

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS

FROM: JOE TRUCE

DATE: August 15, 2003

RE: **APPLICANT'S OBLIGATION TO REVIEW AND SIGN HIS DEPOSITION TRANSCRIPT AND PAYMENT OF LABOR CODE §5710 ATTORNEYS FEES**

For some years we have all been frustrated by the singular lack of interest of an applicant in reviewing and/or signing the original of his deposition transcript.

In the usual case we will take the deposition of the applicant and shortly thereafter (even before the deposition is transcribed) we receive a request for payment of Labor Code §5710 deposition fees. The request is usually in the form of a formal pleading requesting said fees and is served on us by proof of service.

If we do not immediately respond to the petition (and sometimes even when we do), the applicant's attorney will simply obtain an ex parte order and then serve the order on both our office and our client. Most of these orders to pay Labor Code §5710 deposition fees contain a so-called "self destruct order" giving the defense an opportunity to file and serve an objection rendering the order null and void. However, if the order to pay Labor Code §5710 deposition fees does not contain such a self-destruct order, our only recourse is to file a Petition for Reconsideration.

Therefore, it is significant that we have recently received two significant and favorable Trial court decisions on Labor Code §5710 deposition fees.

These are as follows:

1. The first case involves a favorable decision obtained by D'Arcy Swartz, who is now the Managing Partner of our San Diego office. In the case of Belen Lopez v. Arly Corporation¹ D'Arcy attempted to initially take the deposition of the applicant but the applicant's contract attorney was so disruptive that D'Arcy finally had to discontinue the deposition proceedings. Thereafter, D'Arcy reached agreement with the applicant's attorney for a second deposition, which was obtained without incident. D'Arcy certainly intended on resisting any petition for Labor Code §5710 deposition fees. However, applicant's counsel

¹The case of Belen Lopez v. Arly Corporation, Case no. LAO 0801940, is enclosed.

MEMO TO ALL ATTORNEYS/CLIENTS
RE: LABOR CODE §5710 DEPOSITION FEES
August 15, 2003
Page 2

(a well known applicant's firm in Los Angeles) filed a Petition for Deposition Fees and D'Arcy issued the appropriate objection. Notwithstanding, the applicant's attorney obtained an ex parte order for deposition fees from Judge Barbara Burke at the Los Angeles office of the Appeals Board and neglected to serve Judge Burke with D'Arcy's objection to the award of fees. Therefore, Judge Burke issued an Order awarding Labor Code §5710 fees and as the Order did not contain a self destruct Order, D'Arcy petitioned for reconsideration to the full Appeals Board in San Francisco, setting forth his objections to the award of Labor Code §5710 attorneys fees. Once Judge Burke realized that she had not been given D'Arcy's objection by the applicant's attorney, Judge Burke vacated her decision and stated in relevant part as follows:

“It is assumed that there is no objection to petition for fees, for if there is an objection, presenting the petition as a walk through matter is a knowing denial of the right of real parties in interest to notice and an opportunity to be heard on the petition, a denial of due process...”

Furthermore, Judge Burke went further and indicated that the issue of Labor Code §5813 sanctions, costs and attorneys fees for applicant's attorney's "conduct in obtaining the June 2, 2003 order and serving said order, proof of service by Aida Govea of Hinden, Grueskin & Rondeau averring under penalty of perjury she mailed the order to defense counsel on June 4th, but the envelope enclosing a copy of said order sent to defense counsel bears a postmark of June 17, 2003, remain off calendar...”

Suffice to say, Judge Burke was not pleased with the conduct of the applicant's attorney and intends to hold a hearing on the issue of Labor Code §5813 sanctions.

2. The second case is a Trial court decision from Northern California entitled Amy Mitchell v. Christopher Michael Salon & Spa and Farmers Insurance Exchange, case no. FRE 0202184.²

In this case the workers' compensation judge held that the reasonable period within which to pay Labor Code §5710 deposition fees "is 20 days after applicant reviews, executes and returns the deposition to defendant...”

According to this decision by Judge Obata, a Labor Code §5710 attorneys fee is not payable

²A copy of the Trial court decision is enclosed with this memo.

