

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

DENNIS HERNANDEZ, *Applicant*

vs.

YRC FREIGHT; OLD REPUBLIC INSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ8710519
Los Angeles District Office**

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

Applicant's attorney Bruce Gelber, on behalf of his firm Fensten & Gelber (collectively Gelber), seeks reconsideration of the Findings and Order (F&O) issued on April 13, 2021, wherein the workers' compensation administrative law judge (WCJ) set attorney's fees at twenty percent of the \$75,000.00 settlement of applicant's Labor Code section 132a claim.¹ The WCJ ordered defendant to pay Gelber \$15,000.00, less monies previously paid, and applicant the settlement monies remaining in trust.

Gelber contends that the WCJ erroneously failed to set attorney's fees at one third of the settlement amount, or \$25,000.00

We did not receive an Answer.

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

We have considered the allegations of the Petition and the contents of the Report. Based upon our review of the record, and for the reasons expressed below, we will grant reconsideration, rescind the F&O, and substitute a finding that Gelber is entitled to attorney's fees of \$25,000.00 and an order that defendant pay them that amount, less monies previously paid as attorney's fees on the section 132a claim.

FACTUAL BACKGROUND

While employed as a truck driver by defendant during the period from October 15, 2011 to October 15, 2012, applicant sustained injury to his low back.

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

On October 21, 2014, the parties settled the case in chief by way of an order approving compromise and release. (Order Approving Compromise and Release, October 21, 2014.)

On May 7, 2015, the WCJ found that defendant violated section 132a by terminating applicant's employment on December 6, 2012, and issued an award in favor of applicant and against defendant that deferred the issue of remedies, with jurisdiction retained by the WCAB in the event of a dispute. (Findings, Award and Order, May 7, 2015.)

On August 12, 2019, we affirmed the WCJ's May 7, 2015 findings, award and order. (Opinion and Decision After Reconsideration, August 12, 2019, pp. 10-11.)

On July 7 and July 10, 2020, respectively, applicant and defendant executed a compromise and release (C&R), agreeing to settle applicant's section 132a claim and all of his other claims. (C&R, July 16, 2020, pp. 1-14.) The C&R provides that the "parties agree to settle the above [claims(s)] . . . by pay[ment] of the SUM OF \$75,000.00," with the sum of "\$25,000.00 requested as applicant's attorney's fee[]" (successful prosecution of 132a through trial and recon)." (*Id.*, p. 6.) The WCJ approved the C&R without including the full amount of the agreed upon attorney's fees, with Gelber seeking reconsideration of the WCJ's decision as more fully described below.

On March 25, 2021, the matter proceeded to trial as to the issue of whether Gelber is entitled to attorney's fees of one third of the \$75,000.00 settlement of applicant's section 132a claim. (Minutes of Hearing (Reporter), March 25, 2021, pp. 1, 2:19-22.)

At trial, the parties stipulated that Gelber would submit a position statement in lieu of testimony. (*Id.*, p. 2:4-5.) Thereafter, Gelber submitted a verified position statement dated December 21, 2020 (Exhibit 1), the "required adverse letter to the applicant" dated February 8, 2021 providing notice that Gelber sought increased attorney's fees (Exhibit 2) and Gelber's fee agreement with applicant dated March 14, 2013 (Exhibit 3). (*Id.*, p. 2:11-23.)

The position statement reads, in pertinent part, as follows:

I can provide reasonable estimates of all of the time that was spent over the past 8 years on this case. It included proceeding through trial, over several appearances at the Board. It included all the preparation that goes into winning a case, including the trial prep, and the preparation of the applicant. (More than 30 hours).

Then there was the petition for reconsideration - - for which I had to prepare our answer. Typically, the time spent on an answer to reconsideration is in the range of 30-40 hours of work.

Then, I had to monitor the case as it lingered on reconsideration for over 3 years when the Board granted reconsideration for further review.

I then engaged in settlement negotiations requested by the Recon Unit with Judge Newman -- and that required preparation and participation. And then, when the Board issued its final decision and defendants did not seek further review by writ. I had to engage in negotiations with defense counsel. It involved many complicated overlapping issues of mitigation of damages.

I have discharged my duty of disclosure to the applicant of the various issues involved, including the conflict of interest and his right to seek a second legal opinion as to the issues involved.

