WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FELIX NINO MOTA, ***Applicant,*** **vs.** **ALLGREEN LANDSCAPE; NATIONAL INSURANCE COMPANY, Administered by FARA Adjusting Services,** ***Defendants.***	**Case No. ADJ2567272 (AHM 0105012)** **OPINION AND AWARD OF ADDITIONAL ATTORNEY'S FEES (LAB. CODE, §§ 5801, 5811)**

This matter is before the Appeals Board on the issue of "reasonable" appellate attorney fees under Labor Code section 5801,[1] plus appellate costs under section 5811. For the reasons that follow, and for the reasons stated in our October 15, 2012 notice of intention (NIT),[2] which we adopt and incorporate by reference, we will award a section 5801 fee of $2,500 to applicant's attorneys, rather than the $51,900 they originally requested. We will also award undisputed section 5811 costs in the amount of $104.67.

Briefly, as background, the Court of Appeal issued an order denying defendant's petition for writ of review and found under section 5801 that "there is no reasonable basis for the petition." Therefore, the Court remanded this case to the Appeals Board to make a supplemental award of "reasonable

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[1] Unless otherwise noted, all further statutory references are to the Labor Code.

In pertinent part, section 5801 provides:

> "In the event the injured employee or the dependent of a deceased employee prevails in any petition by the employer for a writ of review from an award of the appeals board and the reviewing court finds that there is no reasonable basis for the petition, it shall remand the cause to the appeals board for the purpose of making a supplemental award awarding to the injured employee or his attorney, or the dependent of a deceased employee or his attorney a reasonable attorney's fee for services rendered in connection with the petition for writ of review. Any such fee shall be in addition to the amount of compensation otherwise recoverable and shall be paid as part of the award by the party liable to pay such award."

[2] See *Mota v. Allgreen Landscape* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 526 (Appeals Board panel decision).

attorney's fees [to applicant's attorneys] based upon services rendered in connection with the petition for writ of review."

By letter dated June 11, 2012, the Appeals Board informed the parties' attorneys that absent a stipulation regarding a "reasonable" section 5801 attorney's fee, the Appeals Board would determine what constitutes a "reasonable" fee. In addition, the letter stated in relevant part:

> "To facilitate ... determination [of the section 5801 attorney's fee], you may submit to the Appeals Board ... a statement *that sets forth in detail the time expended in rendering legal services* relating to the petition for writ of review and that specifies the hourly rate being requested. In addition, you may submit a statement in support of the hours and/or hourly rate being requested. ... If more than one person was involved in performing the claimed legal services, *the itemization should set forth the time expended by each person* and the hourly rate claimed for each."
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> (Italics added.)

On June 26, 2012, applicant's attorneys submitted three *unitemized* declarations claiming a section 5801 attorney's fee in the total amount of $51,900, i.e., 62 hours at $500 per hour for Susan E. Kaplan, Esq.; 16 hours at $550 per hour for R. Jeffrey Evans, Esq.; and 22 hours at $550 per hour for Gary R. Kaplan, Esq.

On October 15, 2012, we issued our NIT.

Preliminarily, for four basic reasons, our NIT stated that "the three declarations submitted by applicant's attorneys are inadequate to support their request for a section 5801 fee of $51,900.00." In brief, these four reasons were the following.

First, "the declarations do not cite to itemized billings or, indeed, anything that might indicate the time expended on (and the dates of) each specific task" and, therefore, "the declarations of time expended are essentially completely unsupported."

Second, "although the declarations claim a total of 100 hours of attorney time rendered in connection with defendant's petition for writ of review, the declarations give no indication of why so many hours were reasonably required."

Third, "the declarations include statements that the attorneys' 'usual and customary' rates are $500 to $550 per hour, but the statements are not supported by such potential factors as the attorneys'

status as certified workers' compensation specialists, if any, or the degree of care exercised and the effort required because of the legal or factual issues involved. Furthermore, a mere declaration that the stated rates of $500 and $550 per hour actually represent applicant's attorneys' 'usual and customary' rates for appellate work does not establish that those rates are *reasonable*." (Italics in original.)

Fourth, "Ms. Kaplan's declaration also claimed $500 per hour for time she spent performing clerical tasks. However, section 5801 provides for 'a reasonable attorney's fee for services rendered in connection with the petition for writ of review.' We interpret 'services' in this context to mean *legal* services rendered by the attorney, not clerical services the attorney may have performed. (See, e.g., *Marquez v. B&S Auto & Truck* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 248 [section 5801 attorney's fee not allowed for attorney's hand delivery of answer to Court of Appeal].)" (Italics in original.)

