WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RAFAEL TAPIA,

Applicant,

vs.

MEDIA NEWS GROUP, INC./ANG dba THE ARGUS NEWSPAPER; LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

Case No. ADJ1914194 (SFO 0468596)

ORDERS DENYING PETITION FOR RECONSIDERATION AND DISMISSING PETITION FOR REMOVAL

We have considered the allegations of the applicant's Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in said report which we adopt and incorporate, we will deny reconsideration. With respect to the applicant's Petition for Removal, as correctly indicated by the WCJ in his report, it is untimely and will therefore be dismissed.

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For the foregoing reasons,

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

IT IS FURTHER ORDERED that applicant's Petition for Removal is **DISMISSED.**

WORKERS' COMPENSATION APPEALS BOARD

FRANK M. BRASS

I CONCUR,

DEPUTY
RICK DIETRICH

CONCURRING, BUT NOT SIGNING
ALFONSO J. MORESI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOV 10 2011

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

RAFAEL TAPIA
CARCIONE, CATTERMOLE, DOLINSKI, ET AL.
THOMAS LYDING
MULLEN & FILIPPI
LIVINGSTON LAW FIRM

csl

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

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Defendant.

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(SFO0468596)

Report and Recommendation on Petition for Reconsideration And Petition for Removal

Introduction

Applicant's counsel (Petitioner) filed a timely but questionable verified Petition for Reconsideration of the Findings and Order of August 26, 2011, which denied the request to assess an attorney's fee against the lien of the Department of Health Services(DHS) and a Petition for Removal from the Order of December 30, 2010, deferring the issue of discovery. Petitioner contends in substance that there was no evidence or facts supporting there was actual involvement or active participation by DHS, that Welfare & Institution section 14124.72 was ignored, that it was denied due process by the deferral of discovery issues and that it has suffered irreparable harm and prejudice by deferring the discovery issues. At the end of the Petition, petitioner provided over his signature "Stated under penalty of perjury under the laws of the State of California at Redwood City, CA, on September 15, 2011".

An Answer has not been received as of this date.

The issue of employment was first tried on November 1, 2005. After eight days of trial, the trial judge found the applicant was an employee of The Argus Newspaper and issued his Findings and Order on July 1, 2008. Reconsideration of defendant's petition was granted on September 22, 2008, for the purpose of obtaining a transcript of the trial and for such further decision deemed to be appropriate. On November 16, 2009, a decision after reconsideration

issued rescinding the Findings and Order and returned the matter to the trial level to determine whether the Compromise and Release Agreement submitted by the parties was adequate.

The Agreement settled this case for $5,000,000 less $28,300.48 payable to applicant's attorney for costs, less $1,100,000 to DHS medical lien and less $774.339.00 to applicant's attorney as an attorney's fee. The applicant's attorney's lien against Medi-Cal(DHS) was deferred with jurisdiction reserved. The Agreement was executed by applicant's counsel and the guardian ad litem on October 16, 2009, and by defendant's attorney on October 14, 2009. It was not executed by DHS. There is a Stipulation to Pay Lien Claimant DHS the sum of $1,100,000 to resolve the lien of $2,481,686.79 which was executed by lien claimant on August 5, 2009, and by defendant on August 6, 2009. Applicant's attorney requested an 18% fee of the sum payable to the applicant and 25% against the lien settlement.

At the Status Conference of December 30, 2010, WCJ David Hettick ruled and ordered as follows:

> THE COURT: After hearing argument of counsel, it is my ruling that in the interest of judicial economy, the issue of whether the Carcione office is entitled to a fee for the legal services provided in this matter payable from the recovery of Medi-Cal is a threshold issue that should be determined before any further proceedings occur in this matter. Therefore, I will order that this matter be set for trial on that issue based on briefs to be submitted by the parties and that any issues of discovery, including entitlement to discovery and circumstances of discovery and type of discovery, are being reserved.
> ISSUES
> 1. The claim of Carcione, et al. for attorneys' fees for legal services that that firm provided in this case payable from the recovery of the lien claimant, State of California (Medi-Cal), in this case.
> 2. All other issues are deferred.
> ORDER
> IT IS ORDERED that the parties submit pre-trial briefs which set forth allegations as to the relevant facts and an argument as to the relevant law.
> The following briefing schedule will apply: Initial briefs to be filed simultaneously by the parties before March 15, 2011; thereafter, reply briefs to be filed by the parties prior to April 1, 2011.