It is my understanding that [applicant] is very appreciative of what I have done and wishes to honor the special retainer agreement which he signed. (Exhibit 1, Position Statement/Declaration of Applicant's Counsel, December 21, 2020, pp. 4-5.)

The February 8, 2021 letter contains the following:

NOTICE OF ADVERSE INTEREST: RIGHT TO SEEK INDEPENDENT COUNSEL

Dear Mr. Hernandez:

We are now set for trial for March 25, 2021, at 8:30 AM before Judge Lallana regarding the attorney's fees for the 132a. You may appear by video conference, and instructions will be provided as we get closer to the date. We have adverse interest because we are requesting an attorney's fee of 33.33% (in the sum of \$25,000), for which you previously executed a special retainer agreement. I enclose a copy of the special retainer for your reference.

You have the right to seek independent legal representation and to get a second opinion regarding your rights.

...

(Exhibit 2, Letter to Applicant, February 8, 2021.)

The fee agreement provides in pertinent part:

132a CLAIM FEE AGREEMENT

Fenster & Gelber . . . (F&G), shall handle applicant's Labor Code § 132a [Discrimination] claim against YRC FREIGHT.

...

F&G shall receive as its legal services fee 33 1/3 percent of recovery if successful, and zero if unsuccessful.

Applicant understands and agrees that the standard of proof, on a Labor Code § 132a [Discrimination] claim is far higher than the "no fault" standard of proof on the basic benefit claim.

Given that the prosecution of a Labor Code § 132a [Discrimination] claim involves greater risk of loss to the attorneys, greater time investment, and greater level of skill and diligence, it is hereby requested that the Workers Compensation Judge approve a greater fee percentage, *i.e.*, a 33 1/3 percent contingency fee.

(Exhibit 3, Agreement for Attorney's Fees, March 14, 2013.)

Defendant submitted a statement of payments made pursuant to the C&R, showing that it disbursed the \$75,000.00 settlement amount as follows: "\$50,000 to Applicant, \$11,250 (15%) to Fensten and Gelber, and the amount of \$13,750" held in trust. (Minutes of Hearing (Reporter), March 25, 2021, pp. 2:23-3:1.)

The record in EAMS reveals all of these exhibits admitted in evidence. The record also shows that applicant did not appear for trial. (Minutes of Hearing (Reporter), March 25, 2021, p. 1.)

In the Report, the WCJ states:

On July 16, 2020, a Compromise and Release for the settlement of the 132a action was submitted for approval. The settlement amount was for \$75,000.00 and the requested attorney fee 33 1/3 of the settlement value. An Order Approving Compromise and Release (OACR) issued on 7/21/2020 using the attorney fee standard currently used, with 15% attorney fee.

Applicant's Attorney filed a Petition for Reconsideration. On 10/14/2020, the Opinion and Order Granting Reconsideration issued finding the WCJ's determination of attorney's fee without a hearing was a violation of 5702 and the right of due process. The Appeals Board directed the WCJ to hold a hearing on the issue of whether Mr. Gelber is entitled to the full amount of the 33 1/3% attorney fee.

...

With respect to the matter of time involved and the results obtained, it was found that "the record is clear that there was considerable work done by the Applicant's counsel on the 132A matter. Exh 1 p. 3-4."

...

[T]he trial on 12/28/2020 had to be continued as applicant's attorney did not sen[d] the required adverse letter to his client. The 12/28/2020 Minutes of Hearing show that Applicant's attorney admitted that he only gave a verbal notification. . . . [T]he WCJ continued the trial to 3/25/2021 and ordered Applicant's Attorney to send the required letter of adverse interest and right to seek independent counsel. MOH 12/28/2020 EAMS73662103. (Report, pp. 2-3.)

DISCUSSION

Gelber contends that the WCJ erroneously failed to set attorney's fees at one third of the settlement amount, or \$25,000.00. We observe that the "appeals board may determine, and allow as liens ... a reasonable attorney's fee ... and [order] the reasonable disbursements in connection therewith." (§ 4903(a).) To determine the amount of the attorney's fees, we must give consideration to the responsibility assumed by the attorney, the care exercised by the attorney, the time involved, and the results obtained. (§ 4906(d); Cal. Code Regs., tit. 8, § 10775, now § 10844 (eff. Jan. 1, 2020).)