Having concluded that applicant's attorneys' declarations were inadequate to support an award of a reasonable attorney's fee under section 5801, our NIT stated that, where the fee declarations submitted are inadequate to support a section 5801 fee request, we ordinarily determine a reasonable fee based on our independent review of the record. Moreover, in the absence of the $51,900 fee claimed, we would have determined that a fee award in the range of $14,000 to $16,000 would have been "reasonable" based on our independent review.

However, based on an extensive discussion of California and corresponding federal case law, we emphasized that, where the original request for a "reasonable" attorney's fee is unreasonably inflated, we may award less than what would otherwise be a "reasonable" fee or even allow no fee at all.

For example, we cited to *Chavez* v. *City of Los Angeles* (2010) 47 Cal.4th 970, in which the California Supreme Court affirmed a trial court's denial of a "reasonable" attorney's fee under Code of Civil Procedure section 1033(b)(2), citing to the "established principle governing attorney fee awards" that "[a] fee request that appears unreasonably inflated is a special circumstance permitting the trial court *to reduce the award **or deny one altogether**.*" (*Chavez*. 47 Cal.4th at p. 990 [italics and bolding added; internal quotation marks omitted]; accord: *Ketchum* v. *Moses* (2001) 24 Cal.4th 1122, 1137.) The California Supreme Court went on to declare:

> "Here, the trial court reasonably could and presumably did conclude that plaintiff's attorney fee request in the amount of $870,935.50 for 1,851.43 attorney hours was

> grossly inflated when considered in light of the single claim on which plaintiff succeeded, the amount of damages awarded on that claim, and the amount of time an attorney might reasonably expect to spend in litigating such a claim. This fact alone was sufficient, in the trial court's discretion, to justify denying attorney fees altogether."
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> (*Chavez*, 47 Cal.4th at p. 991.)

In making these statements, *Chavez* cited to the Supreme Court's earlier decision in *Serrano v. Unruh* (1982) 32 Cal.3d 621, which addressed the issue of attorney's fees awarded under Code of Civil Procedure section 1021.5, i.e., the "private attorney general" statute. *Serrano* said:

> "[The private attorney general fee statute] does not license prevailing parties to force their opponents to a Hobson's choice of acceding to exorbitant fee demands or incurring further expense by voicing legitimate objections. Prevailing parties are compensated for hours reasonably spent on fee-related issues. A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether. [Footnote.] *'If ... the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place To discourage such greed, a severer reaction is needful. ... ' (Brown v. Stackler* (7th Cir. 1980) 612 F.2d 1057, 1059.)"
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> (*Serrano*, 32 Cal.3d at p. 635 [emphasis added].)

Therefore, for the limited purpose of assisting us in determining what fee, between $0 and $16,000, should be awarded, our NIT allowed applicant's attorneys to file properly itemized declarations. We were not allowing applicant's attorneys a "second bite of the apple" at justifying the original $51,900 inadequate and defective fee request.

On November 2, 2012, applicant's attorneys filed a response and three supplemental declarations consequent to our October 15, 2012 NIT. Based on our review of the three latest fee declarations, together with our review of the prior declarations and the appellate record, we conclude that the latest fee declarations are not credible and, instead, represent an inaccurate and inadequate after-the-fact attempt to justify the original un-itemized fee request.

In concluding that the three supplemental declarations represent a non-credible, inaccurate, and inadequate after-the-fact attempt to justify the original un-itemized fee request, we observe that all three

declarations claim that legal services were rendered in connection with the petition for writ of review *before* (according to its proof of service) it was even mailed and *before* the petition presumably would have been received by the attorneys in the course of ordinary mail.

That is, the three attorneys' most recent declarations claim to have expended a total of 34.8 hours of legal services between them from Monday, March 12, 2012 through Wednesday, March 14, 2012. Specifically, Ms. Kaplan's declaration claims to have expended 1.7 hours on March 12, 2012, 6.6 hours on March 13, 2012, and 8.7 hours on March 14, 2012. Mr. Evans' declaration claims to have expended 1.4 hours on March 12, 2012 and 5.5 hours on March 13, 2012. Mr. Kaplan's declaration claims to have expended 0.9 hours on March 12, 2012, 3.9 hours on March 13, 2012, and 6.1 hours on March 14, 2012.

