WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ALVIN SELLERS, JR., *Applicant*

vs.

CITY AND COUNTY OF SAN FRANCISCO, PERMISSIBLY SELF-INSURED, *Defendants*

Adjudication Number: ADJ10776773
San Francisco District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition.[1] This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the December 15, 2020 Amended Findings and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) ordered defendant to pay stipulated deposition fees, and denied both applicant and defense petitions for penalties and attorney fees. Applicant contends that defendant did not have genuine legal doubt as to its liability for deposition fees, which defendant had previously stipulated to pay.

We have received defendant's January 19, 2021 "Opposition to Applicant Shatford's [sic] Petition for Reconsideration; and Its/The CCSF's Own Petition of Reconsideration," (Defendant's Answer/Petition). Defendant contends the stipulation to pay deposition fees was the result of mutual mistake of fact, and that applicant should be sanctioned for advancing specious claims.

We have also received applicant's Request for Permission to File Supplemental Pleading, dated January 21, 2021, applicant's Answer to Defendant's Petition for Reconsideration, dated January 29, 2021 (Applicant's Answer), and applicant's Supplemental Pleading in Support of

[1] Commissioner Lowe, who was on the panel that granted reconsideration to further study the factual and legal issues in this case, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

Petition for Reconsideration, dated March 1, 2021 (Supplemental Pleading). We accept the Supplemental Pleading pursuant to WCAB Rule 10964. (Cal. Code Regs., tit. 8, § 10964.)

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that Applicant's Petition be denied.

We have considered Applicant's Petition, Defendant's Answer/Petition, applicant's Answer and applicant's Supplemental Pleading, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will dismiss defendant's Petition for Reconsideration, and affirm the F&O.

FACTS

Applicant claimed injury in the form of hernia while employed as a gardener in training by the City and County of San Francisco, permissibly self-insured (defendant) on January 10, 2017.

Defendant noticed its deposition of applicant for November 21, 2017, however the deposition did not go forward due to applicant's illness. (Ex. C, Transcript of Deposition, dated November 21, 2017.) Applicant's deposition was rescheduled for February 9, 2018, and was completed. (Ex. B, Transcript of Deposition, dated February 9, 2018.) On April 22, 2018, applicant requested Labor Code section 5710 deposition fees in the amount of $2,804.00.[2] (Ex. F, City and County of San Francisco Correspondence with attachments, various dates, p. 6.) Defendant objected to the proposed fee, and offered $1,600.00 "in full satisfaction" of the demand. (*Id*. at p. 1.)

The parties proceeded to Mandatory Settlement Conference (MSC) on July 24, 2018, at which time a settlement agreement was reached. The parties drafted a Compromise and Release agreement (C&R) which was signed and approved the same day. (Order Approving Compromise and Release, dated July 24, 2018.) The parties stipulated at paragraph 8 that, "Defendant to issue 5710 fee of $1600 – to Shatford Law Office." (Compromise and Release, dated July 24, 2018, at p. 6.)

On March 8, 2019, applicant filed a petition, contending no payment had issued following the July 24, 2018 deposition fee stipulation, and seeking payment of $1,600, along with attorney fees, penalties and sanctions. (Petition to Enforce Award and for Attorney Fees, Penalties and Sanctions, dated March 8, 2019.)

[2] All further statutory references are to the Labor Code unless otherwise stated.

Defendant's March 21, 2019 response to the petition contended that defendant had paid the $1,600 on June 11, 2018. (Defendant CCSF's Answer/Response to Applicant's Petition to Enforce Award and for Attorney's Fees, Penalties and Sanctions and Objection to Applicant's DOR, dated March 21, 2019, at 1:25.) Defendant's Answer/Response averred that following applicant's failure to appear at prior depositions, defendant was seeking associated deposition costs. Accordingly, the parties who were present at the July 24, 2018 MSC and who were unaware of defendant's recent payment of fees, had agreed to "liquidate" their respective claims for fees related to the prior depositions (i.e., section 5710 fees for applicant, missed deposition costs for defendant) in the amount of $1,600. (*Id*. at 2:8.)