In evaluating these factors, Gelber argues that for a period of "more than five years" he spent long hours on various proceedings and their related substantive law issues, from trial on the merits of applicant's section 132a claim to reconsideration of the outcome of the liability issue, from analysis of overlapping damages and mitigation issues to negotiations of settlement based thereon. (Petition, 2:3-4:26.) Gelber further argues that through his services applicant not only obtained an excellent result in the form the \$75,000.00 recovery, but also vindication against the charge that he committed misconduct justifying his termination. (*Id.*, p. 4:1-6.)

On the record before us, we are persuaded that Gelber is entitled to attorney's fees of \$25,000.00. Here, as stated by the WCJ in the Report, it is "clear that there was considerable work done" by Gelber on behalf of applicant in the years following the October 21, 2014 settlement of applicant's case in chief. (Report, p. 2; Order Approving Compromise and Release, October 21, 2014.) This conclusion is supported not only by Gelber's verified position statement, but also the extensive procedural history available to us in EAMS. In addition, the result obtained was exceptionally favorable to applicant.

While we note that Gelber did not provide written notice to applicant of his adverse interest in seeking increased attorney's fees prior to the trial scheduled for December 28, 2020, the WCJ afforded him another opportunity to provide such notice and concluded that his February 8, 2021 letter to applicant complied with the requirement.² (Report, p. 3; Minutes of Hearing (Reporter), March 25, 2021, p. 2:11; Exhibit 2, Letter to Applicant, February 8, 2021; see also Cal. Code Regs., tit. 8, former § 10778, now 10842.) Moreover, the record shows that applicant did not

² We note that the record does not contain proof of service of the letter to applicant as required by WCAB Rule 10842. (Cal. Code Regs., tit. 8, former § 10778, now 10842.) However, based upon the record showing that Gelber submitted the "required adverse letter", we are persuaded that he substantially complied with the requirement to provide notice of his interest adverse to that of applicant. (Minutes of Hearing (Reporter), March 25, 2021, p. 2:11.)

appear at trial or otherwise oppose a decision to set attorney's fees in the amount to which he assented in the fee agreement and the C&R. (Exhibit 3, Agreement for Attorney's Fees, March 14, 2013; C&R, July 16, 2020, pp. 1-14; see also *County of San Joaquin v. Workers' Compensation Appeals Bd. (Sepulveda)* (2004) 117 Cal.App.4th 1180, 1184 [69 Cal.Comp.Cases 193] [finding that contract principles are used to determine the meaning of a compromise and release]; Civ. Code, § 1636 [providing that a compromise and release must be interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful].)

Accordingly, we will grant reconsideration, rescind the F&O, and substitute a finding that Gelber is entitled to attorney's fees of \$25,000.00.

Having determined the amount of attorney's fees to which Gelber is entitled, we note that the record shows settlement disbursements to date of \$50,000.00 to applicant and \$11,250.00 to Gelber, with the remaining \$13,750.00 held in trust by defendant. (Minutes of Hearing (Reporter), March 25, 2021, pp. 2:23-3:1.) We will therefore substitute an order that defendant pay Gelber \$25,000.00, less monies previously paid as attorney's fees on the section 132a claim.

Accordingly, we will grant reconsideration, rescind the F&O, and substitute a finding that Gelber is entitled to attorney's fees of \$25,000.00 and an order that defendant pay him that amount, less monies previously paid as attorney's fees on the section 132a claim.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order issued on April 13, 2021 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued on April 13, 2021 is **RESCINDED AND SUBSTITUTED** as set forth below.

FINDINGS OF FACT

1. The record regarding applicant's attorney Bruce Gelber's assumption of responsibility, exercise of care, time spent, and results obtained with respect to applicant's Labor Code section 132a claim demonstrates that he is entitled to attorney's fees in the amount of \$25,000.00.

ORDER

Defendant is ordered to pay Gelber the sum of \$25,000.00, less monies previously paid as attorney's fees on applicant's Labor Code section 132a claim.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 28, 2021

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

**DENNIS HERNANDEZ
FENSTEN AND GELBER
HANNA BROPHY**

SRO/oo

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