

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

PURVIS COWENS, *Applicant*

vs.

**ABC UNIFIED SCHOOL DISTRICT; permissibly self-insured, administered by
KEENAN & ASSOCIATES, *Defendants***

**Adjudication Number: ADJ13906645
Van Nuys District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.¹

Applicant seeks reconsideration of the First Amended Findings of Fact and Order (F&O) issued on December 17, 2021, wherein the workers' compensation administrative law judge (WCJ) found that applicant's attorney has been adequately compensated for all Labor Code section 5710² fees. The WCJ ordered that applicant's request for additional section 5710 attorney's fees be denied.

Applicant contends that the WCJ erroneously failed to find applicant entitled to attorney's fees for reviewing the deposition transcript and responding to the deposition notice to produce documents. Applicant further contends that the WCJ erroneously failed to find that the attorney's fee rate of \$450.00 per hour was reasonable.

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 of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, as our Decision After Reconsideration, we will affirm the F&O.

¹ Commissioner Lowe, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

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

FACTUAL BACKGROUND

While employed on October 23, 2019, as a special education aide, applicant sustained injury arising out of and in the course of employment to his cervical spine, thoracic spine and lumbar spine.

On December 15, 2021, the matter proceeded to trial of the issue of whether applicant is entitled to section 5710 attorney's fees. (Transcript of Proceedings, December 15, 2021, p. 4:6-7.)

The parties stipulated that defendant paid \$950.00 in partial satisfaction of the applicant's requested section 5710 fees. (*Id.*, p. 4:4-5.)

The WCJ admitted the Notice of Taking Deposition and Notice to Produce Documents at Applicant's Deposition dated December 22, 2020, the Deposition of Purvis Cowens dated March 9, 2021, the Invoice of Robert Ozeran dated March 11, 2021, defendant's objection letter dated March 31, 2021, and applicant's Response to Deposition of Documents dated April 11, 2021. (*Id.*, pp. 4:11-5:10.)

The Notice of Taking Deposition and Notice to Produce Documents at Applicant's Deposition dated December 22, 2020 requests that applicant produce documents corresponding to ten requests on the date of applicant's deposition. (Ex. A, Notice of Taking Deposition and Notice to Produce Documents at Applicant's Deposition, December 22, 2020, pp. 1-6.)

The Deposition of Purvis Cowens dated March 9, 2021 contains no reference to whether or when documents were produced in response to defendant's Notice to Produce Documents at Deposition. (Ex. C, Deposition of Purvis Cowens, March 9, 2021, pp. 1-18.)

The Invoice of Robert Ozeran dated March 11, 2021, requests payment for two hours of Tawni Tagaki's attorney time at the rate of \$450 per hour for a total of \$900 of attorney time associated with the March 9, 2021 deposition. In addition, it requests payment of \$50.00 for a half hour of attorney staff time. (Ex. 1, Invoice of Robert Ozeran, March 11, 2021, p. 1.)

The Objection Letter to Ozeran dated March 31, 2021 states, in pertinent part:

Please be advised that I am objecting to your demand for payment at a rate of \$450.00 per hour as I believe \$400.00 per hour is reasonable and fair. I am also objecting to your demand for "legal staff fees" as those are not compensable under Labor Code 5710. As such I have instructed my client to issue payment accordingly.

(Ex. D, Objection Letter to Ozeran, March 31, 2021.)

The Response to Deposition of Documents dated April 11, 2021 consists of a formal response to the requests for documents which is signed by Ozeran, a list of the categories of exhibits attached, and approximately 875 pages of attached exhibits. (Ex. E, Response to Defendant's Deposition of Documents, April 11, 2021, pp. 1-879.)

At the December 15, 2021 trial, applicant testified as follows:

Q. Do you remember speaking with me on the phone?

A. Yes.

Q. Okay. And we talked about your deposition?

A. Yes.

Q. And that's -- at that time you informed me that you had no changes?

A. Yes.

Q. Okay. So you were producing documents before and after the deposition as you found them; correct?

A. Yes.

...

BY MS. ZIERHUT:

...

Q. Okay. Now, when your deposition was completed, how did you get a copy of the transcript?

A. E-mail.

Q. Okay. And when it was e-mailed, was it e-mailed to you by a paralegal or who e-mailed today to you?

[Colloquy between court and Mr. Ozeran.]

