

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



Case Number: FRE 2021 84

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.

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.

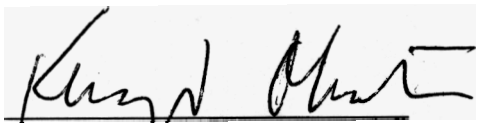
Defendant, pursuant to the sections cited above, has the duty to make the deposition available to applicant for review within a reasonable time *after* completion of the deposition.

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

