WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ISABEL VALDEZ, *Applicant*

vs.

ROSS STORES, INC.; ARCH INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Numbers: ADJ10892681; ADJ10892685
San Diego District Office

OPINION AND ORDER DENYING PETITIONS FOR RECONSIDERATION

Defendant and Applicant seek reconsideration of the Findings, Award, Order (F&O) issued on July 17, 2024, wherein the workers' compensation administrative law judge (WCJ) found as relevant that (1) while employed as a retail associate on January 17, 2016, applicant sustained injury arising out of and in the course of employment to her lower back and left knee; (2) the injury caused 8% permanent disability in an amount to be adjusted by the parties; (3) applicant will require further medical treatment to cure or relieve her from the effects of injury; (4) applicant's attorney is entitled to a fee of 15% of the permanent disability awarded in an amount to be commuted from the far end of the award after adjustment by the parties; and (5) the parties failed to establish their respective claims for penalties, sanctions, costs and attorney's fees.

The WCJ awarded applicant permanent disability, further medical treatment, and attorney's fees in accordance with the findings.

The WCJ ordered that (1) defendant's petition to set aside the stipulation entered into at the February 21, 2018 trial be granted and that Finding of Fact no. 1 issued on July 11, 2018, regarding applicant's lower back be rescinded; (2) applicant take nothing on her petition for penalties, sanctions and costs filed on October 31, 2018; and (3) defendant take nothing on its petition for sanctions and costs filed on November 10, 2022.

Defendant contends that the WCJ erroneously failed to impose sanctions for applicant's attorney's alleged (1) ex parte communication to the PQME in violation of Labor Code section 4062.3; and (2) bad faith misrepresentations in applicant's petition for sanctions and costs.

Applicant contends that the WCJ erroneously failed to impose (1) Labor Code section 5814 penalties and Labor Code section 5814.5 attorney's fees for allegedly failing to provide timely medical treatment sought by Dr. Whalen; (2) Labor Code section 5813 sanctions and costs for

defendant's alleged failure to authorize chiropractic treatment and alleged frivolous assertion in its petition to suspend benefits that applicant was not participating in discovery; and (3) Labor Code section 5813 sanctions and costs for defendant's alleged bad-faith disregard of the stipulation that applicant sustained lower back injury.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petitions for Reconsideration (Report) recommending that the Petitions be denied.

We have considered the allegations of the Petitions, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will deny the Petitions.

FACTUAL BACKGROUND

In the Report, the WCJ writes:

> This matter proceeded to regular trial over the course of four days on the **sole issue** of whether the applicant could select a chiropractor as her primary treating physician (PTP) (see MOH-SOE, February 21, 2018)[fn]. Neither party raised penalties or reserved jurisdiction over penalties for this trial.
>
> As there are two separate trials in this matter with separate issues to avoid confusion the WCJ will refer to them as the **first trial** and **second trial**.
>
> The first trial was submitted on April 26, 2018. The WCJ issued a decision on July 11, 2018, finding in part that the applicant had sustained an injury to her lower back, left knee, and left leg for date of injury January 17, 2016. In making this finding, the WCJ relied entirely on the stipulation of the parties at the first trial (see MOH-SOE, February 21, 2018, Stipulation 1).
>
> The WCJ further found that the applicant was entitled to select, and the defendant had to authorize, a chiropractor to act as her primary treating physician.
>
> Concurrently, following the submission of the first trial on April 26, 2018, defendant sought the WCAB assistance with discovery. On June 8, 2018, the defendant filed a petition to compel applicant to attend a lumbar MRI scheduled for June 26, 2018.
>
> On June 11, 2018, an order signed by the Presiding Judge (PJ) Levy ordered applicant to appear to the June 26, 2018, MRI with a provision for suspending of benefits "subject to being heard". Applicant failed to appear for the June 26, 2018 MRI in violation of the PJ's order. Defendant thereafter filed a petition to suspend or bar benefits on July 19, 2018.

On October 5, 2018, the defendant filed another DOR for expedited hearing on the same discovery issues. That DOR resulted in a hearing on November 1, 2018, wherein applicant and defense counsel agreed to get appointments and/or diagnostic testing. The matter went off calendar.