On April 19, 2011, it was determined a factual basis was required to determine the threshold issue. The following was recorded:

Parties are to simultaneously serve declarations or each other setting forth documented events reflecting appearance by lien claimant in the case in 30 days. The parties are to file with the Board and each other the declarations, any references to supporting papers, declarations and arguments that must by 6/13/11 and matter to be set for trial on 6/23/11.

In the declaration of John Hentschel, attorney for Health Management Systems(HMS) who appeared on behalf of DHS, he declared the HMS records document appearances on March 17, 2005, June 7, 2005, October 10, 2005, October 21, 2005 (mediation), February 1, 2007, February 27, 2007(mediation), March 22, 2007, and March 5, 2008. His review of the WCAB file confirmed appearances by HMS representative on the Minutes of Hearing of June 7, 2005, October 9, 2005, March 22, 2007 and March 5, 2008. There were no minutes available documenting appearances at the Mediation of October 21, 2005, and February 27, 2007.

Two declarations of Roger Stucky, applicant's counsel, were submitted. In the first declaration, he indicated more than 96 appearances were made by his office and lien claimant's exhibits establish four appearances but no participation. In his second declaration, Stucky declared that any appearances were only for a few minutes with no participation. The matter was submitted for decision on the eighth day of trial after six years of litigation. The recovery in the amount of $1,100,000 depended entirely on the services provided by applicant's counsel without which Medi-Cal would receive nothing.

The Stucky declarations were admitted in evidence as exhibits 25 and 26 and lien claimant's declaration as Exhibit D.

The determination that Petitioner was not entitled to an attorneys' fee on DHS recovery was based on the following:

W&I 14124.72 is applicable to workers' compensation cases.
Boehm v. WCAB (Brower)(2003) 108 Cal. App. 4th 137, 68 Cal. Comp. Cas 548.

However, this is not dispositive of the issue herein. Section (d) provides as follows:

> **(d)** Where the action or **claim is brought by the beneficiary *alone*** and the beneficiary incurs a personal liability to pay attorney's fees and costs of litigation, the director's claim for reimbursement of the benefits provided to the beneficiary shall be limited to the reasonable value of benefits provided to the beneficiary under the Medi-Cal program less 25 percent which represents the director's reasonable share of attorney's fees paid by the beneficiary and that portion of the cost of litigation expenses determined by multiplying by the ratio of the full amount of the reasonable value of benefits so provided to the full amount of the judgment, award, or settlement.

Here, a lien was filed and appearances were made by lien claimant.

Applicant is correct that Labor Code section 4903.2 by its terms applies to liens for unemployment compensation disability and unemployment compensation benefits. This section permits awarding an attorney's fee to applicant's counsel where there is no participation by lien claimant. However, the issue of what is participation is not limited solely to said code section and therefore, consideration of those cases is pertinent.

Award of an attorney's fee has been allowed against Medi-Cal where it did not participate in the proceedings with exception of filing its lien. Donin v. WCAB(1982) 47 Cal. Comp. Cas 1297(writ denied). This was based on equitable apportionment or common fund doctrine which provides passive beneficiaries to a fund created by winning a law suit may be responsible for their fair share of litigation costs including attorney's fee. Quinn v. State of California(1975) 15 Cal. 3d 162.

Other than the Dressler case, the application of the equitable apportionment of attorney's fees has been addressed by the Courts in third party cases involving the insurer as an intervenor under Labor Code section 3856 which provides in pertinent part:

> **(c)** If the action is prosecuted both by the employee and the employer, in a single action or in consolidated actions, and they are represented by the same agreed attorney or by separate attorneys, the court shall first order paid from any judgment for damages recovered, the reasonable litigation expenses incurred in preparation and prosecution of such action or actions, together with reasonable attorneys' fees based solely on the services rendered for the benefit of both parties where they are represented by the same attorney, and where they are represented by separate attorneys, based solely upon the service rendered in each instance by the attorney in effecting recovery for the benefit of the party represented. After

> the payment of such expenses and attorneys' fees the court shall apply out of the amount of such judgment for damages an amount sufficient to reimburse the employer for the amount of his expenditures for compensation together with any other amounts to which he may be entitled as special damages under Section 3852.
>
> **(d)** The amount of reasonable litigation expenses and the amount of attorneys' fees under subdivisions (a), (b), and (c) of this section shall be fixed by the court. Where the employer and employee are represented by separate attorneys they may propose to the court, for its consideration and determination, the amount and division of such expenses and fees.

