WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

UTILIO HARO, *Applicant*

vs.

GACHINA LANDSCAPE MANAGEMENT, INC., AND CYPRESS INSURANCE administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Numbers: ADJ12062619, ADJ13567550
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Gemini Legal Services, Inc., (cost petitioner) seeks removal/reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on June 10, 2025, wherein the WCJ found in relevant part that cost petitioner did not meet its burden of proof and ordered that cost petitioner's petition for reimbursement/costs be denied.

Cost petitioner contends that it met its burden of proof at trial to show that it was entitled to payment for its services.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant the Petition for Reconsideration and rescind the F&O. We return the matter to the trial level for further proceedings consistent with this opinion.

BACKGROUND

We will briefly review the relevant facts.

On March 29, 2019, applicant filed an Application for Adjudication (Application), claiming injury to the back while employed on March 7, 2018, by defendant as a maintenance worker. (ADJ12062619.) On September 8, 2020, by way of a Compromise and Release (C&R) as the case opening document, applicant claimed injury to his shoulders while employed on August 4, 2017, by defendant as a maintenance worker. (ADJ13567550.)

On September 3, 2020, the case in chief settled by way of a C&R, and an Amended C&R was filed on September 8, 2020 to add Case No. ADJ13567550 instead of "unassigned." The WCJ issued a Joint Order Approving Amended Compromise and Release on September 10, 2020.

In Paragraph 9, it states that:

> THIS COMPROMISE AND RELEASE AGREEMENT INTENDS TO SETTLE ALL OF APPLICANTS CLAIMS AGAINST EMPLOYER INCLUDING CLAIM 33098430 (DOI 03/07/2018) AND MEDICAL ONLY CLAIM 33098672 DOI 08/04/2017. CLAIM 33089672 IS DENIED WITHOUT A CORRESPONDING ADJ NUMBER AS OF THE DATE OF THE AGREEMENT BETWEEN PARTIES.

On May 12, 2023, cost petitioner filed a Notice of Representation and the petition for costs. In the petition, it alleged that it issued eight Subpoenas Duces Tecum (subpoenas) as follows:

Gachina Landscape Management, Inc., December 30, 2019;

Clement Jones, M.D., December 30, 2019;

Peninsula Sports Medicine, February 26, 2020;

Kaiser Hospital/PMG, February 26, 2020;

St. Francis Memorial Hospital, February 26, 2020;

Integrated Pain Care, May 28, 2020;

Clement Jones, M.D., July 3, 2020; and

Comprehensive Spine and Sports Center, September 10, 2020.

It further alleged that its invoices remained outstanding.

On June 11, 2024, the parties proceeded to trial on the petition for costs. Cost petitioner submitted its Petition for Costs with attached exhibits as one exhibit. (Exhibit 101.)

On August 12, 2024, the WCJ issued the F&O.

On September 5, 2024, cost petitioner filed a Petition for Reconsideration/Removal.

On November 25, 2024, the Appeals Board issued an "Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration" (Decision), that rescinded the August

12, 2024 F&O and returned the matter to the trial level for further proceedings and decision by the WCJ. In the Decision, we quoted WCAB Rule 10759 (b)(1) (Cal. Code Regs., tit. 8, § 10759(b)(1)) [each exhibit must be separately identified] and WCAB Rule 10803 subdivision (a) [definition of the record of proceedings] and subdivision (b) [when a C&R is filed medical records are "deemed admitted in evidence"] (Cal. Code Regs., tit. 8, § 10803(a), (b)). We stated that:

> Here, the WCJ's Opinion On Decision states that she "admitted" the cost petition as Exhibit 101. But, a petition is part of the record of proceedings, and need not be "admitted" as evidence. At the same time, evidence to be admitted must be separately identified and marked on the record, and it cannot be "admitted" by way of an attachment to a pleading. Thus, there is no actual evidence in the record with respect to the subpoenas for our review.

