

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

GUSTAVO MONTERO, *Applicant*

vs.

GILBERT ORCHARDS; ZENITH INSURANCE COMPANY, *Defendants*

**Adjudication Numbers: ADJ13936917; ADJ15408931
Redding District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Applicant's current attorney, Norman J. Homen, seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on September 17, 2024, wherein the WCJ awarded attorney fees in the amount of \$5,250.00, split between applicant's current attorney and applicant's former attorney (and lien claimant) as follows: Joseph Hernandez is awarded \$2,625.00 and Norman Homen is awarded \$2,625.00.

Petitioner contends that the WCJ erred in awarding Mr. Hernandez one-half of the attorney fees because Mr. Hernandez did not submit evidence regarding the actual time spent on the matter; and that the WCJ did not sufficiently consider the responsibility and care that he took on applicant's case and the expeditious results he obtained for applicant. Petitioner also contends that the WCJ displayed bias in the decision by awarding Mr. Hernandez fees when Mr. Hernandez did not submit adequate evidence.

We received an Answer from lien claimant Hernandez Law.

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

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto.¹ Based on our review of the record, for the reasons stated in the WCJ's

¹ Mr. Homen has attached many documents to the Petition, most of which appear to have been admitted as exhibits at trial. To the extent that these documents have already been received in evidence, this conduct violates WCAB Rule 10945(c)(1). (Cal. Code Regs., tit. 8, § 10945(c)(1).) Mr. Homen is reminded that all parties before the WCAB must comply with all WCAB Rules, and failure to comply with those Rules may subject the offending party to sanctions. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421.)

Report and Opinion on Decision, which are adopted and incorporated herein, and for the reasons discussed below, we will deny reconsideration.

I.

As a preliminary matter, we note that 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, the case was transmitted to the Appeals Board on October 21, 2024, and 60 days from the date of transmission is December 20, 2024. This decision is issued by or on December 20, 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 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

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

act on a petition. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here, according to the proof of service for the Report by the WCJ, the Report was served on October 21, 2024, and the case was transmitted to the Appeals Board on October 21, 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 October 21, 2024.

II.

The Appeals Board 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 establishing what constitutes a "reasonable" attorney's fee, the WCJ must consider four factors: (1) the responsibility assumed by the attorney; (2) the care exercised by the attorney; (3) the time involved; and (4) the results obtained. (Lab. Code, § 4906(d); see Cal. Code Regs., tit. 8, § 10844.) However, the WCJ may also consider other factors, including the complexity of the issues, whether the case involved highly disputed factual issues, and whether detailed investigation, interrogation of prospective witnesses, and/or participation in lengthy hearings are involved.

Where there is a dispute between applicant's current attorney and former attorney on how to split the award of attorney's fees, the WCJ must consider the reasonableness of the attorneys' fee overall, and then the division of the fees as between the attorneys. A WCJ has broad discretion in determining a reasonable fee, and we see no abuse of discretion by the WCJ in this case. Thus, we will not disturb the WCJ's decision.

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order issued by the WCJ on September 17, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 20, 2024

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

**GUSTAVO MONTERO
APPLICANT'S CURRENT ATTORNEY NORMAN HOMEN
APPLICANT'S FORMER ATTORNEY HERNANDEZ LAW
HANNA BROPHY**

JB/pm

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

**REPORT AND RECOMMENDATION ON RECONSIDERATION AND
NOTICE OF TRANSMITTAL**

**I
INTRODUCTION**

- | | | |
|-----------------------------------|---|----------------------------|
| 1. Date of first injury | : | 02/25/2020 |
| Parts of the body in first injury | : | Back |
| Date of second injury | : | 01/29/2021 |
| Parts of the body in 2nd injury | : | Back & lower extremities |
| 2. Identity of Petition | : | Second Applicant's Counsel |
| Timeliness | : | The petition was timely |
| Verification | : | The petition was verified |

**II
BACKGROUND**

On 12/04/2020, initial Applicant's then Counsel, Joseph Hernandez, submitted Notice of Representation of Applicant Gustavo Montero for date of injury 2/25/2020, which alleged industrial injury to Applicant's back. The Application for Adjudication of Claim had previously been filed on 12/02/2020. ADJ13936917 was assigned for date of injury 2/25/2020.

Subsequently on 11/10/2021, initial Applicant's Counsel Joseph Hernandez submitted Notice of Representation of Applicant Gustavo Montero for a subsequent date of injury. An Application for Adjudication of Claim having been previously submitted on 9/22/2021 alleging an injury to Applicant's back and lower extremities as occurring on 1/29/2021. ADJ15408931 was assigned for date of injury 1/29/2021. A subsequent hearing occurred on 9/23/2021; however further discovery was needed so the matter was taken off calendar.

The parties, Applicant's Counsel Joseph Hernandez and Defense Counsel Steven Schroth, obtained an initial Panel Qualified Medical Evaluation by Anthony Fenison, M.D. on 7/09/2021. In the ensuing report, Dr. Fenison found zero permanent disability; however, all the medical records may not have been reviewed by Dr. Fenison prior to that initial report. A subsequent report by PQME Fenison on 12/20/2021 indicated there was likely some permanent disability, but the doctor needed further medical records.

