

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

BEATRIZ MORENO, *Applicant*

vs.

RTJ HOME SWEET HOME, INC., a California Corporation; ROSALINDA GALO, a substantial shareholder of RTJ HOME SWEET HOME, INC.; TORINO JAVIER, a substantial shareholder of RTJ HOME SWEET HOME, INC., illegally uninsured, *Defendants*

**Adjudication Number: ADJ7998608
Van Nuys District Office**

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

Defendant seeks reconsideration of our April 20, 2021 Opinion and Award of Additional Attorney's Fees ("Opinion and Award"), wherein we awarded applicant's counsel attorney's fees in the amount of \$16,897.20 pursuant to the Second District Court of Appeal, Division Eight's January 21, 2021 Order (Court of Appeal Order). For the reasons described below, we will grant the petition for the sole purpose of reducing the amount of the award by \$22.20 to correctly omit unrecoverable filing fees; in all other respects, we affirm our prior award.

Initially, we clarify the scope of review in this matter. Under Labor Code section 5801, when the Court of Appeal determines that there was no reasonable basis for a writ of review filed by an employer, counsel for the injured employee is entitled to a supplementary award of attorney's fees, to be determined by the Appeals Board. (Lab. Code, § 5801.) In *Crown Appliance v. Workers' Comp. Appeals Bd. (Wong)* (2004) 115 Cal.App.4th 620, 627-628 [69 Cal.Comp.Cases 55], the Court held that a finding of no reasonable basis under section 5801 is "analogous to the lack of merit of a frivolous appeal" and that an action is frivolous "when it indisputably has no merit," i.e., "when any reasonable attorney would agree that the appeal is totally and completely without merit." (*Ibid.* [internal quotation marks omitted].)

After the Court of Appeal Order, applicant's counsel filed a Petition for 5801 Attorney Fees, seeking a total of \$16,897.20. (Petition for 5801 Attorney Fees, at p. 7.) On March 22, 2021, the Workers' Compensation Administrative Law Judge (WCJ) in the underlying case, apparently proceeding under the understanding that the amount of fees was a matter for his decision, issued an Order for Attorney Fees Under Labor Code 5801, awarding applicant's attorney the fees sought, subject to timely objection within 20 days to void the order. On March 26, 2021, defense counsel filed an Objection to the Petition for 5801 Attorney Fees. After consideration of the Petition and the Objection (but not, as described below, the WCJ's order), we issued our Opinion and Award on April 20, 2021.

Pursuant to Labor Code section 5801, it was our role to determine the proper amount of fees due to applicant's counsel. The WCJ's order was therefore in excess of his authority. However, because the WCJ's order was issued subject to timely objection within 20 days, defense counsel's March 26, 2021 objection resulted in the order being rescinded pursuant to its own terms. As a result, the WCJ's order never became final, and is therefore not before us on reconsideration.

Furthermore, to dispel any possible confusion on this point, the WCJ's order played no role whatsoever in our decision as to the proper amount of fees due to applicant's attorney in this matter, which was based entirely upon our own independent consideration of the Petition, the Objection, and the record. To the extent that the Petition for Reconsideration seeks to reopen the merits of this case by arguing that the WCJ's error is evidence of bias that should cause us to retroactively rescind applicant's award of compensation, such an attempt is wholly inappropriate, both procedurally and substantively. We reject any argument that the WCJ's actions in this matter showed bias against defense counsel, much less bias sufficient to retroactively rescind the now-final award in applicant's favor. (See *McEwen v. Occidental Life Ins. Co.* (1916) 172 Cal. 6, 11 ["Erroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias or prejudice, especially when they are subject to review."]) We strongly caution defense counsel that further attempts to relitigate the merits of the underlying award in applicant's favor may constitute bad faith tactics subject to sanctions pursuant to Labor Code section 5813.

Accordingly, the sole question before us in this Petition for Reconsideration is the appropriateness of our Opinion and Award issued on April 20, 2021. Turning to that question, for

the reasons articulated in our Opinion and Award, and for the further reasons expressed below, we reject defense counsel's arguments that our fee award is excessive.¹

To the extent that they do not repeat arguments raised in the Objection, most of the Petition for Reconsideration's arguments are directed not against the substance of our award, but instead against perceived slights to defense counsel's advocacy expressed therein. In making the observations we did about the Writ of Review, it was not our intent to evaluate the substance of the arguments advanced by defense counsel; it was, after all, the Court of Appeal that determined that the writ lacked a reasonable basis. Instead, we simply sought to highlight that defense counsel elected to file a wide-ranging writ seeking review on many different bases, presenting a host of unusual legal arguments outside the normal range of what workers' compensation attorneys typically encounter, while making reference to myriad aspects of a long and tortured procedural history. Under the circumstances, it was entirely reasonable for applicant's counsel to spend a longer period of time than she would ordinarily spend responding to a writ, particularly when it came to reviewing and researching the caselaw the Writ of Review cited in support of its more creative arguments. Having elected to file such a writ, defense counsel cannot reasonably complain that opposing counsel chose to spend the time necessary to determine how best to respond to such an unusual document.

Finally, although the issue was not clearly raised in the Petition for Reconsideration, we have discovered after our own independent examination of the record that our Opinion and Award inadvertently awarded applicant's counsel \$22.20 in filing fees that were not recoverable under the statute. Our Opinion and Award correctly stated that these fees were not recoverable, but we neglected to deduct them when computing the final award, and we will therefore grant the petition in order to reduce the total amount of the award from \$16,897.20 to \$16,875.00.

¹ We note that the Petition for Reconsideration does not argue, as the Objection did, that the hourly rate was unreasonably inflated. We therefore restrict our attention to the second prong of the fee award, the reasonableness of the time spent.

Accordingly, we will grant the Petition for Reconsideration, and amend our fees award to reduce the total fees awarded to \$16,875.00. In all other respects, the Opinion and Award is affirmed.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of our April 20, 2021 Opinion and Award of Additional Attorney's Fees is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Opinion and Award of Additional Attorney's Fees we issued on April 20, 2021 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

AWARD IS MADE in favor of **JENNIFER RYAN** and **DENNIS W. RYAN, INC., PLC**, and against **RTJ HOME SWEET HOME, INC., ROSALINDA GALO**, and **TORINO JAVIER**, of appellate attorney's fees in the amount of \$16,875.00, with interest and penalties waived if payment is issued within 30 days of service of this Award, and which fees are payable in addition to the amount of any compensation otherwise paid or payable to the applicant.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 25, 2021

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

**BEATRIZ MORENO
DENNIS W. RYAN, INC.
MIKE PINCHER, ATTORNEY AT LAW**

AW/abs

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