIVAN & ASSOCIATES, LLP**

TLH/mc

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

**REPORT AND RECOMMENDATION ON
PETITION FOR REMOVAL**

I

INTRODUCTION

Defendant petitions for removal from the Findings & Order of 8/24/22, arguing that it should be allowed to take the deposition of the QME, without first advancing him payment of the minimum two hours for testimony of a medical/legal expert, because it previously paid him the fee for a prior, aborted deposition. For the reasons that follow, the Petition is without merit and should be denied.

II

STATEMENT OF MATERIAL FACTS

This is a claim, denied in its entirety by Defendant, of a senior accountant for the City of Greenfield, for cumulative orthopedic and other injuries (MOH/SOE 8/11/22, p. 2). The sole issue for this trial was whether QME Lockwood could be compelled to submit to deposition by Defendant, without Defendant making payment in advance of the two-hour minimum expert witness fee under 8 CCR 9785. I ruled that Defendant could take the doctor's deposition but was required to advance the doctor the prescribed \$910.00 as a condition for doing so. (Ibid, p. 2; Findings & Order, 8/24/22).

Defendant initially scheduled the doctor's deposition for September 27, 2021 (Ex. D-1). The doctor did not appear, and the deposition was terminated after the parties waited 30 minutes (Transcript, Lockwood deposition, 9/27/21, Ex. D-2). The deposition was re-scheduled for 5/19/22 (Notice of Taking Deposition, Ex. J- 8). Dr. Lockwood appeared, was sworn in by the court reporter, and briefly testified (Transcript, Ex. J-7). Dr. Lockwood acknowledged that he received payment of \$910.00 for the September deposition but did not testify. He stated (Ibid, pp. 6-7) that he spent one hour preparing for the September deposition and tried numerous times, unsuccessfully, to connect with someone at the number provided by defense counsel, ultimately leaving a voice mail describing his difficulties, and then waiting 30 to 40 minutes for someone to return his voicemail or otherwise contact him and was never called. He further stated that he believed he was entitled to payment of an additional two hours of time as a condition to proceeding with the deposition in May. In the course of the doctor's testimony, applicant's attorney stated on the record that he, too, encountered difficulty making connection with the parties for the September deposition. Defense counsel, who had called the deposition,

elected at this point to conclude her interrogation, and the deposition was terminated (Ibid, pp. 10-12).

III

DISCUSSION

The Code of Civil Procedure and the Labor Code contain reciprocal provisions concerning the CCP's application to workers' compensation depositions [Labor Code Section 5710 and CCP Section 2034.430(f)]. 2034.450 requires the party taking the deposition of an expert witness to tender the fee in advance for the anticipated time of the deposition or tender it at the start of the deposition. 8 CCR 9795 provides that the medical-legal witness is entitled to be paid a minimum of two hours, at the hourly rate of \$455. It also provides that the physician "shall be entitled to fees for all itemized reasonable time spent related to the testimony, including reasonable preparation and travel time."

Here, Defendant initially complied with these requirements, by tendering Dr. Lockwood the minimum two hours compensation in advance of the original deposition date of September 27, 2021.

Defendant argues that it doesn't owe Dr. Lockwood \$910.00 for the re-scheduled deposition, in addition to its prior payment to him, because 8 CCR 9793(i) defines "medical-legal testimony" as "testimony at a deposition," and Dr. Lockwood didn't testify. The argument is ludicrous: first, it ignores the law's allowance of all expenses reasonably incurred by the expert witness in connection with the deposition, including preparation time. Secondly, Defendant's argument does not envision any circumstance in which an expert witness is entitled to be compensated when the witness does not actually give testimony. Theoretically, Defendant could deny payment, even if its attorney cancels the deposition at the last minute or some other event not caused by the witness prevents his testimony.

Here, Dr. Lockwood's testimony as to his time spent and the technical difficulties that prevented his testimony at the September deposition stands un rebutted and is

convincing. Defendant is required to advance Dr. Lockwood an additional \$910.00 if it wants to proceed with the doctor's deposition.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. [Cal. Code Regs., tit. 8, § 10955(a)]

Petitioner does not explain how the challenged decision will cause it substantial prejudice or irreparable harm, or why reconsideration would not be an adequate remedy. However, there is no significant prejudice or irreparable harm to Defendant by requiring it to pay Dr. Lockwood the additional \$910.00. It has been allowed to proceed with the doctor's deposition, and it can probably afford to wait until the litigation of the more critical issues (such as AOE/COE) concludes to seek reimbursement from Dr. Lockwood. If it receives an adverse decision on the issue, it can petition for reconsideration. Aside from these concerns, the position of Defendant is totally without merit, warranting denial of its Petition in any event.

IV

RECOMMENDATION

I recommend that the Petition for Removal be Denied.

Respectfully submitted,

MICHAEL H. YOUNG
Workers' Compensation
Administrative Law Judge

Served 9/15/2022 on the following:

Sprenkle, Georgariou & Dilles, LLP
Acclamation
Michael Sullivan & Associates, LLP

By:
SELENE F. OGDEN