At Status Conference on 1/06/2022, attended by Applicant's Counsel Hernandez, and Defense Counsel for the 1/29/2021 claim, the appearing parties requested consolidation of both cases, which resulted in the Order for Consolidation appearing on the 1/06/2022 Minutes of Hearing. Both Defense Counsel, appeared at the 2/07/2022 Status Conference along with Applicant's then Counsel Hernandez, but again it was argued that further discovery still remained necessary so another Order for off calendar.

At a hearing on 9/01/2022, the parties appeared, requested an Order to the Medical Unit to provide a Spine panel. Subsequently on 1/25/2023 the Notice Dismissing Joseph Hernandez as Applicant's Counsel was submitted into the EAMS/FileNet system.

Thus, during the period Joseph Hernandez represented Applicant, two Applications for Adjudication of Claim were filed, three hearings were attended, along with ordering consolidation and the panel being requested along with two Qualified Medical Evaluations, one on 7/09/2021 and a second on 12/20/2021. Both QME reports indicated a finding of 0% permanent disability; however, the then QME Anthony Fenison, M.D. did indicate Dr. Fenison felt that Applicant fully recovered from the initial 2/25/2020 injury and that Applicant's "ongoing difficulties" were due to other causes.

Mr. Hernandez made a demand of \$25,000.00 to resolve both cases; however, that demand at that time, did not result in settlement.

Following Norman Homen's representation of Applicant, Defendant in ADJ13936917, (the 2/25/2020 claim), filed Declaration of Readiness to Proceed as Defendant argued that case had been ready for resolution as of 7/2021. However, Applicant's Counsel Norman Homen successfully argued that QME evaluation was upcoming. No hearing thus occurred at that time.

The parties obtained a second PQME Dr. Frank W Minor evaluated Applicant on 10/06/2023. Dr. Minor reviewed medical records from 2/25/2020 through 3/18/2022 along with Applicant's deposition testimony of 3/08/2022

Subsequently, Applicant, under Mr. Homen's representation, was evaluated by PQME Frank Minor, M.D. PQME Minor determined future treatment needs along with 15% whole person impairment to be allocated between the two dates of injury. Mr. Homen was subsequently able to negotiate final settlement by Compromise and Release on 10/06/2023 for \$35,000.00, an increase of \$10,000.00.

Thus, during the period Norman Homen represented Applicant, one hearing was attended; however, Mr. Homen did obtain a new Panel Qualified Medical Evaluator, Frank W. Minor, M.D., who evaluated Applicant on 10/06/2023 and increased the permanent disability to 15% Whole Person Impairment. This increase in permanent disability allowed Mr. Homen to negotiate a Compromise and Release at \$35,000.00, an increase of \$10,000.00 from the amount demanded by prior Counsel Hernandez. The Compromise and Release at [\$35,000.00] allowed for an Applicant Attorney Fee of \$5,250.00. The Attorney Fee was to be held in trust by Attorney Homen pending a written agreement settling the lien of prior Attorney Hernandez.

III **CURRENT TRIAL ISSUES RESULTING IN THE INSTANT PETITION FOR** **RECONSIDERATION**

Following the 3/26/2024 Order Approving the Compromise and Release, the two Counsel, Mr. Homen and Mr. Hernandez could not agree on a fee-split of the \$5,250.00 fee.

The two Counsel thus met at Mandatory Settlement Conference on 5/13/2024 and completed a Pre-Trial Conference Statement listing the sole issue as attorney fees. The parties then appeared for trial on the sole issue of attorney fees on 7/24/2024. The matter was submitted on the record without testimony.

Subsequently, on 9/16/2024, the undersigned issued an Opinion on Decision and Findings and Order, finding that because each Counsel had contributed separate, but substantial efforts in the case and because neither would have succeeded without the prior/subsequent efforts of the other, that an equal share of the fee was due each Counsel. In coming to that decision, the undersigned did not take into consideration the time point system of hours spent, but rather the steps taken, the issues accomplished, hearings, etc. It was felt the the point system was too personally subjective to be considered. For example, in drafting the same letter, one attorney could allocate a .4 while another could allocate a .6. Rather the undersigned considered steps taken, the care exercised, the time involved, and the results obtained. As noted in the 9/16/2024 Opinion, both Counsel played a large part in progressing through the case. Both Counsel are highly experienced and both Counsel adequately represented their client. The entire fee was only \$5,250.00. The undersigned, weighing all the evidence, felt, given that both Attorneys had put legitimate time and effort into the case, with each Counsel progressing through the case reasonably and responsibly, that a fee spite at \$2,650.00 each, was appropriate.

Subsequent Counsel Norman Homen, in his Petition for Reconsideration, indicates as item 4, “Petitioner has discovered new evidence material to him which he could not with reasonable diligence have discovered and produced at the hearing”, however, no further description/discussion on this issue was included in the Petition For Reconsideration. The trial on the attorney fee issue occurred on 7/24/2024 and was submitted on the evidence presented at that time. At no time, even in the Petition For Reconsideration, has there been submitted, any request to vacate submission to develop the record and/or to submit further evidence.