Where there are two representatives in the proceeding, two distinct approaches developed in the case law. One approach is to determine whether there is, in fact, a passive beneficiary. This is set forth in Kavanaugh v. City of Sunnyvale(1991)233 Cal. App. 3d 903, 56 Cal. Comp. Cas 542. The Court opined the relative contributions by each counsel should not be weighed in determining whether an attorney's fee should be awarded believing it would "likely lead to inconsistent and unfair results." The Court wrote:

> Third, any attempts to weigh the contributions of the attorneys would likely lead to inconsistent and unfair results. The problem is illustrated by considering what criteria the trial court should apply in making its determination. For example, should the trial court consider the quality of counsel's efforts, or the quantity of actions taken? Should the amount of money spent figure into the determination? Should the hours billed be considered? Is the issue whether counsel actively participates in the litigation, or whether counsel actively participates in obtaining recovery? What if counsel's involvement hinders the chances of obtaining recovery? In other words, what if counsel is active, but not effective?
>
> On the other hand, what if counsel's decision to remain in the background during much of the litigation actually contributed to creation of the common fund? In fact, the trial court suggested as much in this case, when it stated "[Xerox's attorney] did a good job in the respect that he didn't get in the way ... he could have jumped in more. He was doing a good job. Had he done this, or done that, he maybe could have done worse than just letting you do it."
>
> The wide range of ways in which an attorney could be considered active in prosecuting the litigation or in contributing to creation of the fund supports our conclusion that the issue before the trial court is much more limited. Simply put, the issue is whether one party is a passive beneficiary. Where both parties employ attorneys, and both attorneys participate in the

> prosecution of the litigation, then there is no passive beneficiary.
>
> Of course, we do not suggest that the mere filing of a motion to intervene, for example, is sufficient. In that respect, we agree with the conclusion in Kaplan that this type of action clearly does not constitute prosecution of the action. (Kaplan v. Industrial Indem. Co. , supra , 79 Cal. App. 3d at p. 709.) Nor do we suggest that a token appearance by a party's attorney will suffice. (Cf. Eldridge v. Truck Ins. Exchange (1967) 253 Cal. App. 2d 365, 367 [61 Cal. Rptr. 347].) Nonetheless, we do not think it will be difficult for the trial court to distinguish between such token or insincere efforts and actual involvement in the litigation.

In Walsh v. Woods(1986) 187 Cal. App. 3d 1273, the Court held the question of active participation was a question of fact and wrote "Where such active participation is demonstrated, sound policy reasons (prolonged litigation and likely duplicative efforts) militate against efforts to weigh the relative contributions of counsel in an attempt to avoid liability for the other party's attorney's fees."

The other approach is whether there was active participation. Kindt v. Otis Elevator(1995) 32 Cal. App. 4th 452, 60 Cal. Comp. Cas 84; Gapusan v. Jay (1998) 66 Cal. App. 4th 734, 63 Cal. Comp. Cas 1144; Hartwig v. Zacky Farms(1992) 2 Cal. App.4th 1550, 57 Cal. Comp. Cas 28 In these cases, a showing of the nature of the participation must be made to prevent an attorney's fee from being assessed against an intervenor or, in this case, a lien claimant. The Court noted:

> The *Hartwig* rule is sound. An employer or workers' compensation carrier who has paid employee compensation benefits has a lien right against any judgment obtained in a third party lawsuit by the employee, with or without any participation in the litigation. It is inequitable to force the worker to underwrite the entire cost of obtaining any ensuing judgment. On the other hand, if the employer or insurance carrier actively participates in procurement of the common fund, apportionment is appropriate. The *Hartwig* rule is designed to ferret out those cases in which the intervener is, for all intents and purposes, a silent partner in the litigation. Merely showing up for depositions or filing one or two documents, lacking in any real substance, should not be permitted to defeat a worker's entitlement to have the beneficiaries of the fund contribute to the costs of its procurement.

