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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. ADJ4640837 (GRO 0031810)

JOEY M. COSTA,

Applicant,

vs.

**HARDY DIAGNOSTIC and STATE
COMPENSATION INSURANCE FUND,**

Defendant(s).

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration in this matter to further study the factual and legal issues in order to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. The following is our Decision After Reconsideration.

Previously, the Appeals Board had issued two en banc decisions in this case.¹

In "*Costa I*" (2006) 71 Cal. Comp. Cases 1797, the Appeals Board held that (1) the applicant had not met his burden of proving that the new permanent disability rating schedule (PDRS) under Labor Code section 4660² was invalid, and (2) as under former section 4660, current section 4660 allows the parties to present rebuttal evidence to a proposed rating and that the costs of such rebuttal evidence may be allowable under section 5811. In addition, contrary to the determination of the workers' compensation administrative law judge (WCJ), the costs for the

¹ Pursuant to Labor Code section 115, a majority of the Appeals Board voted that this matter not continue to be determined en banc, but be decided by a three-member panel, as it no longer presents novel issues, nor is uniformity of decision paramount. However, as Commissioner Frank Brass is the only remaining panel member of the original three assigned to this matter, Commissioners Merle Rabine and Janice Murray having completed their terms with the Appeals Board, Commissioners Alfonso Moresi and Deidra Lowe have been assigned in their place.

² Unless otherwise noted, all further statutory references are to the Labor Code.

1 testimony of the applicant's vocational rehabilitation expert, Ann Wallace, Ph.D., and for her
2 report to the extent "some of her work in preparing that report may have provided a foundation for
3 her testimony," were allowed in an amount to be adjusted between the parties.³

4 In "*Costa II*" (2007) 72 Cal. Comp. Cases 1492, following the petition for reconsideration
5 filed by defendant State Compensation Insurance Fund (SCIF) regarding the reimbursement of Ms.
6 Wallace's costs under section 5811, the Appeals Board reaffirmed its prior holding that section
7 4660 continues to allow the parties to present evidence on and/or in rebuttal to a permanent
8 disability rating under the new PDRS, and that the costs of such evidence may be allowable.
9 Additionally, the Appeals Board concluded that the standards for allowing such costs, as with
10 medical-legal costs, are whether they were reasonable and necessary at the time they were incurred.
11 Thus, vocational rehabilitation expert evidence may be reimbursable even though the injured
12 worker is not successful in his or her claim, and even if the expert evidence does not rebut or
13 successfully affect the permanent disability rating. (*Costa II, supra*, 72 Cal.Comp.Cases at p.
14 1498.) Accordingly, the prior decision in this matter was amended to defer the issue of
15 reimbursement for the costs incurred by Ms. Wallace, and returned this matter to the trial level for
16 the WCJ to apply the standards set forth in *Costa II*.

17 In his decision issued on February 22, 2008, the WCJ found that "[d]efendant is not liable
18 to pay any cost related to the reports and testimony of Ann Wallace, Ph.D., as [they are] incapable
19 of proving or disproving a disputed fact, her conclusions are totally lacking in credibility, and her
20 reports and testimony must have at leas[t] the potential to affect a permanent disability rating in
21 order for their cost[s] to be recoverable." Applicant sought reconsideration, contending that Ms.
22 Wallace is entitled to reimbursement as her conclusions were based on his diminished earning
23 capacity, including work restrictions, and that if "reasonable minds" differ about the methodology
24 utilized by such experts, as Ms. Wallace, then she is entitled to reimbursement. Applicant also
25 submitted a supplemental petition for reconsideration "pursuant to WCAB Rule § 10848," in

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27 ³ We agreed with the WCJ, however, that Ms. Wallace's report was inadmissible and that her testimony did not rebut the PD rating in this case.

1 which he “prays that this supplemental petition, and the attached authorities be weighed, and
2 considered by the Board in determining the current petition for reconsideration for reimbursement
3 of costs.”⁴ Defendant has filed an answer to the petition for reconsideration and the supplemental
4 petition, asserting that the WCJ’s decision should be affirmed.

5 For the reasons discussed below, we will reverse the WCJ and allow the costs of Ms.
6 Wallace’s report and testimony.

7 In now allowing the costs for Ms. Wallace’s testimony and report,⁵ we note that the present
8 matter was one of the first cases to raise the issue of the use of a vocational rehabilitation expert to
9 rebut the new 2005 PDRS. Indeed, the Appeals Board did not set forth the standards for allowing
10 reimbursement for such rebuttal evidence until *Costa II*, as *Costa I* was concerned primarily with
11 addressing the challenge to the validity of the 2005 PDRS itself. Moreover, subsequent to the
12 decision in *Costa II* and the WCJ’s determination here, the Court of Appeal issued its decision in
13 *Barr v. Workers’ Comp. Appeals Bd.* (2008) 164 Cal.App.4th 173, 178 [73 Cal.Comp.Cases 763].

14 *Barr* held that, pursuant to section 5811, the Appeals Board has discretion to award costs
15 for a vocational rehabilitation expert’s report regardless of whether the report is admissible, as
16 nothing in section 5811 suggests that the Appeal Board’s discretion is limited by rules of
17 admissibility and inadmissible reports may be valuable in furthering settlement negotiations or in
18 preparing for trial. Furthermore, the Court in *Barr* cited *Costa II* with approval, noting that it
19 reflected legislative policy to accord the Appeals Board discretion to evaluate whether the costs of
20 a vocational rehabilitation expert are reasonable and necessary based on the facts of each case.
21 Accordingly, *Barr*, in which the WCJ, as affirmed by the Appeals Board had allowed the costs of
22 the vocational rehabilitation expert’s testimony, but not for his report, on the basis of the reports’

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24 ⁴ We have accepted and considered applicant’s supplemental petition and defendant’s answer thereto in reaching our
25 decision herein.