A. THE WITNESS: I can't recall who it was e-mailed from. All I know is it was e-mailed and once -- every time I got papers, I discussed it with Robert and we discussed everything. As far as where it came from, I don't know. I mean, I don't know where it came from.

...

The Court: . . . The question I think that was being asked was when you -- when you e-mailed the -- or when you obtained the transcript by e-mail, did you e-mail it back to somebody?

THE WITNESS: Are you asking me?

THE COURT: Yes, Mr. Cowens. Did you e-mail it back?

THE WITNESS: Yes.

THE COURT: Do you know who you e-mailed it to?

THE WITNESS: No, I don't. I already stated that. I mean, I would have to go back through all my e-mails.

THE COURT: When the transcript was e-mailed to you, did you review if you were all by yourself or were you in the presence of either Mr. Ozeran or members of his firm?

THE WITNESS: I reviewed it myself. It was e-mailed to me.

THE COURT: But when you were reviewing it, were there other people in close proximity to you?

HE WITNESS: No.

...

THE COURT: With respect to the transcript itself, you reviewed it, and you testified you would call the office. Do you know if you spoke to Mr. Ozeran personally or a member of his staff?

THE WITNESS: I don't remember.

...

Q. BY MS. ZIERHUT: Do you remember how long that phone call was?

A. I don't remember.

(Transcript of Proceedings, December 15, 2021, pp. 9:4-16, 10:2-16:3.)

In the Report, the WCJ states:

Applicant submitted into evidence two invoices in support of his request for Labor Code § 5710 fees in connection with the Applicant's deposition dated March 9, 2021 consisting of the following:

1. Preparation Time (9:00 a.m. to 10:00 a.m.): 1.0 (at \$450.00 per hour)
2. Wait Time (10:00 a.m. to 10:07 a.m.): 0.2 (at \$450.00 per hour)
3. Deposition (10:07 a.m. to 10:55 a.m.): 0.8 (at \$450.00 per hour)
4. Miscellaneous Zoom Coordination by Office Staff: 0.5 (at \$100.00 per hour)

5. Review and Signature of Deposition Transcript: 1.0 (at \$450.00 per hour)
6. Response to Demand for Production and Deposition of Documents dated April 11, 2021: 1.5 (at \$450.00 per hour)
7. Applicant coordination by Office Staff: 0.5 hours (at \$100.00 per hour) Total requested fee: \$2,125.00

...

With respect to the services rendered, the number of hours sought in his fee request was unreasonable and subject to reduction. Here, a reasonable fee would be limited to time to prepare the Applicant, commute and attendance at the deposition. Thus, in this case, it is reasonable to award the Applicant's attorney preparation time, wait time and his time incurred during the deposition. . . .

With respect to the Applicant's attorney's response to the Defendant's demand for production, it appeared that the majority of the work performed was borne by the Applicant in obtaining and submitting the documents and the work performed by the Applicant's attorney was merely an itemization of the documents, a task that appeared to have been performed by his office staff, and a cover sheet with skeletal descriptive information, a task that also appeared to have been performed by his office staff.

In addition, even assuming that the Applicant's attorney incurred any time in this respect, it was not deemed a reasonable expense pursuant to Labor Code § 5710.

Finally, pursuant to the testimony of the Applicant, he reviewed his deposition transcript alone and made no changes. To the extent that his attorney was involved in the review process, it was barely negligible at best . . .

Therefore, having considered the Applicant's requested fees in accordance with Labor Code § 5710, discounting services deemed inflated and purely clerical in nature, the following fees were awarded to the Applicant's attorney:

1. Preparation Time (9:00 a.m. to 10:00 a.m.): 1.0 (at \$400.00 per hour)
2. Wait Time (10:00 a.m. to 10:07 a.m.): 0.2 (at \$400.00 per hour)
3. Deposition (10:07 a.m. to 10:55 a.m.): 0.8 (at \$400.00 per hour)
4. Total Amount: \$900.00

Given by the stipulation of the parties that \$950.00 has already been paid in connection with his requested Labor Code § 5710 fees, the Applicant was not entitled to any further monies in connection thereof.

(Report, pp. 2-3.)