The parties proceeded to trial on September 17, 2020 and framed three issues for decision: (1) whether defendant was required to pay to applicant's attorney $1,600 as stipulated in the Compromise and Release of July 24, 2018; (2) if not, whether any other relief was owed by either party to the other, and (3) whether either party was entitled to penalties, costs, and interest pursuant to sections 5813, 5814, and 5814.5. (Minutes of Hearing (Minutes), dated September 17, 2020, at 2:21.) The parties called no witnesses to testify, but the WCJ received in evidence a verified offer of proof prepared by Dyana Lechuga, the attorney representing defendant at the July 24, 2018 MSC. (Ex. G, Offer of Proof from Dyana Lechuga, DCA, dated September 16, 2020.)

The WCJ issued his F&O on December 15, 2020, finding that defendant had not met the burden of proving that the stipulation to pay $1,600 arose out of mutual mistake of fact. Accordingly, defendant was ordered to issue payment to applicant's counsel in accordance with the stipulation. (F&O, Order No.1.) The WCJ further determined that neither party engaged in bad faith tactics sufficient to warrant the imposition of penalties, interest or attorney fees. (F&O, Findings of Fact No.3.) Finally, the WCJ found that the parties' positions were not unreasonable as defined in sections 5814 or 5814.5. (F&O, Findings of Fact No. 4.)

Applicant contends that defendant's reliance on a theory of mutual mistake of fact was unreasonable, rendering the delay in payment also unreasonable, and subjecting defendant to penalties and costs under sections 5814 and 5814.5. (Applicant's Petition at 9:18.) Applicant asserts that defendant did not entertain reasonable doubt as to the nature of the stipulation entered into as part of the C&R agreement. (Applicant's Petition at 18:21.) Applicant further contends that defendant has waived their right to raise mutual mistake for lack of prompt action on the issue, and that the WCJ applied an incorrect standard of "bad faith" to adjudge whether defendant was

liable for penalties and costs for unreasonably delay under section 5814. (Applicant's Petition at 21:21.)

Defendant contends applicant waived any additional claim for reimbursement when it accepted defendant's payment of deposition fees.[3] (Defendant's Answer/Petition, at 13:22.)

The Report of the WCJ responds that despite defendant not meeting the burden of establishing a mutual mistake of fact, the evidence nonetheless supported a finding that the delay in payment was not unreasonable. (Report at p.6, second full para.) The WCJ states:

> [T]he standard for determining reasonableness in litigation is not success. Rather, the facts and legal arguments presented must be evaluated to determine whether the position is entirely without merit and therefore unreasonable. As discussed above, Ms. Lechuga's uncontradicted and agreed upon recitation of events raises serious questions about the existence of a mutual or unilateral mistake of fact such that litigating the issue is within the realm of reason. For this reason, penalties are inappropriate. (Report at p.6.)

Given defendant's colorable assertions, the WCJ found that the delay in satisfying the deposition fee stipulation was not per se unreasonable, and denied applicant's section 5814 petition for penalties.

DISCUSSION

At the outset, we note that to the extent that Defendant's Answer/Petition seeks reconsideration of the F&O, the petition is untimely. Labor Code section 5903 allows twenty (20) days after service of a final order, decision, or award to file a petition for reconsideration, and the time for filing may be extended five (5) days for mailing. (Code of Civ. Proc., §1013; Cal. Code Regs., tit. 8, § 10605.) A petition for reconsideration is deemed filed on the day it was actually received at the WCAB office and not on the date it was deposited in the mail. (*Valle v. Workers' Comp. Appeals Bd.* (1973) 38 Cal.Comp.Cases 468 [1973 Cal. Wrk. Comp. LEXIS 2253] (writ denied); *Oliver v. Structural Services and Zenith National Ins. Co.* (1978) 43 Cal.Comp.Cases 596 [1978 Cal. Wrk. Comp. LEXIS 3189] (Appeals Board Panel Opinion); *County of Lake v. Workers' Comp. Appeals Bd. (Helbush)* (1984) 49 Cal.Comp.Cases 627 [1984 Cal. Wrk. Comp. LEXIS

[3] Defendant's Answer/Petition also contends that applicant's claims are specious and warrant monetary sanctions, and that the July 24, 2018 stipulation regarding deposition fees should be rescinded because there was no meeting of the minds in the drafting of the stipulation. However, as is discussed herein, to the extent that these sections of defendant's Answer/Petition purportedly seek reconsideration of the F&O, the Petition is dismissed as untimely.