(Decision, pp. 6-7.)

On April 8, 2025, the parties returned to trial. Cost petitioner submitted its invoices as exhibits (Exhibits 107-113). Despite our guidance in our Decision, the WCJ marked documents that were already included in the record of proceedings; yet, the subpoenas were not submitted.

On June 10, 2025, the WCJ issued the F&O.

DISCUSSION

I.

Former Labor Code section 5909[1] provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

[1] All further statutory references are to the Labor Code, unless otherwise noted.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on July 14, 2025, and 60 days from the date of transmission is September 12, 2025. This decision is issued by or on September 12, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on July 14, 2025, and the case was transmitted to the Appeals Board on July 14, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 14, 2025.

II.

A petition for reconsideration may properly be taken only 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]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) 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]). Interlocutory procedural or evidentiary decisions, entered in the midst of the workers'

compensation proceedings, are not considered "final" orders. (*Id.* at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer*, *supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer*, *supra,* at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, as in the previous Petition, although cost petitioner filed the Petition for Reconsideration in the alternative, the WCJ's decision with respect to her denying cost petitioner's petition for costs is a final order. Thus, we consider the Petition as one for reconsideration only.

III.

On November 25, 2024 we issued our Decision in response to cost petitioner's first Petition for Reconsideration/Removal.

As we discussed, a cost petitioner holds the burden of proof to establish all elements necessary to establish its entitlement to payment for a medical-legal expense. (See Lab. Code, §§ 3205.5, 5705.5; *Torres v. AJC Sandblasting* (2012) 77 Cal.Comp.Cases 1113, 1115 (Appeals Board en banc).) As we explained in our en banc decision in *Colamonico v. Secure Transportation* (2019) 84 Cal. Comp. Cases 1059 (Appeals Board en banc), section 4622 provides the framework for reimbursement of medical-legal expenses. Subsection (f) of the statute, however, specifically states that "[t]his section is not applicable unless there has been compliance with Sections 4620 and 4621." (Lab. Code, § 4622(f).) Thus, a lien claimant is required to establish that: 1) a contested claim existed at the time the expenses were incurred; 2) the expenses were incurred for the purpose of proving or disproving the contested claim; and 3) the expenses were reasonable and necessary at the time were incurred. (Lab. Code, §§ 4620, 4621, 4622(f); *Colamonico*, *supra*, 84 Cal.Comp.Cases 1059.)

Section 4620(a) defines a medical-legal expense as a cost or expense that a party incurs "for the purpose of proving or disproving a contested claim." (Lab. Code, § 4620(a).) Lien claimant's initial burden in proving entitlement to reimbursement for medical-legal expense is to show that a "contested claim" existed at the time the service was performed. Section 4620(b) states that: "A contested claim exists when the employer knows or reasonably should know that the employee is claiming entitlement to any benefit arising out of a claimed industrial injury and one of the following conditions exists: (1) The employer rejects liability for a claimed benefit. (2)

The employer fails to accept liability for benefits after the expiration of a reasonable period of time within which to decide if it will contest the claim. (3) The employer fails to respond to a demand for payment of benefits after the expiration of any time period fixed by statute for the payment of indemnity." (Lab. Code, § 4620(b).)

In our Decision, we addressed the threshold issue that must be determined when considering reimbursement of a medical-legal expense. There, we agreed with cost petitioner that it appeared that a contested claim existed at the time it performed its services on applicant's attorney's behalf.

Once a cost petitioner has met its burden of proof pursuant to section 4620, it has a second hurdle to overcome; the purported medical-legal expense must be reasonably, actually, and necessarily incurred. (Lab. Code, § 4621(a).) The determination of the reasonableness and necessity of a service focuses on the time period when the service was actually performed. (*Id*.)

While the evidence is not in the record before us, it appears that cost petitioner provided the subpoena services requested by applicant's newly retained attorney and produced the records applicant's newly retained attorney requested. Thus, the issue is the amount of the bill or the amount that cost petitioner is entitled to be paid for the services it provided.