DISCUSSION

Section 5710 provides, in pertinent part, as follows:

- (a) The appeals board, a workers' compensation judge, or any party to the action or proceeding, may, in any investigation or hearing before the appeals board, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this state under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure. To that end **the attendance of witnesses and the production of records may be required. . . .**
- (b) If the **employer or insurance carrier requests a deposition to be taken of an injured employee**, or any person claiming benefits as a dependent of an injured employee, **the deponent is entitled to receive in addition to all other benefits:**
 - (1) All reasonable expenses of transportation, meals, and lodging incident to the deposition.
 - (2) Reimbursement for any loss of wages incurred during attendance at the deposition.
 - (3) One copy of the transcript of the deposition, without cost.
 - (4) **A reasonable allowance for attorney's fees for the deponent**, if represented by an attorney licensed by the State Bar of this state. The fee shall be discretionary with, and, if allowed, shall be set by, the appeals board, but shall be paid by the employer or his or her insurer. . . .(§ 5710 [Emphasis added].)

Hence, the WCJ has authority to award applicant reasonable attorney's fees incurred by reason of his deposition, including for his "attendance" and "production of records." (§ 5710.)

Turning first to applicant's contention that the WCJ erroneously failed to find him entitled to attorney's fees for review of the deposition transcript, we note that applicant testified that he reviewed his deposition transcript alone and made no changes to it—and the record otherwise fails to evidence Ozeran's involvement in the review. (Transcript of Proceedings, December 15, 2021, pp. 9:4-16, 10:2-16:3; Report, p. 3.) Consequently, we agree with the conclusion of the WCJ that the record fails to support the request for payment for one hour of attorney time reviewing the deposition transcript. Accordingly, we are unable discern error in the WCJ's finding that applicant is not entitled to additional attorney's fees for review of the deposition transcript.

Next, we address applicant's contention that the WCJ erroneously failed to find him entitled to additional attorney's fees for responding to the deposition notice to produce documents.

Here, the record fails to show Ozeran's involvement in the identification and production of documents. Specifically, although Ozeran's signature appears on the Response to Defendant's Deposition of Documents, applicant's trial testimony was that applicant himself produced "documents before and after the deposition as [he] found them" without implicating Ozeran in that process; the deposition transcript fails to show that the documents were produced at applicant's deposition; and the record otherwise lacks evidence such as a cover letter or email showing Ozeran's involvement in the document production, whether before, during or after applicant's deposition. (Transcript of Proceedings, December 15, 2021, p. 9:4-16; Ex. C, Deposition of Purvis Cowens, March 9, 2021, pp. 1-18; Report, pp. 2-3.) Given the absence of evidence showing how, if at all, Ozeran was involved in the production of documents other than signing the formal response, we are unable to discern error in the WCJ's finding that applicant is not entitled to additional attorney's fees based upon the production of documents.

We next address applicant's contention that the WCJ erroneously failed to find the rate of \$450.00 per hour reasonable because defendant paid the initial invoice which charged that rate. Applicant, in other words, contends that defendant waived its right to object to the \$450.00 per hour rate when it paid the initial invoice.

We observe that waiver is the intentional relinquishment of a known right after knowledge of the facts, and it may be either express or implied. (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) (*Supervalu*) 74 Cal.Comp.Cases 720, 728.) "To make a case of abandonment or waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such a purpose, or acts amounting to an estoppel on his part." (*First Nat'l Bank v. Maxwell* (1899) 123 Cal. 360, 367-368.)

Here, although defendant paid the initial invoice requesting \$450.00 an hour for two hours of attorney Takagi's time and \$50.00 for a half hour of staff time, defendant's attorney objected to the fee rate and the charge for staff time. (Transcript of Proceedings, December 15, 2021, p. 4:4-5; Ex. D, Objection Letter to Ozeran, March 31, 2021.) Thus, the record fails to show a decisive act on defendant's part demonstrating that it waived its known right to object to the rate. Accordingly, we are unable to discern error in the WCJ's failure to find the rate of \$450.00 per hour reasonable.

Accordingly, we will affirm the F&O.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the First Amended Findings of Fact and Order issued on December 17, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 2, 2022

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

**PURVIS COWENS
LAW OFFICES OF ROBERT OZERAN
THE OAKS LAW GROUP**

SRO/cs

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