

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

**SUMMER JACKSON, *Applicant***

**vs.**

**INFINITY CARE OF EAST LOS ANGELES;  
INSURANCE COMPANY OF THE WEST, *Defendants***

**Adjudication Number: ADJ16125996  
Van Nuys District Office**

**OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND  
DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Order (F&O) issued on July 2, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) applicant alleged that she sustained injury during the period of December 1, 2021 through April 18, 2022 while employed by Infiniti Health LLC, who was insured by State Compensation Insurance Fund, and settled her claim on August 3, 2023; (2) applicant failed to prove that she was employed by Infinity Care of East Los Angeles, who was insured by Insurance Company of the West (ICW); (3) ICW did not insure Infiniti Health LLC; (4) applicant is not entitled to deposition attorney's fees under Labor Code Section 5710(b) because she failed to prove that she was employed by Infinity Care of East Los Angeles; (5) the court dismissed ICW from the case on March 2, 2023 and applicant did not object to the dismissal order; and (6) neither party established grounds for the imposition sanctions and costs.

The WCJ ordered that applicant's petition for deposition attorney's fees and sanctions be denied.

Applicant contends that the finding that applicant is not entitled to deposition attorney's fees is without support.

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, we will grant

reconsideration and, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that (1) applicant is entitled to deposition attorney's fees; (2) the dismissal of ICW as a party was without prejudice and does not bar applicant's petition for such fees; and (3) the issue of the amount of deposition attorney's fees is deferred.

### **FACTUAL BACKGROUND**

On March 2, 2023, the WCJ ordered that "ICW is hereby dismissed without prejudice based on the parties' stipulation." (Minute Order, March 2, 2023.)

In the Report, the WCJ states:

Applicant alleged that she was employed during the period December 1, 2021, through April 18, 2022, as a data entry clerk. An application was initially filed naming Infinity Care of East Los Angeles and ICW as the Defendants. Defendant ICW disputed employment. During a hearing held on March 2, 2023, before the undersigned, the parties stipulated that State Compensation Insurance Fund was the carrier for the correct employer, Infiniti Health LLC. On March 2, 2023, a Minute Order issued from this court dismissing ICW as a party based on the Applicant's stipulation that Infinity Care of East Los Angeles and ICW were not proper parties and could be dismissed. (EAMS ID 76499127. Subsequently, the case settled by Compromise and Release agreement between State Compensation Insurance Fund and the applicant on August 3, 2023 (EAMS ID 47559407.) The C&R contained language indicating that Applicant's counsel was reserving his right to litigate the 5710 fee against ICW who was not a party to the C&R and was the carrier for Infiniti (also listed as 5710 fee against ICW who was not a party to the C&R and was the carrier for Infiniti (also listed as Infinity) Care of East Los Angeles. The matter proceeded to trial and the WCJ found that Applicant was not entitled to a 5710 fee because he has agreed to dismiss the Defendant ICW based on lack of employment, that pursuant to LC Section 5710 (b)(4) Applicant was not an employee and therefore no benefits were owed and that no sanctions or penalties were owed. (Report, pp. 1-2.)

### **DISCUSSION**

#### **I.**

Former Labor Code section 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, Labor Code 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 Labor Code 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 July 23, 2024, and 60 days from the date of transmission is September 21, 2024. The next business day that is 60 days from the date of transmission is September 23, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)<sup>1</sup> This decision is issued by or on September 23, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on July 23, 2024, and the case was transmitted to the Appeals Board on July 23, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 23, 2024.

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<sup>1</sup> 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.

## II.

Labor Code section 5710 provides:

- (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 . . .
  - (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.
- (Lab. Code, § 5710 [Emphasis added].)

In *Mitchell v. Golden Eagle Insurance* (1995) 60 Cal.Comp.Cases 205 (en banc), the Appeals Board held that a finding of industrial injury is not a prerequisite or mandatory condition precedent to allowing deposition attorney's fees under section 5710(b). There the defendants argued that the use of the term "injured employee" in section 5710(b) meant that a finding of industrial injury was a condition precedent to the WCJ's authority to award deposition attorney's fees. The Appeals Board disagreed, concluding that the Legislature did not intend to require a finding of industrial injury for the WCJ to allow deposition attorney's fees, reasoning:

The statute itself does not specifically require that an industrial injury must be proven before the employee's attorney can recover a deposition attorney's fee under Labor Code section 5710(b)(4). The legislative history of AB 1705 is helpful in determining that the Legislature did not intend that there be a finding of industrial injury before a WCJ can exercise his or her discretion in allowing a deposition attorney's fee.

...

The provision of reasonable attorney fees to a "worker" is consistent with both the purpose and procedures of discovery in the workers' compensation system. The purpose of taking a deposition is to investigate the workers' compensation claim made by the employee. [fn] Early discovery and investigation promotes resolution of disputes. Under Labor Code section 5710, the defendant is given a full opportunity to take the deposition of the alleged injured employee and the employee's attorney is encouraged to fully cooperate in the discovery process.

In addition, the custom and practice in the workers' compensation adjudication system for more than 20 years has been to allow a deposition attorney's fee under Labor Code section 5710(b)(4) in cases where the deposition was taken, regardless of whether industrial injury was ultimately found. This practice is consistent with Labor Code section 4620 which allows medical-legal costs to prove a contested claim, even where there is no finding of industrial injury, and Labor Code section 138.3 "... requiring the employer to serve notice on the 'injured employee' that he may be entitled to benefits under this division." Requiring a finding of industrial injury before a deposition attorney's fee can be allowed under Labor Code section 5710(b)(4) is not consistent with discovery practice in workers' compensation which allows both the employee and the defendant to develop their cases with a view towards expeditious resolution, nor is it consistent with the legislative intent.