Unfortunately, while documentation was attached to the petition for costs, that documentation, *including the subpoenas*, was never admitted into evidence. Thus, we are unable to consider the matter on the merits.

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Furthermore, decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra,* 66 Cal.Comp.Cases at p. 475.) The WCJ's decision

must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id*. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).)

Upon return, all of the evidence, including the subpoenas, should be admitted into the record. Then, the WCJ can consider whether cost petitioner is entitled to additional reimbursement.

IV.

The WCJ has since resigned, so that this matter upon return will be assigned to a new WCJ. However, we wish to clarify several statements by the WCJ in her Opinion on Decision:

The WCJ stated that: "There has been no evidence that the records were procured or that Gemini did anything with these orders at all." (Opinion on Decision, p. 5.) The reason that the evidence in the form of the subpoenas was not before the WCJ is because she did not admit it. It is not as if cost petitioner did not attempt to submit the subpoenas as evidence by way of its Petition for Costs. It simply did not realize that it was necessary to have the subpoenas separately marked and admitted. A WCJ bears some responsibility in guiding parties as to how to proceed. Yet, the WCJ stated in her Opinion that: "They chastised the WCJ and indicated that a Cost Petition was admitted as evidence, when it need not be, as it was already as a part of the record." (*Ibid.*) This statement makes clear that it was the WCJ, and not cost petitioner, who did not understand the legal distinction between a pleading and evidence. A petition is not submitted as evidence to prove a disputed issue; it is argument, and only the actual evidentiary documents are appropriately included in the evidentiary record so that the decision is based on substantial evidence.

The WCJ went onto state in her Opinion that:

> The only unresolved issue is whether cost petitioner is entitled to reimbursement under section 4622. In response, the WCJ only has to say that it is explicitly outside the jurisdiction of a WCJ to "rescue" parties, and lien claimants, especially with an attorney representative, are responsible for understanding their burden of proof and providing the appropriate evidence. However, as the WCAB has given Gemini another bite at the apple we turn to analysis of the second part of the burden of proof.

(*Ibid.*)

As we explained in our previous Decision and above, if the evidence is not admitted into the record, then there is no basis for a WCJ's decision and no basis for our review, so that there is no choice but to rescind the decision. That is, the recission of the WCJ's previous decision was based on an error of law by the WCJ, not the failure by a party.

Section 5311 provides that a party may seek to disqualify a WCJ upon any one or more of the grounds specified in Code of Civil Procedure section 641. (Lab. Code, § 5311; see also Code Civ. Proc., § 641.) Among the grounds for disqualification under section 641 are that the WCJ has demonstrated "[t]he existence of a state of mind . . . evincing enmity against or bias toward either party." (Code Civ. Proc., § 641(g)). "Due Process is violated where there is even an appearance of bias or unfairness in administrative hearings. (citations)" (*Robbins v. Sharp Healthcare, et al.* (2006) 71 Cal.Comp.Cases 1291, 1302 (*Robbins*).) An appearance of bias may be sufficient to require disqualification. The statements by the WCJ quoted above at the least raise the appearance of bias against cost petitioner insofar as the WCJ refers to cost petitioner having been 'rescued' and given 'another bite at the apple' by our prior decision.

Had the WCJ not left the bench, we would have disqualified her and ordered the Presiding WCJ to reassign the matter to a different WCJ in order to avoid the appearance of bias.

Accordingly, we grant the Petition for Reconsideration, rescind the F&O and return the matter to the trial level so that it may be assigned to a new WCJ.

For the foregoing reasons,

IT IS ORDERED that cost petitioner's Petition for Reconsideration of the June 10, 2025 Findings & Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the June 10, 2025 Findings & Order is **RESCINDED**, and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 12, 2025

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

SIEGEL MORENO STETTLER
CHISVIN LAW GROUP

DLM/oo

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