26 ⁵ We note that on January 24, 2007, applicant’s counsel submitted a revised bill for Ms. Wallace’s services in this case
27 and a proposed order. The revised bill subtracted \$65.00 from the original total of \$1040.00, leaving a balance of
\$975.00, reimbursement at the rate of \$130.00 per hour, for two hours re her trial testimony and travel time, \$260.00 +
\$715.00, six hours for the preparation of her report (\$780.00 - \$65.00). We find this revised bill to be reasonable, and
will allow reimbursement in the amount of \$975.00.

1 inadmissibility, was remanded to the Appeals Board to exercise its discretion to determine whether
2 the costs of the report were nonetheless reimbursable.

3 Therefore, given that at the time it was raised, the issue here was one of first impression,
4 that under *Barr, supra*, inadmissibility is *not* a basis for disallowing reimbursement, and that we
5 disagree with the WCJ that the standards set forth in *Costa II* for reimbursement have not been
6 met, we will reverse the WCJ's decision. More specifically, with regard to *Costa II*, as stated
7 previously, the costs for vocational rehabilitation expert evidence, like medical-legal costs, are
8 reimbursable if they were reasonable and necessary at the time they were incurred, and such costs
9 may be reimbursable even though the injured worker is not successful in his or her claim, and even
10 if the expert evidence does not rebut or successfully affect the permanent disability rating.
11 Furthermore, Ms. Wallace's report and testimony are not premised on facts or assumptions so false
12 as to render them worthless (*Penny v. Workers' Comp. Appeals Bd.* (1983) 48 Cal.Comp.Cases
13 468 (writ den.); *Pacific Medical Associates, Inc. v. Workers' Comp. Appeals Bd. (Rodarte)* (1995)
14 60 Cal.Comp.Cases 526 (writ den.)), and contrary to the WCJ, they are not incapable of proving or
15 disproving a disputed fact, nor are their conclusions so totally lacking in credibility that they did
16 not at least have the potential to affect the permanent disability rating.

17 The Appeals Board is the ultimate finder of fact (see Lab. Code, §5953), and on
18 reconsideration, is empowered to re-evaluate the record, to reject the findings of the WCJ, and to
19 enter its own findings, provided they are supported by substantial evidence. *Lamb v. Workers'*
20 *Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281 [39 Cal.Comp.Cases 310]; *Garza v. Workers'*
21 *Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]. While the Appeals Board
22 may not act arbitrarily or capriciously on reconsideration, it has "considerable discretion," "enjoys
23 broad authority to correct injustices" (*Redner v. Workers' Comp. Appeals Bd.* (1971) 5 Cal.3d 83,
24 92 [36 Cal.Comp.Cases 371]), and it can "redetermine the case upon the existing record" and can
25 take a "different view of the same evidence" than the WCJ. (*Argonaut Ins. Exchange v. Industrial*
26 *Acc. Com. (Bellinger)* (1958) 49 Cal.2d 706, 709-712 [23 Cal.Comp.Cases 34.]) This is
27 particularly true where a WCJ's findings are not based predominantly on the witnesses' credibility

1 (see *Garza, supra*, 3 Cal.3d at pp. 318, 319), but are instead based largely on an assessment of
2 documentary evidence such as medical reports, which is an assessment that is “as well made by the
3 [Appeals Board] as the trial judge.” *County of San Bernadino v. Workers’ Comp. Appeals Bd.*
4 (*Ramirez*) (1981) 125 Cal.App.3d 679, 686 [46 Cal.Comp.Cases 1200.]

5 Accordingly, we will rescind the WCJ’s decision and allow reimbursement for the costs of
6 Ms. Wallace’s testimony and report.

7 For the foregoing reasons,

8 **IT IS ORDERED** as the Decision After Reconsideration of the Workers’ Compensation
9 Appeals Board that the decision issued on February 22, 2008, is **RESCINDED** and the following
10 **SUBSTITUED** therefor:

11 **FINDINGS OF FACT**

12 I. Pursuant to Labor Code section 5811, defendant is liable for the costs, which have been
13 determined to be reasonable, of the testimony and report of Ann Wallace, Ph.D.

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1 **ORDER**

2 Defendant State Compensation Insurance Fund is **ORDERED** to pay Wallace & Associates
3 the sum of \$975.00, in accordance with Finding of Fact No. 1.
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5 **WORKERS' COMPENSATION APPEALS BOARD**

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10 **FRANK M. BRASS**

11 **I CONCUR.**

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13 **ALFONSO J. MORESI**

14 **PARTICIPATING, BUT NOT SIGNING**

15 **DEIDRA E. LOWE**
16
17



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

19 **JAN 05 2009**

20 **SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT**
21 **THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:**

22 **JOEY M. COSTA**
23 **STATE COMPENSATION INSURANCE FUND**
24 **WILLIAM HERRERAS**
25 **VOCATIONAL GUIDANCE**
26 **EDD - SANTA BARBARA**

27 **VB/bea**


COSTA, Joey M.