

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

ISIDRO RUIZ, *Applicant*

vs.

**YARD CREATIONS LANDSCAPE SERVICES, INC.;
MID-CENTURY INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ10991888
Stockton District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration¹ to further study the factual and legal issues presented in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant's attorney, Fernando E. Vargas (Vargas), seeks reconsideration of the Joint Findings of Fact and Order (F&O) issued on March 9, 2021, wherein the workers' compensation administrative law judge (WCJ) found as follows: (1) applicant's prior attorney, Central Valley Injured Workers' Legal Clinic (CVIWLC), is entitled to one third of the attorney's fees, "and the pro rata time the file was in the office, eight percent of the total time"; (2) Vargas is entitled to one third of the attorney's fees, "the pro rata time the file was in his office", and the fees to which applicant's prior attorney, Buzzell Law Firm, would have been entitled; (3) CVIWLC is entitled to attorney's fees in the amount of \$4,320.00; and (4) Vargas is entitled to the attorney's fees remaining in trust in the amount of \$7,680.00. The WCJ ordered Vargas to pay CVIWLC the sum of \$4,320.00 from funds held in trust and the release of the remaining fees to Vargas.

Vargas contends that the WCJ erroneously (1) applied Labor Code section 4906(d)² to determine the amount of fees to which he is entitled; (2) exceeded her authority by modifying the

¹ Following the grant of reconsideration, Commissioner Dodd became unavailable to participate. Another commissioner was assigned in her place.

² Unless otherwise stated, all further statutory references are to the Labor Code.

terms of a fee-splitting agreement between himself and his former employer, Buzzell Law Group; and (3) failed to make a record of the evidence received and relied upon in determining the F&O.

We received an Answer from CVIWLC.

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, the Answer, and the contents of the Report. Based upon our review of the record, and for the reasons expressed below, as our Decision After Reconsideration, we will rescind the F&O and return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

While employed as a gardener by defendant on June 21, 2017, applicant sustained injury to his left lower extremity and back and claims injury to his circulatory system, fingers and psyche.

On January 6, 2021, the matter proceeded to trial. (Minutes of Hearing and Summary of Evidence (Reporter), January 6, 2021, p. 1.) The parties stipulated that applicant's claim was resolved by way of a Compromise and Release dated October 8, 2019, which provided attorney's fees in the amount of \$12,000.00. (*Id.*, p. 2:9-10.) The issue for trial was framed as follows:

1. After an award of attorney's fees in the amount of \$12,000.00 after resolution by [C]ompromise and Release:
 - a) How should the fee be distributed to the attorneys?
 - b) [W]hat is the value of the fee to each attorney?

The following attorneys in this matter:

. . . Law Office of Fernando Vargas had the file from July 24, 2018 through October 8, 2019, the date of resolution.

. . . The Buzzell Law Firm who has declined to pursue a fee, but had the file from October 12, 2017 through July 24, 2018.

. . . Central [V]alley Injured [W]orker Legal [C]linic had the file from August 4, 2017 through October 17, 2017.
(*Id.*, p. 2:12-18.)

The WCJ admitted an itemized statement from CVIWLC, a claim denial letter dated April 19, 2018, and stated that judicial notice would be taken of the entire file. (*Id.*, pp. 2:21-3:6.) The WCJ authorized Vargas to submit a bill of particulars by January 15, 2021, without the parties

presenting witness testimony and without any other documents admitted in evidence. (*Id.*, pp. 1:22-3:6.)

A review of the Petition reveals attachments identified as Exhibit A through Exhibit G, none of which appear to be either of the two documents the WCJ admitted into evidence.