Yet, the proof of service to defendant's petition for writ of review, executed under penalty of perjury, declares that the petition was mailed in envelopes "with first-class postage" *on Tuesday, March 13, 2012.* Applicant's attorneys do not challenge the proof of service to defendant's petition for writ of review and, therefore, we will presume that the petition was in fact mailed on March 13, 2012 and not some earlier date. (Code Civ. Proc., § 1013(a)(3); *Forslund v. Forslund* (1964) 225 Cal.App.2d 476, 486.) Indeed, the March 13, 2012 mailing date declared on defendant's proof of service is consistent with the Appeals Board's date-stamp reflecting that we received the petition by mail on Thursday, March 15, 2012. Moreover, the apparent truth and accuracy of the March 13, 2012 proof of service is also supported by its declaration that the petition for writ review was "[d]ispatched by courier for filing [with the Court of Appeal] on this date." This is consistent with the Court of Appeal's docket, which reflects that the petition was filed on March 13, 2012.

Necessarily, the three attorneys' declarations cannot possibly establish how they each could have performed legal services in connection with the petition for writ of review on March 12, 2012, i.e., *the day before it was even mailed to them*. Nor do the declarations establish how they could have performed legal services in connection with the petition on March 13, 2012, *the day the petition was mailed to them*.

We also conclude that the declarations do not credibly establish that legal services were rendered on March 14, 2012, the day after the petition was sent to applicant's attorneys by first class mail.

First, a properly mailed document "is presumed to have been received in the ordinary course of

mail." (Evid. Code, § 641.) In this context, we believe the most reasonable presumption is that the copy of the petition defendant sent from Pasadena by first class mail on March 13, 2012 arrived at applicant's attorneys' offices in Los Angeles on March 15, 2012.

Second, even if we were to assume that the copy of the petition sent from Pasadena by first class mail on March 13, 2012 arrived in Los Angeles on the very next day (i.e., March 14, 2012), we would still disbelieve Ms. Kaplan's and Mr. Kaplan's claims that they expended 8.7 hours and 6.1 hours, respectively, on March 14, 2012. That is, even if the petition was actually received on March 14, 2012, we would find it incredible that, once received, the petition was *immediately* processed by applicant's attorneys' staff and then Ms. Kaplan and Mr. Kaplan each *immediately* expended close to a whole working day on it.

This is not to say that, as a matter of law, attorneys like these—who apparently fail to track their actual time using legal billing software or some other contemporaneous tracking method—are precluded from retroactively making reasonable estimates of their hours based on a thorough review of their files. However, when such an *ex post facto* method of billing is used, the hours billed must bear some reasonable relationship to reality. This, of course, is not the case when itemized billings, which have been declared under penalty of perjury to be true and correct, claim to have rendered legal services on a petition for writ of review before it was mailed and before it reasonably could have been expected to have been received.

The defects in the three attorneys' declarations are not limited to the extremely troubling problem that they claimed to have rendered legal services in connection with the petition for writ of review before, we conclude, they ever could have received or processed it. For example, although none of the declarations of time expended submitted by the three attorneys bothered to tally the total number of hours claimed, the Board has independently undertaken such a tally. In his original declaration, Mr. Kaplan claimed a total of 22 hours at $550 per hour. However, his most recent declaration totals only 20 hours. This, among other things, further supports our conclusion that the declarations are non-credible, inaccurate, and inadequate after-the-fact attempts to rationalize the $51,900 fee claimed. (We observe further that, notwithstanding the two fewer hours itemized in Mr. Kaplan's second declaration,

applicant's attorney's overall fee request was not correspondingly reduced by $1100.)

Because we conclude that the declarations are not credible, and possibly even perjurious, and we will entirely disregard them.

Next, we note that, in response to some comments made in our NIT,[3] applicant's attorneys assert that some roundtable discussions of the issues among all three of them were reasonably appropriate, and that a managing partner would reasonably provide some oversight of the work of associates. We do not disagree with the concept. Nevertheless, the assertion is effectively rendered a non-issue because the meetings involving two or all three of the attorneys totaled only 2.9 hours—a fact obviously not alleged in the original *unitemized* declarations on which our NIT was based. Furthermore, the three declarations fail to persuade us that *all three attorneys* had to *independently* conduct extensive legal research[4] and *independently* read the cases the others discovered,[5] especially given that each of them claims to have practiced law for at least 16 years with appellate experience of at least 15 years. Thus, this was not an instance where a partner was overseeing the work of some first or second-year associates.