MEMO TO ALL ATTORNEYS/CLIENTS
RE: LABOR CODE §5710 DEPOSITION FEES
August 15, 2003
Page 3

until the deposition is transcribed and is signed by the applicant. In analyzing the intent behind Labor Code §5710, Judge Obata states in relevant part as follows:

“Defendant is entitled, nevertheless, to have the deponent review and sign the deposition. The reasonable period to pay attorneys fees thus should take that into consideration. Accordingly, it will be found that the reasonable time in which to pay attorneys fees under Labor Code §5710, after applicant’s attorney has tendered a bill, is 20 days after the applicant reviews, dates, signs and returns the deposition to defendant...”

According to Judge Obata, defendant’s obligation is to “make the deposition available to applicant for review within a reasonable time after completion of the deposition...”

In many cases we do not waive the provisions of CCP 2025 and the original of the deposition remains in the custody of the court reporter, who then advises the applicant by letter that the deposition is ready to be signed. The applicant then has the option of either going to the court reporter’s office and reviewing and signing the deposition, or making his corrections by Certified Mail.

I would think the reasoning of Judge Obata would apply equally to a deposition in which the examining attorney leaves a blank for the applicant to fill in certain information. In these type of situations good practice would be to indicate that we do not consider that the deposition is completed until the applicant provides the requested information.

Happy deposing! Good work D’Arcy.

WJT:dab
Enclosure - Lopez and Mitchell cases

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

BELEN LOPEZ,

Applicant

vs.

ARLY CORPORATION, CIGA for
SUPERIOR NATIONAL INSURANCE

In liquidation,

Defendants

CASE NO. LAO 0801940

ORDERS

Petition for reconsideration filed July 7, 2003 from an order of deposition fees obtained ex parte June 2, 2003 as a walk through matter for immediate action, pursuant to Title 8, Cal Regs 10890 noting petitioner had filed and served it's objection before said order issued, and good cause appearing in the objection, not matched to the file before the order issued,

IT IS ORDERED the order of attorneys' fees filed June 2, 2003 be vacated and set aside nunc pro tunc as having issued in error, Title 8 Cal Regs 10859. The issues addressed in the petition for reconsideration, notice and an opportunity to be heard, are not specifically addressed in Title 8, Cal Regs 10890(b)(4) which permits ex parte presentation of petitions for deposition fees as walk through matters for immediate approval. It is assumed there is no objection to petition for fees, for if there is an objection, presenting the petition as a walk through matter is a knowing denial of the right of real parties in interest to notice and an opportunity to be heard on the petition, a denial of due process.

IT IS FURTHER ORDERED applicant's attorneys present no further petitions for deposition fees to the undersigned judge in this case as ex parte walk through matters for immediate action.

IT IS FURTHER ORDERED Labor Code Section 5710 attorneys' fee issues and Labor Code Section 5813 issues of sanctions, costs and attorneys' fees for applicant's attorneys' conduct in obtaining the June 2, 2003 order and serving said order, proof of service by Aida Govea of Hinden, Grueskin & Rondeau averring under penalty of perjury she mailed the order to defense counsel June 4th, but the envelope enclosing a copy of said order sent to defense counsel bears a postmark of June 17, 2003, remain off calendar for the filing of a valid declaration of readiness to proceed, or hearing set on board motion.

Filed July 8, 2003 at
Los Angeles, California
Served by mail as shown
on the Official Address Record
on 7-8-03

by [Signature]

[Signature]

WCJ Barbara Burke

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

AMY MITCHELL,

Applicant,

vs.

CHRISTOPHER MICHAEL SALON & SPA
and FARMERS INSURANCE EXCHANGE,

Defendants.

Case No. FRE 0202184

FINDINGS AND AWARD

This matter having been heard by and submitted for decision to KEIGO OBATA, Workers' Compensation Administrative Law Judge, said Judge now Finds and Awards as follows:

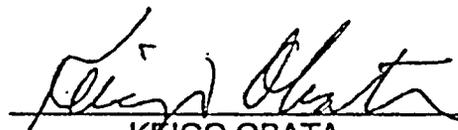
FINDINGS OF FACT

1. Amy Mitchell, born 11/17/77, while employed on 4/27/01, as a massage therapist, occupational group number 311, at Dublin, California, by Christopher Michael Salon & Spa, sustained injury arising out of and occurring in the course of employment to the left upper extremity.
2. The reasonable time period within which to pay attorney's fees under Labor Code Section 5710 after billing is 20 days after applicant reviews, executes, and returns the deposition to defendant.
3. Penalties are not applicable.