In the Report, the WCJ states:

After this matter resolved by way of Compromise and Release (C&R) on 8 October 2019, while the applicant was represented by The Law Office of Fernando E. Vargas ("Vargas"), the matter came on the trial calendar to address the prior attorney lien of Central Valley Injured Workers' Legal Clinic ("CVIWLC"), 6 January 2021. Findings of Fact and Order issued 9 March 2021, awarding prior counsel, CVIWLC, a fee out of the total attorney fee from the C&R in the amount of \$4,320.00, with the remainder awarded to Vargas; the intermediate firm, The Buzzell Law Firm ("Buzzell"), we were informed by Vargas, as an officer of the court, that Buzzell was not seeking a fee. On 6 April 2021, Vargas filed a Petition for Reconsideration that includes multiple exhibits in violation of the practice rules pertaining to filing for reconsideration; the remedy is to treat the documentation as though it was thrown away and is not to be considered. The respondent, CVIWLC, has filed an answer.

...

The initiating documentation at the Workers' Compensation Appeals Board was filed by CVIWLC. . . . It is clear that CVIWLC was attempting to obtain treatment for the injured worker. The applicant chose to dismiss CVIWLC and retain Buzzell. Based upon representations made by Vargas, he was the attorney handling the matter at Buzzell. However, it must be clear, the applicant hired Buzzell, not Vargas, during the intervening period. Eventually, the applicant dismissed Buzzell as counsel of record and retained representation by Vargas, presumably when he left the employment of Buzzell. Vargas eventually settled the matter by way of a Compromise and Release that resulted in an attorneys' fee of \$12,000.00. . . . The aforementioned fee was determined to be split, \$4,320.00, payable to CVIWLC, and \$7,680.00, payable to Vargas, including the amount that would have been awarded to Buzzell, \$1,440.00. CVIWLC and Vargas were award[ed] one third of the fee, CVIWLC for initiating the litigation, and Vargas for bringing the matter to a close. The last third was divided based upon a pro rata share, CVIWLC was not given a higher fee based upon the work done by certified legal specialists, and Vargas was not penalized for not providing evidence of his experience. (Report, pp. 2-3.)

DISCUSSION

Vargas contends that the WCJ erroneously applied section 4906(d) to determine the amount of fees to which he is entitled. Under section 4906(d), the amount of attorney's fees to which applicant's attorneys may be entitled is determined by application of the following factors: 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 this regard, the record is unclear as to how, if at all, the WCJ applied these factors to the record evidence in allocating the \$12,000.00 of attorney's fees to the attorneys with lien claims. In particular, the Report contains little discussion relating to the responsibility assumed by these attorneys, the care they exercised, or the results they obtained. Notably, it is not clear that the allocation of one third of the fees to CVIWLC for "initiating" the litigation and one third to Vargas for settling it, combined with the assignment of "pro rata" shares to each of the remaining third based upon the number of days their respective offices held the file, is supported by evidence showing how much time they actually spent performing legal work. (Report, pp. 2-3.)

A decision by the WCJ "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc)), and must be supported by substantial evidence. (§§ 5903, 5952, subd. (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. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.)

Since the record before us fails to set forth how, if at all, the WCJ applied the factors set forth in section 4906(d) to allocate attorney's fees, we will rescind the F&O.

However, the Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].) Accordingly, we

will return the matter to the trial level so that the WCJ may develop the record as to the application of section 4906(d).

Having addressed the merits of the Petition, we recognize that Vargas filed multiple attachments thereto consisting of materials not part of the record—and that each such filing constitutes a violation of WCAB Rule 10945. (Report, p. 2; Cal. Code Regs., tit. 8, § 10842, now § 10945 (eff. Jan. 1, 2020).) We therefore admonish Vargas for repeatedly violating WCAB Rule 10945.

Accordingly, we will rescind the F&O and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings of Fact and Order issued on March 9, 2021 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 22, 2021

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

**ISIDRO RUIZ
LAW OFFICE OF FERNANDO E. VARGAS
CENTRAL VALLEY INJURED WORKER LEGAL CLINIC, INC.
STRATMAN SCHWARTZ**

SRO/ara

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