In addition, as discussed in our NIT, each of the three attorneys claims a usual and customary hourly rate in the range of $500 to $550 per hour. Their unverified response to the NIT also claims that such hourly rates are reasonable because appellate work in Los Angeles County is billed at a minimum of $575 per hour and as high as $900 per hour. Yet, our prior opinion stated that billing at a particular rate does not make the rate "reasonable," and that we were unaware of any case in which the WCAB has awarded a section 5801 attorney's fee at a rate of $500 to $550 per hour. Applicant's attorneys' response cites to no such cases.

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[3] In our NIT, we said: "[T]he fee request offers nothing to reasonably justify the apparently significant number of hours allegedly rendered in multiple reviews and revisions and, in particular, nothing to justify the multiple meetings allegedly involving all three attorneys, which meetings were billed at a total of $ 1,600 per hour."

[4] Ms. Kaplan's supplemental declaration claims she spent a total of 14.1 hours conducting legal research. Mr. Kaplan's supplemental declaration claims he spent a total of 8.8 hours conducting legal research. Mr. Evans' supplemental declaration claims he spent a total of 8.6 hours conducting legal research.

[5] Ms. Kaplan's supplemental declaration claims she spent 1.9 hours reading cases the others discovered. Mr. Kaplan's supplemental declaration claims he spent 2.3 hours reading cases the others discovered. Mr. Evans' supplemental declaration claims he spent 1.7 hours reading cases the others discovered.

Finally, notwithstanding the statement in our prior opinion that "a reasonable attorney's fee for services rendered in connection with the petition for writ of review" refers to *legal* services rendered by the attorney, not clerical services the attorney may have performed, Ms. Kaplan's second declaration persists in claiming services, at $500 per hour, for such things as making copies of exhibits for the answer, Bates-stamping and collating exhibits for the answer, sorting the answer, traveling to and from a photocopy facility, preparing envelopes, and mailing the answer.

Accordingly, for the reasons stated in our NIT, which we adopt and incorporate in full by reference, and for the reasons stated above, we will not award a section 5801 fee in the range of $14,000 to $16,000. Nevertheless, while the overreaching by applicant's attorneys and their non-credible and inadequate declarations in response to our NIT might well call for a "reasonable" fee of $0 (as more extensively discussed in our October 15, 2012 opinion at 4:18-7:6), the record does reflect that applicant's attorneys rendered some valuable legal services in connection with the petition for writ of review, which involved some issues not commonly presented in workers' compensation cases. Therefore, even though their original fee request was unreasonably inflated, and even though their response to our NIT is inadequate for the reasons specified above (among others), we will allow a section 5801 fee of $2500.

We emphasize that our decision on fees is expressly intended to deter applicant's attorneys from making future unreasonably inflated fee requests that are not supported by adequate and accurate time itemizations (or, worse, that are based on non-credible and possibly even perjurious declarations). We specifically observe that our intent is to deter them not only from making unreasonably inflated fee section 5801 requests, but also any other type of "reasonable" attorney's fee request, including but not limited to deposition attorney's fees (Lab. Code, § 5710(b)(4)), fees for compensation unreasonably delayed subsequent to the issuance of an award (Lab. Code, § 5814.5), and even fees claimed as a lien against ordinary benefits (Lab. Code, § 4906 [esp., subd. (d)], Cal. Code Regs., tit. 8, § 10775). Moreover, we caution applicant's attorneys that if they do make such improper fee requests in the future, not only do they risk being allowed a $0 attorney's fee, but they also risk sanctions under section 5813 and WCAB Rule 10561. (Cal. Code Regs., tit. 8, § 10561.)

We will, however, allow the full $104.67 amount of the costs requested by applicant's attorneys under section 5811.

For the foregoing reasons,

AWARD IS MADE in favor of **GRAIWER & KAPLAN, L.L.P.** and against **EVEREST NATIONAL INSURANCE COMPANY** of Labor Code section 5801 attorneys' fees in the amount of $2,500.00 and Labor Code section 5811 costs in the amount of $104.67, payable forthwith, in addition to the amount of any compensation otherwise paid or payable to applicant.

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY

NEIL P. SULLIVAN

I CONCUR,

FRANK M. BRASS

ALFONSO J. MORESI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JAN 29 2013

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

FELIX NINO MOTA
GRAIWER & KAPLAN
STOCKWELL, HARRIS, WOOLVERTON & MUEHL

NPS/JTL/bea