...

[I]t may be stated that while defendants may be required to pay the reasonable litigation costs of an applicant who is attempting, in good faith, to prove a contested claim, it is not reasonable to require defendants to pay the litigation costs of an applicant who deceitfully or fraudulently deceives WCJ's, referees, attorneys, hearing representatives, medical practitioners, rehabilitationors and consultants, or any other persons involved in the litigation process, in order to obtain worker's compensation benefits.

...

When defendants, in good faith, allege that the employee has deceitfully or fraudulently brought a claim for workers' compensation benefits, the WCJ should defer making a decision until he or she has had the opportunity to determine the merits at the hearing on the case-in-chief.[fn] This does not mean that the issue should be deferred when defendants allege only that applicant has failed to establish his or her claim by a preponderance of the evidence.

(*Mitchell, supra*, at pp. 209-211.)

The Court of Appeals subsequently declined to overturn *Mitchell*. In *Hilton Hotels Corp. v. Workers' Comp. Appeals Bd. (Green)* (1995) 60 Cal.Comp.Cases 1115 (writ den.), the WCJ found that that the applicant, who had failed to prove industrial injury, was nevertheless entitled to deposition attorney's fees. The defendant sought reconsideration, the Appeals Board panel affirmed, and the Court of Appeals denied the defendant's appeal.

Courts have disallowed deposition attorney's fees, however, where the defendant successfully establishes its independent contractor defense. In *Zarate v. Estate of Cowan* (1978) 43 Cal.Comp.Cases 906 (en banc) the Appeals Board (with three commissioners dissenting) found that an injured worker determined to be an independent contractor and not an employee was not entitled to deposition attorney's fees. Likewise, in *Dhillon v. Workers Compensation Appeals Bd.* (1997) 62 Cal.Comp.Cases 1589 (writ den.), an Appeals Board panel denied without comment a request for deposition attorney's fees where the defendant had established that the applicant was an independent contractor—and the Court of Appeals denied the applicant's appeal thereon.

In the present case, the WCJ found that applicant is not entitled to deposition attorney's fees because she was not employed by ICW and could not hold it liable for workers' compensation benefits. (Report, pp. 1-2.)

But *Mitchell* stands for the proposition that requiring a finding of industrial injury, i.e., a finding that the defendant employed the applicant at the time of injury, before deposition attorney's fees may be allowed is not consistent with the legislative intent of Labor Code section 5710(b) or workers' compensation discovery practice. (*Mitchell, supra*, at pp. 209-210.)

It follows that the WCJ's finding that applicant is not entitled to deposition attorney's fees is without substantive legal support.

As to whether the WCJ's finding that applicant is not entitled to deposition attorney's fees is supported on procedural grounds, we note that the March 2, 2023 dismissal of ICW was without prejudice. (Minute Order, March 2, 2023.) The dismissal therefore does not bar applicant from recovering deposition attorney's fees.

Accordingly, we will rescind the F&O and substitute findings that (1) applicant is entitled to section 5710(b) deposition attorney's fees; and (2) the dismissal of ICW as a party was without prejudice and does not bar applicant's petition for such fees.

Having adjudicated the issues raised by the Petition, we note that the record fails to show the amount of deposition attorney's fees to which applicant is entitled. To determine that amount, the WCJ must consider the responsibility assumed by the attorney, the care exercised by the attorney, the time involved, and the results obtained. (Lab. Code, § 4906(d); Cal. Code Regs., tit. 8, § 10844.) Hence we conclude that the WCJ should develop the record as to the amount of deposition attorney's fees. (See *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [65 Cal.Rptr.2d 431, 62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998)

62 Cal.App.4th 1117 [72 Cal.Rptr.2d 898, 63 Cal.Comp.Cases 261] (finding that the Appeals Board has the discretionary authority to develop the record when appropriate to fully adjudicate the issues); see also Lab. Code, § 5313.)

Accordingly, we will substitute a finding that the issue of the amount of deposition attorney's fees is deferred.

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the F&O and substitute findings that (1) applicant is entitled to deposition attorney's fees; (2) the dismissal of ICW as a party was without prejudice and does not bar applicant's petition for such fees; and (3) the issue of the amount of deposition attorney's fees is deferred.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Findings and Order issued on July 2, 2024 is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued on July 2, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

**FINDINGS OF FACT**

1. Applicant alleged that she sustained injury during the period of December 1, 2021 through April 18, 2022 while employed by Infiniti Health LLC, who was insured by State Compensation Insurance Fund, and settled her claim on August 3, 2023.
2. Applicant is entitled to deposition attorney's fees pursuant to Labor Code section 5710(b) arising from her deposition taken by Infinity Care of East Los Angeles (ICW).
3. The dismissal of ICW as a party herein was without prejudice and does not bar applicant's petition for deposition attorney's fees.
4. The issue of the amount of deposition attorney's fees to which applicant is entitled is deferred.
5. The parties did not meet their respective burdens of proof regarding their petitions for sanctions and costs.

**ORDER**

The parties shall take nothing on their petitions for sanctions and costs.

**IT IS FURTHER ORDERED** that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**SEPTEMBER 20, 2024**

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

**SUMMER JACKSON  
LAW OFFICES OF ROBERT OZERAN  
TOBIN LUCKS**

**SRO/cs**

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