

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

ROBERTO CABALLERO CRUZ, *Applicant*

vs.

BENU LLC DBA MONSIEUR BENJAMIN;ZENITH INSURANCE, *Defendants*

**Adjudication Number: ADJ10995520
San Francisco District Office**

**OPINION AND ORDER
DENYING PETITION FOR
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 deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 22, 2023

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

**ROBERTO CABALLERO CRUZ,
OTUS LAW GROUP
CHERNOW PINE
MISSION COLLECTIONS
BAY AREA INTERPRETING**

AS/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 RECONSIDERATION

Elizabeth Dehn, Workers' Compensation Judge, hereby submits her report and recommendation on the Petition for Reconsideration filed herein.

Introduction

On January 3, 2023, cost petitioner filed a Petition for Reconsideration following the issuance of my December 8, 2022 Findings of Fact, Order and Opinion on Decision in this matter. Cost petitioner asserts that the by the Findings and Order I acted without or in excess of my powers, that the evidence does not justify the Findings of Fact and Order and that the Findings of Fact does not support the Findings and Order.

Cost Petitioner's petition was timely filed and accompanied by the verification required under Labor Code section 5902. To date, I am not aware of an answer having been filed by the defendant.

The parties stipulated that Robert Caballero, born [], while employed on March 8, 2017 as a dishwasher at San Francisco, California, by Benu LLC DBA Monsieur Benjamin, insured for workers' compensation purposes by Zenith Insurance, sustained injury arising out of and in the course of employment to his chest and abdomen.

The parties proceeded to trial on August 29, 2022, with a second day of trial on November 9, 2022, on cost petitioner Bay Area Interpreting's February 2, 2022 petition for costs for the unpaid balance of \$75 for the bill for translating at the signing of a compromise and release on June 26, 2019, along with a claim of interest, attorneys' fees and costs. Based on the witness testimony, the documentary evidence and applicable law, I issued my Findings of Fact, Order and Opinion on Decision finding that cost petitioner did not meet her burden of proof of market rate entitling her to additional payment for her services on June 26, 2019, and that cost petitioner was not entitled to any recovery on the February 2, 2022 petition for costs for penalties, interest and attorneys' fees in connection with that petition for costs.

Cost petitioner's contentions

In her petition, cost petitioner contends that she met their burden in establishing cost petitioner's market rate for interpreting services, and that defendant acted in bad faith in objecting to the disputed portion of the invoice at issue, and therefore penalties, interest, costs and attorneys' fees were warranted.

Discussion

1. Cost petitioner did not meet her burden of proof in this matter

The burden of proof rests on the party holding the affirmative on the issue. (Labor Code section 5705.) The evidentiary burden of proof must be backed by a preponderance of the evidence. (Labor Code section 3202.5.) To recover charges for interpreter services, the interpreter has the burden of proving, among other things, that the fees charged were reasonable. (*Guitron v. Santa Fe Extruders*, 76 Cal. Comp. Cases 228, 34 (WCAB *en banc*)) As cost petitioner is seeking to recover on her petition, she has the burden of proof in this matter.

The fees for certified interpreters are presumed to be reasonable for services other than an appeals board hearing, arbitration, or depositions if they are

[billed and paid at the rate of \$11.25 per quarter hour, or portion thereof, with a minimum payment of two hours, or the market rate, whichever is greater. The interpreter shall establish the market rate for the interpreter's services by submitting documentation to the claims administrator, including a list of recent similar services performed and the amounts paid for those services.

(Title 8, California Code of Regulations section 9795.3(b)(2).)]

The term "market rate" means the amount an interpreter has actually been paid for recent interpreter services. (Title 8, California Code of Regulations Section 9795.1(e).)

To determine the reasonableness of an interpreter's services, the WCAB has looked at the factors outlined in the *en banc* case of *Kunz v. Patterson Floor Coverings, Inc*, which include "1) the usual fee accepted (not charged) by the provider, 2) the usual fee accepted by other medical providers in the same geographical area, 3) other aspects of the economics of the medical provider's practice that are relevant, and 4) any unusual circumstances in the case. (*Guitron, Supra*, 76 Cal. Comp. Cases at 247, quoting *Kunz v. Patterson Floor Coverings, Inc.* (2002) 67 Cal. Comp. Cases 1588, 1598 (Appeals Board *en banc*.) Even though *Kunz* discusses what medical providers need to prove in order to prove the reasonableness of their charges, the WCAB has specifically applied the same requirement to provide the usual fee accepted by the provider, as well as other providers in the same geographical area, to interpreters. (See, *Better Resource v. Workers' Comp.*

Appeals Bd. (2008) 73 Cal. Comp. Cases 1071, 1075 (writ denied); *Guitron, Supra*, 76 Cal. Comp. Cases at 247.)

The fact that the cost petitioner is a petitioner, rather than a lien claimant, does not affect the burden of proof. As cost petitioner is seeking recovery on her petition, she must meet her burden of proof on every element of her claim. In this case, the only dispute is that cost petitioner is entitled to the balances of her charges for the June 26, 2019 invoice, which she alleges is the market rate for that service. Cost petitioner submitted approximately 40 invoices for various interpreting services performed in June, 2019. All of the submitted invoices were only from cost petitioner Bay Area Interpreting. As cost petitioner did not submit any evidence of the usual fee accepted by other interpreters in the same geographical area, cost petitioner failed to establish the market rate for her services. As defendant paid cost petitioner more than what Regulation 9795.3(b)(2) assumes is reasonable for an interpreter to bill for services other than appearances at hearings trials or arbitrations or depositions, cost petitioner was not entitled to any further payment for the interpreting services performed on June 26, 2019.

2. Is cost petitioner entitled to costs, sanctions and attorney's fees?

Title 8, California Code of Regulations section 9795.4 requires that within 60 days of the receipt of an invoice for interpreter's services, the claims examiner shall be either pay the invoice or contest liability and pay any uncontested amount. The un rebutted testimony from defendant's witness was that cost petitioner's invoice was received on August 28, 2019 and objected to on September 4, 2019, accompanied by payment of the undisputed amount. (Summary of Evidence from November 9, 2022 trial, page 5, lines 41:42; Defendant's Exhibit A.[.]) As defendant timely paid the undisputed portion of the invoice and contested the remaining balance, there was no basis to award costs and attorney fee.

Recommendation

For the foregoing reasons, I recommend cost petitioner's January 2, 2023 Petition for Reconsideration be denied.

DATE: January 9, 2023

Elizabeth Dehn
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

Pursuant to Rule 10628, served on all parties as shown on the Official Address Record

BAY AREA INTERPRETING SAN FRANCISCO, Email

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Date: January 9, 2023

By: B. Skaife