In Hartwig, supra, the Court reasoned:

> If the lienholder desires to avoid apportionment, it must provide the trial court with sufficient factual detail to establish that its activities constituted a conscientious effort in the circumstances to address the substantive issues encompassed by the lienholder's case. (See Walsh I, supra, 133 Cal. App. 3d at p. 768, fn. 1.) Whether the showing by the lienholder in any one instance constitutes substantial evidence of active participation will necessarily turn upon the particular facts and events involved in the action.
>
> By this holding we do not intend to question or undercut the rule prohibiting the weighing of the relative efforts of counsel in connection with motions for apportionment. (See Walsh I, supra, 133 Cal. App. 3d at p. 768.) We here address only the nature of the proof necessary to establish "active participation".

In Dressler, supra, the Court addressed the issue of how much participation is sufficient to avoid having an attorney fee taxed against EDD's lien. The Court held an attorney was not entitled to a fee from EDD where:

> The facts here are undisputed. The attorney for the lien claimants prepared and filed the liens claims and also filed amendments to those claims. She entered an appearance in the proceedings and attended the hearings on the claim. However she did not introduce evidence beyond the filed liens, did not examine or cross-examine any witness, and made no argument to the hearing officer. We conclude that that was sufficient activity to insulate her client from any fee payable to the worker's attorney.
>
> In this case, it developed that no opposition to the liens arose--the hearing being devoted only to the employer's contention that the injury was not industrially caused. However, a lien claimant cannot be sure, prior to the hearings, that its lien will be allowed in full if the worker secures an award. It is entitled to have its own attorney present in the event that its claim is attacked, either in amount or in full. Here, the lien claimants, having retained and paid its own attorney to be present and be prepared to protect their interest if necessary, clearly did not rely on petitioner to protect such interest.

In the en banc decision of Soils v. Swift Transportation(1978) 43 Cal. Comp. Cas 83, the Appeals Board held the failure of lien claimant to take an active role at trial did not make lien claimant a passive beneficiary per Quinn supra. This case preceded the enactment of Labor Code section 4903.2. The Appeals Board concluded as follows:

> The workers' compensation judge concluded that because lien claimant's representative at the hearing "merely sat silently in the hearing room, and had nothing at all to say,"

> lien claimant was a passive beneficiary of applicant's attorneys' efforts.
>
> Contrary to the workers' compensation judge, we find that the mere fact that the Department's representatives took no active role in the proceedings does not make lien claimant a passive beneficiary. The proceedings of the Workers' Compensation Appeals Board are geared to expedite benefits to the applicant. If a determination is to be made that the lien claimant must actively litigate in the courtroom, the Department will have no other course but to take an extremely active role in the actual litigation of cases. The Department's representative, to protect the record, would cover the same ground which applicant's counsel had previously covered in questioning the applicant. In addition, the Department's representatives would feel that they must cross-examine other witnesses in order to preserve their active status. Many times the defense attorneys will have no cross-examination of the applicant and the case will be submitted without any active role being taken on the part of the defense counsel. It certainly cannot be said that the defense counsel did not participate in the proceedings. As long as the Department's representative has appeared and represents to the court that he is appearing to protect the interest of his client, there is sufficient basis for finding an act of participation by the Department.

I am persuaded the reasoning and rationale set forth in Kavanaugh that it is not the relative efforts of counsel that is the determinative factor and that the determination of whether a lien claimant is a passive beneficiary will turn on the "particular facts and events involved in the action." Hartwig, supra. The cases where active participation was espoused did not involve the threshold issue of employment as in this case or injury arising out of and in the course of employment. They were cases involving third party action where the insurer/employer filed a complaint in intervention for recovery of expenses paid in workers' compensation. As in Dressler, supra, the trial in this case was not focused on the lien but on whether there was employment or whether the applicant was an independent contractor. As explained in Soils, supra, and Walsh, supra, lien claimant would cover the same ground as the applicant to establish entitlement to reimbursement of its lien.