On October 31, 2018, applicant's counsel filed a petition for penalties. According to the petition, the basis for this petition was the following:

"Applicant seeks Penalties, Sanctions and Attorney Fees for defendant's unreasonable conduct in this case and for having to defend against defendant's Petition to Suspend and Bar benefits to Applicant."

In addition to the above, the applicant also asserted that the applicant "seeks penalties for defendant's unreasonable failure to provide medical care in the past in this case and currently as well." Applicant further states: "Applicant contends that defendants cannot meet their burden of demonstrating a satisfactory explanation for the failure to authorize Dr. Whalen as per PTP in the past and for its failure to provide treatment."

On October 2, 2019, defendant filed a "Petition to set aside stipulation". The basis for this petition was that defendant was seeking to withdraw from the stipulation previously entered into at the initial February 21, 2018 first trial date wherein defendant stipulated that applicant had sustained a low back injury.

The matter proceeded to a conference on December 10, 2019, wherein it was set for a **second trial**. Both parties authored trial briefs. The second trial finally commenced in this matter on November 10, 2021, and was submitted on October 17, 2022.

Issues raised at the second trial were (1) parts of body dispute over the low back; (2) permanent disability; (3) apportionment; (4) need for further medical treatment; (5) attorney fees; (6) petition to set aside stipulation; and (7) penalties.

On October 17, 2022 defendant asked the court leave to file a post-trial brief. The defendant was given leave to file the post-trial brief no later than November 10, 2022. Defendant filed a post-trial brief but also included a petition for penalties in its post-trial brief.

The WCJ issued a joint Findings dated January 2, 2023 in which he was able to address the numerous issues before him in the separate case of ADJ10892685 but further ordered the parties to develop the record with additional reports from the PTP and PQME on the applicant's lower back claim and knee apportionment. Two petitions for reconsideration were filed and then withdrawn with the WCJ amending his findings to include reserving jurisdiction over the penalty petitions at the second trial as no

specific findings regarding the penalties were made in the WCJ's original decision.

Ultimately, the parties were able to resubmit the second trial on April 24, 2024, with additional reports from the PTP and PQME (Court exhibits YY and XX). No additional testimony was taken on April 24, 2024.

. . .

The present petitions for reconsideration are isolated to the **second trial** in this matter and specifically to case number **ADJ10892681** wherein penalties were actually raised in the penalty petition of applicant dated October 31, 2018, and the penalty petition of the defendant dated November 10, 2022 (identified as a post-trial brief in EAMS). It is only to this case that the facts and penalties are relevant.

. . .

Procedurally, defendant raised the issue of sanctions in its post-trial brief dated November 10, 2022. The defendant asked the WCJ to amend issues in the resubmission of this case on April 24, 2024 and referenced specifically this petition for penalties (see MOH-SOE, April 24, 2024).

. . .

Defendant contends that the July 30, 2019 cover letter from applicant's counsel (applicant's exhibit 25) to defense counsel which identified that it was enclosing the final report of the PTP was an ex parte communication because it simultaneously courtesy copied the final report of Dr. Whelan to the PQME. Defendant alleges that this is a violation of Labor Code §4062.3(h) (see defendant's petition for reconsideration, statement of facts, items 29 and 30; also see page 11).

The WCJ did not find that there was any credible evidence to support this argument.

It should first be noted that the letter identified as an ex parte communication is dated July 30, 2019 (applicant's exhibit 25). Defendant did not object to this letter except to raise the issue of ex parte communication in a post-trial brief after submission of the second trial on November 10, 2022, over three years after the letter was issued.

. . .