3530] (writ denied). The time limit for filing a petition for reconsideration is jurisdictional so that the Board lacks the power to grant an untimely petition. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171 [1989 Cal. App. LEXIS 663]; *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979 [46 Cal.Comp.Cases 1008].)

The F&O was filed and served in this case on December 16, 2020. The 25th day for filing a petition for reconsideration was January 10, 2021, which fell on a weekend, and was thus extended to Monday, January 11, 2021. (Cal. Code Regs., tit. 8, § 10600(b); 10605.) Defendant's Petition for Reconsideration was filed on January 19, 2021. Accordingly, we will dismiss defendant's Petition for Reconsideration as untimely.

Labor Code section 5814, subd. (a), states:

> When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars ($10,000), whichever is less. In any proceeding under this section, the appeals board shall use its discretion to accomplish a fair balance and substantial justice between the parties.

The determination of penalty issues "should proceed with a view toward achieving a fair balance between the right of the employee to prompt payment of compensation benefits, and the avoidance of imposition upon the employer or [insurance] carrier of harsh and unreasonable penalties." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Stuart)* (1998) 18 Cal.4th 1209, 1215 [63 Cal.Comp.Cases 916].)

The initial burden of proof to demonstrate delay in the provision of benefits rests with applicant. However, once "an injured worker has shown a delay in the payment of compensation, the burden is on the employer to show good reason for the delay." (*Kamel v. West Cliff Med., Superior Nat'l Ins. Co.*, 66 Cal.Comp.Cases 1521, 1523 [2001 Cal. Wrk. Comp. LEXIS 5320] (Appeals Bd. en banc).) "The only satisfactory excuse for delay in payment of disability benefits, whether prior to or subsequent to an award, is genuine doubt from a medical or legal standpoint as to liability for benefits, and that the burden is on the employer or his carrier to present substantial evidence on which a finding of such doubt may be based." (*Kerley v. Workmen's Comp. App. Bd.* (1971) 4 Cal. 3d 223 [36 Cal.Comp.Cases 152].) The possibility that a defendant may be wholly relieved of an obligation to pay a benefit constitutes genuine doubt as to legal liability:

> Genuine doubt as to legal liability or, otherwise stated, actual obligation to pay, constitutes a basis for nonpayment pursuant to section 5814. Section 5814 is aimed at encouraging the employer to timely provide the relief to which the employee is entitled (*Dorman v. Workers' Comp. Appeals Bd.* (1978) 78 Cal.App.3d 1009, 1021 [144 Cal.Rptr. 573]); however, the penalty is to be applied only when the employer unreasonably delays or refuses the relief. The rationale behind allowable delay for genuine medical or legal doubt is that there may ultimately be no medical or legal obligation to pay. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Brown)* (1982) 130 Cal.App.3d 933 [47 Cal.Comp.Cases 358].)

Thus, when benefits are delayed, a defendant may avoid penalties if it can establish legitimate doubt as to its medical or legal obligation to pay.

Here, applicant submitted a request for payment of section 5710 deposition fees in the gross amount of $2,804.00 on April 22, 2018, including four hours of travel time. (Ex. F, Email correspondence from David Norman, DCA, with attachments, dated April 23, 2018, p.6.) Defendant objected to the fee request as excessive, and offered to pay $1,600 in total. Defendant further observed that if applicant accepted the payment "in full satisfaction of your billing," defendant would waive its claim for costs associated with the November 21, 2017 deposition that did not go forward. (*Id*. at p.2.)