Based on the appearances noted in the case file, lien claimant's Declaration and the settlement documents in this case, I find Medi-Cal was not a passive beneficiary of a fund created by the efforts of applicant's counsel. The number of actual appearances set forth in the case file and its appearance at the Mediation represent more than a token appearance. Further, the fund from which the attorney's fee is being sought was the product of negotiations between Medi-Cal and defendant and not the between defendant and applicant. Where there is participation by two separate counsels, the attorney's fee for each counsel is determined by the amount of recovery for each respective party. In this case, the

attorney's fee awarded is payable from the applicant's settlement and the lien claimant representative fee would be from the negotiated settlement or separate agreement with lien claimant. Draper v. Aceto(2001) 26 Cal. 4th 1086.

Discussion

A. WAS THE PETITION FOR RECONSIDERATION PROPERLY VERIFIED?

CCP section 446 provides:

> **(a)** Every pleading shall be subscribed by the party or his or her attorney. When the state, any county thereof, city, school district, district, public agency, or public corporation, or any officer of the state, or of any county thereof, city, school district, district, public agency, or public corporation, in his or her official capacity, is plaintiff, the answer shall be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or, unless a county thereof, city, school district, district, public agency, or public corporation, or an officer of the state, or of any county, city, school district, district, public agency, or public corporation, in his or her official capacity, is defendant. When the complaint is verified, the answer shall be verified. **In all cases of a verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his or her information or belief, and as to those matters that he or she believes it to be true;** and where a pleading is verified, it shall be by the affidavit of a party, unless the parties are absent from the county where the attorney has his or her office, or from some cause unable to verify it, or the facts are within the knowledge of his or her attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he or she shall set forth in the affidavit the reasons why it is not made by one of the parties.

Labor Code section 5902 requires the Petition for Reconsideration "be verified upon oath in the manner required for verified pleadings in courts of record". The same is required for a Petition for Removal per 8 CCR 10843(b) The declaration did not have the highlighted language and therefore, is technically deficient. The Appeals Board may dismiss both Petitions.

B. WAS THE PETITION FOR REMOVAL TIMELY FILED?

CCR 10843(a) provides a Petition for Removal may be filed 20 days after the service of a determination or an occurrence. Petitioner asserts the refusal to enforce an Order Compelling

Medi-Cal to participate in discovery has substantially prejudiced and caused irreparable harm. The complained action took place on December 30, 2010, when WCJ Hettick order all issues except the threshold issue of whether petitioner is entitled to an attorneys' fee from the DHS lien settlement be deferred. A Petition for Removal should have been filed from this determination and therefore, it is untimely and should be dismissed.

If the Petition for Removal is considered timely filed, petitioner has suffered irreparable harm or was significantly prejudiced by the order of WCJ Hettick. The parties were allowed to provide a factual basis for their respective positions by Declaration and to submit a counter Declaration if there is a dispute on the factual presentation provided by the opposing party. Further, the determination of whether DHS was a passive beneficiary was based on the Kavanaugh court decision and the en banc Soils decision which held participation is not based on weighing the contribution of each party. This is discussed below.

C. WAS THE DETERMINATION THAT PETITIONER WAS NOT ENTITLED TO AN ATTOREYS' FEE FROM DHS RECOVERY JUSTIIFED?

Petitioner asserts that the threshold issue framed by WCJ Hettick was never addressed, that the evidence did not justify the Finding of Fact, that there was no evidence DHS attended a Meditation, that the number of appearances made by petitioner and DHS established a lack of participation, a that the decision misapplied the law and that the decision was based on speculation.

The threshold issue for determination was whether the petitioner was entitled to an attorneys' fee from the recovery of DHS. Whether DHS was a passive beneficiary required a factual basis and therefore, the parties were requested to submit declarations setting forth the participation or lack of participation by DHS during the litigation. If either party disputed the other's declaration, they were allowed to submit a counter declaration setting forth what was disputed. Petitioner did not dispute appearances were made at mediation by DHS. Based on the declaration of Hentschel and the Minutes of Hearing, DHS established appearances were made on behalf of Medi-Cal and, based on the case law cited above, established it was not a passive beneficiary.

Recommendation

It is recommended that the Petition for Reconsideration be DENIED.

Gene M. Lam
Workers' Compensation Judge
Workers' Compensation Appeals Board

The Report and Recommendation on Petition for Reconsideration were filed and served on the

Date: 9/27/2011
By: R. Oosterbaan