In its November 10, 2022 penalty petition, defendant further outlines where it believes the violation occurred:

"Applicant's Counsel forwarded a letter to Defendants on July 30, 2019 serving Defendants with Dr. Whalen's July 9, 2019 report. In doing so, Applicant's Counsel also concurrently served Drs. Qian and Tinsley with Dr. Whalen's July 9, 2019 report by copying them with the letter and report. As required under the Labor Code, Applicant's Counsel should have served this report on Defendants 20 days before serving it on Drs. Tinsley and Qian. As a result, Dr. Qian issues a supplemental report on September 26, 2019 noting his review of Dr. Whalen's July 9, 2019 report and on October 23, 2019, Dr. Tinsley issued his report in response to applicant's attorney's

July 30, 2019 letter. As Applicant's Counsel failed to serve Defendants with their letter and medical information 20 days before sending it to Drs. Tinsley and Qian, Applicant's Counsel has violated the dictates of Labor Code §4062.3. Applicant's Counsel, therefore, is subject to costs incurred by Defendants, the cost of the supplemental medical reports issued by Dr. Qian and Dr. Tinsley, and attorney's fees related to Defendants addressing the ex-parte communication pursuant to Labor Code § 4062.3(h)." (see defendant's trial brief/petition)

However, defendant did not object to the "nonmedical records" (the July 30, 2019 cover letter) within 10 days service as required by Labor Code §4062.3(b). There is no objection letter from the defendants in evidence in this trial. Defendant did not object to the letter in the years 2019, 2020, or 2021. Defendant did not object to the letter after receiving the supplemental report from the PQME dated September 26, 2019.

Defendant called no witnesses to allege that the July 30, 2019 letter from applicant's counsel which courtesy copied an MMI report from Dr. Whalen was being objected to as an alleged ex parte communication telephonically or through any other medium or that any objection was ever made to the letter.

Additionally, the WCJ notes that the July 30, 2019 cover letter from applicant is a "subsequent communication" as the PQME in this matter had issued multiple prior reports. Therefore, the controlling statute is Labor Code §4062.3(e) which states: "Any subsequent communication with the medical evaluator shall be in writing and shall be served on the opposing party when sent to the medical evaluator." Here, if the letter was sent to the PQME along with a courtesy copy of Dr. Whalen's MMI report, the applicant's attorney has properly complied with the statue.

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As there is no evidence that an ex parte communication took place, the WCJ rightfully concluded there is no basis upon which to award a penalty in this regard.

. . .

Defendant also argues for the imposition of sanctions pursuant to Labor Code §5813 (see defendant's petition for reconsideration pages 11 and 12). Defendant notes that the WCAB "may" impose sanctions of reasonable expenses and "may" impose additional sanctions not toe exceed $2,500.

. . .

According to defendant argument for Labor Code §5813 penalties, it **appears** to be that applicant's counsel in a "November 2, 2018" petition for penalties made allegations that defendant's actions were improper in seeking to obtain an order to suspend benefits and proceedings after applicant failed to attend an MRI when her appearance had been ordered by the Court (see petition for reconsideration, statement of facts item 25).

This "appears" to be the case because an exact understanding of the defendant's allegations are unknown to the WCJ. This is for several reasons. First, there is no November 2, 2018 petition for penalties in the WCAB record. (This was pointed out to the defendant by the WCJ in his Opinion on Decision, dated July 17, 2024, page 28, second paragraph).

The petition is dated October 31, 2018 and signed by applicant's counsel on that date. The Proof of service attached to the petition is dated November 1, 2018. If there is another petition out there dated November 2, 2018, it wasn't filed with the WCAB.

Secondly, defendant's petition for reconsideration fails to cite to the applicant's petition for penalties itself.

It appears that defendant takes issue with the applicant's counsel indicating that he was going to have to defend against the defendant's petition to suspend benefits because defendant "inappropriately" filed this petition to suspend benefits.

"Defendant filed for an Expedited Hearing which applicant contends is inappropriate." (See applicant's petition for penalties, page 2, lines 15-16; see also defendant's petition for penalties, page 12, second paragraph under heading).

However, this is not a misrepresentation. **This is argument as applicant clearly identifies this as a contention.**

The WCJ does not dispute that the defendant had the right to file the petition to suspend benefits. The applicant **did** miss the June 26, 2018 MRI that she was ordered to attend by Court order signed by the PJ on June 11, 2018.