Further Petitioner misstates what happed by stating, “No evidence was submitted or contained in the court file, including Mr. Hernandez’s trial brief, that Mr. Hernandez had prepared a petition to consolidate the cases”. The 9/16/2024 Opinion on Decision simply states Mr. Hernandez “petitioned for consolidation”.

The 1/06/2022 Minutes of Hearing by the Honorable Judge Curt Swanson simply indicate, “2nd case, ADJ15408931 is hereby consolidated with ADJ13936917.” It appears the issues was raised with Judge Swanson at the 1/06/2022 hearing; however, the petition may have been, and was likely, a verbal petition by the parties at hearing.

IV CONCLUSION

As stated in the conclusion of the Opinion on Decision, both Counsel played a major part in litigating this case. Mr. Hernandez initiated the case, gathered all the necessary information, documentation, evidence and filed the claims. Mr. Hernandez initiated the panel process and dealt with Defense Counsel.

Likewise, Mr. Homen took over the cases and brought them to successful conclusion. Neither Counsel received the equivalent of an hourly fee, but in looking at the work done, different work by each attorney at the time each had the cases, that work demands that each get a portion of the fee. Mr. Hernandez had the case for a longer time period than Mr. Homen, but Mr. Homen brought the cases to conclusion. In reviewing and weighing all the factors and evidence, it was felt and continues to be felt, that a fifty percent split of the fee was the just and correct decision to make.

The undersigned thus recommends that the Honorable Commissioner's deny the Petition For Reconsideration and allow the Opinion On Decision and Findings And Order, both of 9/16/2024 to remain as decided at that time.

DATE: 10/21/2024

Mary Sulprizio
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

BACKGROUND

Applicant Gustave Montero, born [], suffered an injury to his back on 2/25/2020 while employed by Gilbert Orchards. At the time of his injury, Gilbert Orchards was insured for Workers' Compensation purposes by Zenith Insurance Company.

Subsequently Applicant Montero suffered a subsequent injury to his back and lower extremities on 1/29/2021, while still employed by Gilbert Orchards. At the time of his subsequent injury, Gilbert Orchards remained insured for Workers' Compensation purposes by Zenith Insurance Company.

At the time of Applicant Montero's first injury, Mr. Montero selected Joseph Hernandez as his Counsel of record for workers' compensation purposes. Joseph Hernandez remained Applicant Montero's Counsel of record at the time of his second injury. Mr. Hernandez filed Applications for Adjudication of Injury for both injury dates.

On 1/16/2023, Applicant Montero dismissed Counsel Joseph Hernandez and substituted the Law Offices of Norman Homen as his Counsel on both cases.

The two combined cases were settled by Compromise and Release in March 2024 with an Order Approving Compromise and Release totaling \$35,000.00 for both cases on 3/26/2024.

The Attorney fee totaling \$5,250.00 was ordered to be held in trust by the Law Offices of Norman Homen pending resolution of the Attorney Fee lien by Joseph Hernandez.

The two Applicant's Counsel could not resolve the attorney fee split; thus on 5/13/2024, Pre-Trial Conference Statement was completed solely on the issue of the appropriate attorney fee split. The parties subsequently proceed to trial before the undersigned on 7/24/2024. The parties were then given until 8/14/2024 to submit trial briefs with the matter submitted for decision on 8/14/2024.

ISSUES TO CONSIDER FOR ATTORNEY FEES

Typically issues for consideration in an attorney fee dispute include the responsibility assumed by the attorney, the care exercised in the representation, the time involved, and the results obtained.

In this case, the initial attorney, Joseph Hernandez filed the application for adjudication of injury, filed the application for a second injury, petitioned for consolidation of the cases, participated through the panel process with two resulting Panel Qualified Medical Evaluations from PQME Anthony Fenison, M.D. and one Evaluation from PQME Frank Minor, M.D.

Conversely, Norman Homan proceeded with the third PQME evaluation which resulted in a permanent and stationary finding, negotiated and completed the settlement process. Mr. Homen also spent time reviewing the case at the point he assumed representation; however Mr. Hernandez had to review the case at it's inception.

The total Attorney Fee to be divided is \$5,250.00.

DETERMINATION OF ATTORNEY FEE SPLIT

Mr. Hernandez agreed to the representation and spent time reviewing the case, filing the Applications, proceeding through the panel process and through two PQME reports. A fee is required for those processes.

Mr. Homen completed the QME evaluation process with a new PQME and negotiated settlement. A fee is required for those processes.

CONCLUSION

Both Counsel played a big part in proceeding through and completing the case. Both Counsel are highly experienced attorneys and both Counsel adequately represented Applicant Montero.

Of the \$5,250.00 Attorney fee, Mr. Hernandez is awarded \$2,625.00 and Mr. Homen is awarded \$2,625.00.

DATE: 9/16/2024

Mary Sulprizio
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE