

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

BRUCE MORGAN, *Applicant*

vs.

**CLEAR CHANNEL OUTDOOR;
GALLAGHER BASSETT SERVICES, *Defendants***

**Adjudication Numbers: ADJ7295268;
ADJ7295269; ADJ7151536
Sacramento District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Applicant's attorney seeks reconsideration of the Findings and Award, issued by the workers' compensation administrative law judge (WCJ) on August 1, 2024, wherein the WCJ found in pertinent part that applicant's attorney is entitled to attorney's fees in the amount of 12% of the benefits awarded on July 17, 2024, in applicant's Subsequent Injuries Benefit Trust Fund (SIBTF) claim.

Petitioner contends that 15% is a reasonable attorney's fee as to applicant's SIBTF benefits and that the WCJ erred in awarding 12%.

We received an Answer from applicant.

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

A supplemental Petition was filed, along with a request to file same, on August 30, 2024. Pursuant to our authority, we accept petitioner's supplemental Petition, dated August 30, 2024. (Cal. Code Regs., tit. 8 § 10964.)

We have considered the allegations in the Petition, supplemental Petition, the Answer, and the contents of the Report with respect thereto.¹

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

Based on our review of the record, for the reasons stated in the WCJ's Report, which is adopted and incorporated herein, and for the reasons discussed below, we will deny reconsideration.

I.

Former Labor Code section² 5909 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.

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 in ADJ7295268, the case was transmitted to the Appeals Board on August 28, 2024, and 60 days from the date of transmission is Sunday, October 27, 2024. The next business day that is 60 days from the date of transmission is Monday, October 28, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)³ This decision is issued by or on Monday, October 28, 2024, 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

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

³ WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:
Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

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 shall be notice of transmission.

According to the proof of service for the Report by the WCJ, the Report was served on August 28, 2024, and the case was transmitted to the Appeals Board on August 28, 2024. 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 August 28, 2024.

II.

The WCAB has exclusive jurisdiction over fees to be allowed or paid to applicants' attorneys. (*Vierra v. Workers' Comp. Appeals Bd.* (2007) 154 Cal.App.4th 1142, 1149 [72 Cal.Comp.Cases 1128]; Cal. Code Regs., tit. 8, § 10840.) In calculating attorney's fees, our basic statutory command is that the fees awarded must be "reasonable." (Lab. Code, §§ 4903, 4906(a) & (d); Cal. Code Regs., tit. 8, § 10844.) Pursuant to section 4906, in determining what constitutes a "reasonable" attorney's fee, consideration shall be given to the following factors: (1) the responsibility assumed by the attorney; (2) the care exercised in representing the applicant; (3) the time involved; and (4) the results obtained by the attorney. (Lab. Code, § 4906(d); see also Cal. Code Regs., tit. 8, § 10844.)

The WCJ has broad discretion in determining a reasonable fee. (*Vierra, supra*, at 1147-1148.) We have independently reviewed the record and find no good cause to disturb the WCJ's August 1, 2024 decision.

For the foregoing reasons,

IT IS ORDERED that applicant's attorney's Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 28, 2024

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

**BRUCE MORGAN
MCMONAGLE STEINBERG
OD LEGAL
SIBTF SACRAMENTO**

JB/pm

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

Obtaining advised consent is a cornerstone of the Attorney-Client relationship. Applicant credibly testified that he was not advised Petitioner would be seeking a 15% fee when they formed the relationship. He also credibly testified that he felt the agreement should be limited by the Fee Statement he signed and that if he had been made aware of the agreement he would have asked for a 12% fee when the underlying case settled. (MOH-SOE Page 3) Petitioner failed to obtain advised consent to the requested.

The version of Title 8 CCR Section 10135 in effect in 2016 required every applicant's attorney to file a fee disclosure form after initial consultation. The version of Labor Code Section 4906(e) in effect in 2016 also required the filing of a disclosure form. (OOD Page 4) These forms are required to ensure applicants are advised of their rights before they retain an attorney. There is no provision in the Code or the Rule that indicates it is not required for attorneys substituting into a case. There is no evidence that Petitioner advised Applicant he could seek advice from the Information and Assistance Officer as required by law, or if he could seek counsel from an attorney beside Petitioner. Petitioner's failure to have Applicant sign and to file the required forms was considered a negative factor when evaluating the care shown as required by Labor Code Section 4906(d). If Applicant had been advised Petitioner would seek a 15%, he may have chosen a different attorney. Petitioner's failure to advise Applicant reflects negatively on the care shown by Petitioner and should not be held against Applicant.

Petitioner's conduct of pushing the fee dispute to trial before securing the settlement is the proverbial counting of chickens before they hatch. It was considered a negative factor when evaluating the care shown as required by Labor Code Section 4906(d).

The fee Awarded to Petitioner was 12%. Petitioner provided no evidence that the case was above average in complexity. There is no evidence of SIBTF specific discovery offered at trial. Petitioner lists several medical reports in the Petition with an indication they were obtained "in this case". (Petition Page 2) These reports appear to have been obtained as discovery in the underlying compensation claims as several predate the filing for SIBTF benefits. As indicated in the Petition, Petitioner has been paid in those cases and is not entitled to double payment. (Petition Page 3) There is no evidence that SIBTF contested Applicant's entitlement to benefits. There is no evidence that Petitioner negotiated a waiver of any credits asserted by SIBTF.

Applicant credibly testified that he believed a 9% attorney fee was reasonable in the SIBTF claim because Petitioner had been paid fees in the underlying claims. The fact Petitioner spent 7 years as the attorney of record on the SIBTF claim and did obtain a settlement at 100% with credit offsets were taken into consideration as positive factors when responsibility assumed, time spent and results obtained by Petitioner as required by Labor Code Section 4906(d).

Petitioner's argument the "McMonagle Steinberg is in compliance with LC § 4906" is wrong. (Petition Page 4 - 6) Petitioner references several items not introduced into evidence in an argument that Labor Code Section 4906(i) does not apply. Petitioner's post-trial effort to introduce evidence is improper. The Opinion and Decision specifically addressed that the amendments to 4906(a) and 4906(i) which bar awarding any attorney fee for failure to make the proper filing do not apply. (OOD Page 3 Footnote 4) As discussed above, Petitioner did not comply with the

versions of Labor Code Section 4600 or Rule 10135 that were in effect in 2016 which require filing by every attorney after initial consultation. Statutes are interpreted based on the plain meaning of their text and these sections did not require filing by every attorney after initial consultation “unless it is a substitution of attorneys” as suggested by Petitioner. (OOD Page 4)

The argument that law firms substituting into cases prior to January 1, 2017, were not required to file Fee Disclosure forms was found to lack merit. The “initial consultation” referred to in the Code and the Rule are required for every attorney’s initial consultation with an applicant. Labor Code 3202’s liberal construction clause requires this interpretation for the protection of injured workers.

Petitioners’ failure to advise Applicant it would seek a 15% fee denied Applicant the opportunity to seek alternate representation. Petitioners’ failure to comply with the requirements of Rule 10135 and LC 4906(e) in effect in 2016 a 15% fee was found to be unreasonable. Based on Petitioner’s length of time handling the claim, and the results obtained a 9% fee was not found to be reasonable. A 12% fee was found to be reasonable based on the evidence at trial. Therefore, the Petition should be denied.

Additionally, Petitioner did not file the disclosure required by Title 8 CCR 10842 at trial or with the Petition and this provides an independent basis for denial of the Petition.

Date: August 28, 2024

Christopher Brown
WORKERS’ COMPENSATION
ADMINISTRATIVE LAW JUDGE