However, the WCJ will note a few things here. Firstly, the order compelling the applicant to attend the June 26, 2018 MRI was signed by PJ Levy and not the present trial judge. The order from the PJ was obtained shortly after a several day trial conducted by WCJ Romano was submitted on April 26, 2018. The order from the PJ also included hand written language added by the PJ that the suspension of benefits was "subject to being heard".

Secondly, there is no order to suspend benefits issued by the Court in this matter. There was no evidentiary hearing on the issue. Had defendant obtained an evidentiary hearing, which would have been conducted prior to the PJ or the present WCJ issuing on Order suspending benefits, defendant would not have received the order.

This is because applicant, at trial, credibly testified that she did not receive a letter of appointment from defendant regarding the June 26, 2018 MRI. She testified that she did not receive the order compelling her to attend the

June 26, 2018 MRI. She additionally testified that she could not attend an MRI unless it was an open-air MRI as she was afraid of tight closed spaces (see MOH-SOE, October 17, 2022, page 5 last paragraph).

Neither the petition to compel applicant's attendance to the MRI dated June 8, 2018 nor the court order signed by PJ Levy on June 11, 2018 specify that applicant was to attend an open air MRI.

Without this specification, the court order was essentially invalid on its face as the court cannot require applicant to attend an MRI that she is incapable of attending. Without proper notice of the date of the MRI on June 26, 2018 there would have been no order to suspend benefits issued. As such, there was no good cause to suspend benefits.

It therefore may appear to the applicant that defendant's filing of the petition to suspend benefits was inappropriate from applicant's perspective. Legally however, the filing of the petition was appropriateby defendant's perspective, but also legally it would not have been successful.

Therefore, the WCJ indicated in his Finding that defendant had failed once again to present credible evidence of any misrepresentation in a verified petition warranting the imposition of sanctions.

. . .

The WCJ granted defendant's petition to withdraw from its prior stipulations based on a change of circumstance (see Opinion on Decision, dated July 17, 2024, page 10, fourth paragraph). In the present matter, defendant entered into a stipulation at the initial trial concerning the back when the back claim <u>was accepted by defendant</u>.

Defendant then sought and obtained an order compelling applicant to attend an MRI that the PQME had requested following submission of the first trial. Applicant did not attend the court ordered MRI.

Applicant later underwent the open air MRI. Based on the MRI, the PQME altered his opinion to conclude that applicant did not have an industrial back injury. Defendant sought to set aside the stipulation based on evidence it clearly could not have obtained before the initial trial and the stipulations entered into as part of that initial trial. The WCJ granted this petition.

As noted, the petition to set aside the stipulation filed by defendant was based upon a <u>change in circumstances in the evidentiary record</u>.

The WCJ in his Opinion noted that the PQME excluded the applicant's back from the industrial injury in his May 6, 2019 report (defendant's exhibit R) well after the first trial wherein the stipulation was entered into and well after the November 19, 2018 MRI (exhibit Q, page 12).

The PQME had requested the MRI earlier in his May 4, 2018 report which falls in time after the first trial had commenced (February 21, 2018) and again in his August 21, 2018 report (see exhibits O, page 45; and P, page 3) which is well after the first trial had been submitted on July 11, 2018).

Thus defendant had no way of knowing that the MRI which was the subject of the discovery dispute following submission of the first trial would lead to the PQME altering his opinion on back causation in May of 2019. The defendant filed the petition to set aside the stipulation after the PQME's supplemental report dated September 26, 2019 (which is the subject of the alleged ex parte communication above) wherein the PQME unambiguously indicates that applicant's back condition is non-industrial: "Therefore, I do not believe her back condition should be included in the claim of the fall injury on January 17, 2016.". Defendant filed the petition on October 2, 2019.

Moreover, there do not appear to be (nor have any been referenced by applicant's counsel) misrepresentations in the defendant's petition to set aside the stipulation.

. . .

Applicant's penalty argument was filed after the first trial was submitted on April 26, 2018. Applicant's petition for penalties was dated October 31, 2018.

The basis for the penalty petition is that found on page 3 of the petition: "Applicant seeks penalties for defendant's unreasonable failure to provide medical care in the past in this case and currently as well. Applicant contends defendant's conduct was reckless and unfair in this case, was without legal position or authority, as evidenced by the strong decision by the WCAB, and that sanctions are warranted as well." (Emphasis added).

However, in the first trial the issue of penalties was not raised or expressly deferred despite that trial having taken four separate days to submit. Consequently, the WCJ in his Opinion after the **second trial** notes that Labor Code §5814(c) applies:

"Upon the submission of any issue for determination at a regular trial hearing, it shall be conclusively presumed that any accrued claim for penalty in connection with the benefit at issue has been resolved, regardless of whether a petition for penalty has been filed, unless the issue of penalty is also submitted or is expressly excluded in the statement of issues being submitted."

As the issue was not raised, or expressly excluded in the statement of issues being submitted at the first regular trial it is conclusively presumed resolved.

The WCJ noted in his Opinion that the applicant **could** seek penalties for any delay in medical treatment subsequent to the first trial. At the second trial for example, applicant did explicitly raise the issue of penalties. The second trial was submitted initially October 17, 2022 and then resubmitted on April 24, 2024.

The basis for the applicant's claim regarding penalties is that the defendant delayed or failed to provide medical treatment. The WCJ found that applicant presented no credible evidence of delay or failure to provide medical treatment by the defendant.

In order to **prove** a delay or failure to provide medical treatment, the applicant must first establish an entitlement to medical treatment. In its petition for reconsideration, applicant states: "The legislative intent and rules of liberal construction support imposition of penalties under §5814 in this case. Here, Defendant has never approved nor submitted to UR any of Dr. Whalen's RFAs." (See applicant's petition for reconsideration, page 16, lines 19-21). This is stated throughout the petition:

"Even when the WCJ issued his July 11, 2018 F&O, Defendant still did not approve, even retroactively, the prior RFAs that were outstanding." ." (Applicant's petition for reconsideration, page 12);

First, and primarily, defendant denied medical care by not permitting Dr. Wayne Whalen on the MPN to be the PTP and not putting his RFAs through UR. (Applicant's petition for reconsideration, page 15);

"DEFENDANTS' FAILURE TO PROVIDE TIMELY MEDICAL CARE AND APPROVE DR.WHALEN'S RFAs" (Applicant's petition for reconsideration, heading, page 17);

Defendant subsequently ignored and disregarded this Stipulation and Finding and to this date continued to deny treatment to the back and all treatment per Dr. Whalen's RFAs." (Applicant's petition for reconsideration, page 18);

Yet in the second trial the applicant did not submit a single RFA **from any doctor** for back treatment as evidence. If the applicant cannot establish a need for medical treatment through an RFA, applicant cannot establish a delay or denial of medical treatment.

Although Dr. Whelan argues in his supplemental report regarding lack of medical care (see Court exhibit YY, page 26, second paragraph), there is again no references in the entire report to RFAs issued by Dr. Whelan and denied and/or delayed following the first trial (submitted on April 26, 2018). There is not a single reference to an RFA in the doctor's history of injury (Court exhibit YY, pages 2 through bottom of page 7). There is not a single reference to an RFA from Dr. Whelan in the PTP's review of medical

records following in time after April 26, 2018 (Court exhibit YY, pages 8 through 24). There is no mention of a single RFA from Dr. Whelan in the doctor's own discussion commencing page 26-28, (Court exhibit YY).

The doctor's and by extension applicant's blanket statement that applicant was denied care or that care was delayed is therefore **not supported by evidence**. Therefore, the WCJ's decision was correctly decided based on the lack of evidence presented at trial.

. . .

Applicant in its petition further requests Labor Code §5813 penalties against the defendant for failure to allow applicant to treat with a chiropractor as her PTP. However, as noted in the WCJ's Opinion:

"the defendant's position was different from the one characterized by applicant's counsel. Defendant's position was that the applicant could obtain chiropractic treatment, in fact, defendant denied at trial that it was denying applicant access to chiropractic treatment, the defendant was denying that a chiropractor could act as the applicant's primary treating physician. Hypothetically, if applicant's counsel had selected an orthopedic physician as her primary treating physician and the orthopedic physician issued an RFA for chiropractic treatment, approved by utilization review, defendant would have provided the treatment. The treatment therefore was not the issue, the issue was the specialization of the primary treating physician (see specifically, MOH-SOE, April 26, 2018, page 3, last three lines)." (See Opinion, July 17, 2024, page 22).