The parties entered into a Compromise and Release agreement at the July 24, 2018 MSC. Therein, the parties stipulated, "Defendant to issue 5710 fees of $1600 – to Shatford Law Office." (Compromise and Release, dated July, 24, 2018, para. 8.) Defendant has submitted a verified witness proffer of Dyana Lechuga, defense counsel who was present at the July 24, 2018 MSC. (Ex. G, Offer of Proof from Dyana Lechuga, DCA, dated September 16, 2020.) Therein, defense counsel noted that as the parties were completing the draft settlement agreement, applicant's counsel inquired as to the status of outstanding 5710 fees. The Offer of Proof states, in relevant part:

> After I had drafted the C&R and after applicant and [applicant's counsel] Mr. Overton has signed it, Mr. Overton brought up the fact that the 5710 deposition fees had not yet been paid and he wanted to put that into the C&R. I specifically asked him, "are you sure these haven't been paid?" and his reply was "yes." Hence, when I drafted the language I wrote by hand into Section 8 of page 6 of 9 of the C&R agreement[,] I did so based on Mr. Overton's representations to me that deposition fees had not been paid at all. Therefore the language in the C&R was based entirely on Mr. Overton's misrepresentation to me that deposition fees has not been paid at all and the language was not based on any

> potential dispute over what deposition fees had already been paid. But it was never my intention to pay applicant's counsel anything more in Section 5710 fees than the actual amount listed in the C&R. Only after Mr. Norman sought to close out the file was I informed for the first time that there was an actual dispute over 5710 deposition fees and that the deposition fees had been paid prior to my entering into the C&R. (*Ibid*.)

We note that Defendant's Offer of Proof is unrebutted in the record, and has been granted "full weight and credibility as to [Ms. Lechuga's] state of mind at the time of entering into the agreement," by the WCJ. (F&O, Opinion on Decision, p.5, para. 2.) Thus, at the time of the MSC on July 24, 2018, defense counsel was under the mistaken belief that no deposition fees had been paid. This was based in part on the representations made to her by applicant's counsel. (Ex. G, Offer of Proof from Dyana Lechuga, DCA, dated September 16, 2020, at 2:22.) Additionally, Ms. Lechuga is clear in the offer of proof that she did not intend to pay any more than the stipulated $1,600. (*Id*. at 3:2.)

Following the approval of the settlement document, it came to light that defendant had, in fact, paid $1,600 to defendant on June 11, 2018. (Ex. E, Email correspondence from David Norman, DCA, dated August 22, 2018.) Asserting that their obligation to pay the stipulated $1,600 had been satisfied by the payment on June 11, 2018, defendant declined to pay any additional monies. (*Ibid.*)

In sum, defendant had previously offered to settle "in full satisfaction" all outstanding deposition fees for $1,600. Believing those fees had not been paid, and based in part on the representation of applicant's counsel, defendant then stipulated to pay the $1,600 as part of the settlement of the case in chief. When it was discovered subsequently that the $1,600 had been tendered one month before the MSC, defendant maintained and communicated its belief that the monies it had paid on June 11, 2018 were the same monies it had agreed to pay as part of the stipulation on July 24, 2018. (Ex. E, Email correspondence from David Norman, DCA, dated August 22, 2018.) Defendant further declined to make additional payment of deposition fees based on this reasoning. (*Ibid.*) Defendant further refused to pay additional monies based on its prior offer to resolve all outstanding deposition fees for $1,600. Defendant made the offer contingent on applicant depositing the check, and applicant offered no objection to the proposal, or to the check tendered on June 11, 2018.

On this record, we believe that defendant has met its burden of establishing that it had genuine doubt following the July 24, 2018 MSC as to whether it continued to have an obligation to pay the stipulated $1,600 in deposition fees, separate and apart from the monies it had tendered on June 11, 2018.

We acknowledge that the WCJ found that defendant had not met its burden of proof to establish that the stipulations were entered into as a result of mutual mistake of fact. (F&O, Order No.1; Opinion on Decision, p.4.) However, defendant maintained a subsequent belief that the agreed upon deposition fee had been paid in full, and that no further money was owed. It is this genuine doubt that excuses penalties, irrespective of whether the stipulation itself was the result of mutual mistake. (*Kerley, supra,* 4 Cal.3d 223.) 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 defendant's January 19, 2021 Petition for Reconsideration be **DISMISSED.**

IT IS FURTHER ORDERED that the December 15, 2020 Amended Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 17, 2023

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

ALVIN SELLERS
SHATFORD LAW
SAN FRANCISCO CITY ATTORNEY

SAR/abs

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