AWARD

Payment of attorney's fees as indicated in Finding of Fact No. 2 above.

A Petition for Reconsideration from this decision shall be filed only at the Fresno district office of the Workers' Compensation Appeals Board.


KEIGO OBATA
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Filed and Served by mail on: *07.30.03*
On all parties on the
Official Address Record.
By: Darlene Hobbs

P. Sloper

MITCHELL, A.
FRE 0202184

Amy Mitchell

vs

Christopher Michael Salon,
Farmers Ins. Exchange

Opinion on Decision

Applicant's claim of penalties and sanctions for defendant's unreasonable delay in payment.

When do attorneys fees under Labor Code Section 5710 have to be paid?

Applicant asserts that payment must be made after the deposition testimony is completed, defendant asserts that payment is not due until the deposition is reviewed and executed by applicant.

Labor Code Section 5710 in relevant part states the following with respect to attorney's fees for a deposition of an injured worker or dependent of an injured worker:

(b) Where 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:

(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.

Based on a strict reading of this statute standing alone, attorney's fees are technically not payable until the appeals board in its discretion allows and sets a fee.

Be that as it may, under Labor Code Section 3202, the legislature has mandated that statutes in Division 4 and 5 of the Labor Code "...be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of employment". Attorney's fees are such benefits.

As a matter of practice, the parties very often adjust the fees and the defendant makes payment without any appeals board intervention. Needless to say, the appeals board encourages and prefers resolution by compromise without the necessity of intervention.

Under Labor Code Section 5814 when payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to an award, the full amount of the order, decision or award shall be increased by 10 percent.

And under Labor Code Section 5813, the board may order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

Finally, under Rule 10109, "... a claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for workers' compensation benefit ... (and) ... supply the information needed to provide timely benefits ...". (Rule 10109(a), and (b)(1); in relevant part).

On this record, a penalty applies if the defendant does not attempt to adjust attorney's fees due under Labor Code Section 5710, delays payment, and appears before the appeals board without good cause for non-payment. A defense of "we never have to pay until the appeals board sets a fee and orders us to" is contrary to legislative intent and will not be entertained.

What then would be a reasonable time to pay?

There are some guide lines in other statutes.

Under Labor Code Section 5814, "(W)hen payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to an award", payment is subject to a 10% increase on the entire species. A reasonable period for payment in the normal course of business is usually twenty days. In stipulations with request for awards and awards pursuant to compromise and releases, the parties very often add that interest is not due if the award is paid within twenty days of approval. After twenty days, the burden shifts to defendant to prove that payment beyond that period was not unreasonable.

For medical-legal payments under Labor Code Section 4622, payment must be made within sixty days of billing or defendant becomes subject to a 10% increase and 7% interest. In the case of attorney's fees for deposition of an applicant by the defendant, unlike QME examinations by a physician selected by applicant, the defendant is the party that initiates the procedure and defendant is present at the deposition. Defendant thus is in a position to evaluate payment from the moment the deposition is completed. The reasonable time to pay therefore need not be as long as that for medical-legal payments for which defendant usually obtains first notice upon receipt of service of the medical-legal report.

Defendant is entitled, nonetheless, to have the deponent review and sign the deposition. The reasonable period to pay attorneys fees thus should take that into consideration.

MITCHELL, A.
FRE 0202184

Accordingly, it will be found that the reasonable time in which to pay attorneys fees under Labor Code Section 5710, after applicant's attorney has tendered a bill, is twenty days after applicant reviews, dates, signs and returns the deposition to defendant.

Defendant, pursuant to the sections cited above, has the duty to make the deposition available to applicant for review within a reasonable time after completion of the deposition.

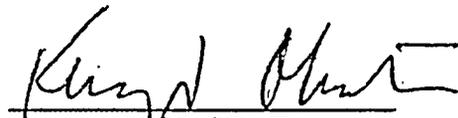
Penalties: The record here indicates that the deposition was taken 06/27/02, the bill is dated 07/01/02, the deposition was available for review by 07/23/02 based on defendant's letter of that date, and as of 05/05/03 according to the Stipulated Statement of Facts, applicant had not signed and returned the deposition.

Penalties are not applicable.

Served by mail on parties
listed on the Official
Address Record.

By:

P. Sloper
07.30.03


KEIGO OBATA
WORKERS' COMPENSATION
ADMINISTRATIVE LAEW JUDGE