WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KALANI SMITH, *Applicant*

vs.

LIFELONG MEDICAL CARE;
BERKSHIRE HATHAWAY HOMESTATE INSURANCE COMPANY
Dba BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ21797896
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Order to Pay 5710 Fees (Order) issued on August 12, 2026, by the workers' compensation administrative law judge (WCJ). By the Order, as relevant here, the WCJ ordered defendant to pay applicant's attorney for deposition fees under Labor Code section[1] 5710.

Defendant contends that the WCJ erred by ordering it to pay section 5710 fees because no petition for attorney's fees had been filed.

We have not received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition for Reconsideration be granted because a clerical error resulted in the Order being issued.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, for the reasons stated in the WCJ's Report as quoted below, and for the reasons discussed below, we will grant the Petition for Reconsideration, rescind the WCJ's August 12, 2026 Order, and return this matter to the trial level for further proceedings consistent with this decision.

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[1] All further statutory references are to the Labor Code, unless otherwise noted.

FACTS

As summarized by the WCJ in the Report, the facts are as follows:

> The applicant filed an application for adjudication on October 13, 2025 alleging an injury CT from December 13, 2024 through October 28, 2025 with injury to the psyche.
>
> In this matter, on July 14, 2026 Defendants filed a Petition to compel attendance at medical evaluation. An Order compelling attendance at the medical evaluation was issued on August 7, 2026 and served on the parties.
>
> On the same date of August 7, 2026, an Order allowing deposition attorney's fees was issued with the same date of August 7, 2026, which was a clerical error, as there was no Petition for 5710 attorney's fees filed in this matter. Therefore, the Order to Pay 5710 Deposition fees was issued in error. The undersigned was on vacation when the Petition for Reconsideration was filed in response to the Order discussed above and this Report and Recommendation is issued in response thereto.

(Report, p. 2, ¶¶ 1-3.)

Defendant then sought reconsideration of the Order.

DISCUSSION

I.

Petitions for reconsideration filed on or after July 14, 2026 are subject to section 5909, which states 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 September 11, 2026, and 60 days from the date of transmission is November 10, 2026. This decision is issued by or on November 10, 2026, 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 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, the Report was served on September 11, 2026, and the case was transmitted to the Appeals Board on September 11, 2026. 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 September 11, 2026.

II.

All parties in workers' compensation proceedings retain their fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157–158, [65 Cal.Comp.Cases 805].) Due process guarantees all parties the right to notice and an opportunity to be heard. (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986].) With respect to notice, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [Citations.]" (*Armstrong v. Manzo* (1965) 380 U.S. 545, 550.) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties' rights to due process. (*Gangwish v. Workers' Comp.*

Appeals Bd. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584], citing *Rucker, supra*, at pp. 157-158.)

The WCJ shall ". . . make and file findings upon all facts involved in the controversy[.]" (Lab. Code, § 5313; see also *Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).)

Section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton*, *supra*, at p. 476., citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, *supra*, at p. 478), and must be supported by substantial evidence (Lab. Code, §§ 5903, 5952(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. Workmen's 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.)

WCAB Rule 10547 establishes conditions precedent that must be met before a party files a petition for attorney's fees under section 5710, including that, "A petition for attorney's fees pursuant to […] section 5710 shall not be filed or served until at least 30 days after a written demand for the fees has been served on the defendant(s)." (Cal. Code Regs., tit. 8, § 10547.)

Based upon our review of the record and the WCJ's analysis of the merits of defendant's arguments in the Report, we are persuaded that it is appropriate to grant defendant's Petition.

First, the WCJ acknowledged in the Report that the Order was issued in error. As explained by the WCJ:

> In this case the Order to pay 5710 Deposition fees was a clerical error and should be vacated as there was no Petition filed for 5710 attorney fees. The Petition that was properly filed, that is not at issue in the Petition for Reoncisederation[sic], was for an Order to attend a medical evaluation and that Order dated 8/7/2026 was correctly issued on the same day. It was simply a clerical error when the Order for 5710 attorney fees issued on a different case but with the wrong caption and case number of the Kalani Smith matter.

(Report, p. 2, ¶ 4-p. 3, ¶ 1.)

Further, a review of the record reveals no evidence that a written demand for fees was served on defendant or that a petition for attorney's fees was filed prior to issuance of the Order. Thus, the Order is void because determining section 5710 fees was premature.

We also note that no record was created to support the Order, but because the Order was issued in error, we need not consider the effects of an incomplete record.

Accordingly, we grant defendant's Petition for Reconsideration, rescind the August 12, 2026 Order, and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the August 12, 2026 Order to Pay 5710 Fees is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the August 12, 2026 Order to Pay 5710 Fees is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 9, 2026

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

KALANI SMITH
MVP TRIAL LAWYERS
LAW OFFICES OF KAPLAN AND BOLDY

DC/*pm*

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