Therefore, applicant could have received treatment from a chiropractor provided that she obtain an RFA from a doctor of another specialty providing chiropractic treatment that was thereafter approved by utilization review. As with the earlier penalty argument, the WCJ has never been provided with a single RFA in evidence by the applicant for either trial (the first or the second trial).

. . .

Applicant further seeks sanctions to defend against defendant's petition to suspend and bar benefits. The WCJ has already addressed this. Defendant was well within its rights to file a petition to suspend benefits as applicant had missed a court ordered MRI on June 26, 2018. The petition to suspend benefits never resulted in an evidentiary hearing. Applicant is not entitled to sanctions for defending against something that resulted from applicant's failure to attend an MRI (that is, applicant's violation of a court order resulted in the filing of defendant's petition).

(Report, pp. 2-19.)

DISCUSSION

I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on August 20, 2024 and 60 days from the date of transmission is October 19, 2024. The next business day that is 60 days from the date of transmission is October 21, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on October 21, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on August 20, 2024, and the case was transmitted to the Appeals Board on August 20, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 20, 2024.

II.

Defendant first argues that the WCJ erroneously failed to impose sanctions for applicant's attorney's alleged ex parte communication to the PQME in violation of Labor Code section 4062.3. Specifically, defendant argues that applicant's attorney failed to timely serve it with information proposed to be sent to the PQME and that service of the information itself constituted a prohibited ex parte communication.

Labor Code section 4062.3 provides, in pertinent part:

> (a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:
>
> > (1) Records prepared or maintained by the employee's treating physician or physicians.
> >
> > (2) Medical and nonmedical records relevant to determination of the medical issue.
>
> (b) Information that a party proposes to provide to the qualified medical evaluator selected from a panel shall be served on the opposing party 20 days before the information is provided to the evaluator. If the opposing party objects to consideration of nonmedical records within 10 days thereafter, the records shall not be provided to the evaluator. Either party may use discovery to establish the accuracy or authenticity of nonmedical records prior to the evaluation.
>
> . . .
>
> (e) All communications with a qualified medical evaluator selected from a panel before a medical evaluation shall be in writing and shall be served on the opposing party 20 days in advance of the evaluation. Any subsequent communication with the medical evaluator shall be in writing and shall be served on the opposing party when sent to the medical evaluator.
>
> (f) Communications with an agreed medical evaluator shall be in writing, and shall be served on the opposing party when sent to the agreed medical evaluator. Oral or

> written communications with physician staff or, as applicable, with the agreed medical evaluator, relative to nonsubstantial matters such as the scheduling of appointments, missed appointments, the furnishing of records and reports, and the availability of the report, do not constitute ex parte communication in violation of this section unless the appeals board has made a specific finding of an impermissible ex parte communication.
>
> (g) Ex parte communication with an agreed medical evaluator or a qualified medical evaluator selected from a panel is prohibited. If a party communicates with the agreed medical evaluator or the qualified medical evaluator in violation of subdivision (e), the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from another qualified medical evaluator to be selected according to Section 4062.1 or 4062.2, as applicable, or proceed with the initial evaluation.
> (Lab. Code § 4062.3(a)-(b),(e)-(g).)

Here, as stated in the Report, applicant's attorney's July 30, 2019 letter was served not in advance of the PQME's medical evaluation of applicant but subsequent to it. (Report, p. 8.) It follows that the July 30, 2019 letter is a subsequent communication within the meaning of Labor Code section 4062.3(e) and applicant's attorney was not required to provide it to defendant 20 days in advance of mailing. (*Id.*)

In addition, as stated in the Report, defendant's allegation that the July 30, 2019 letter was "serv[ed] [upon] Defendants with Dr. Whalen's July 9, 2019 report . . . [and] concurrently served [upon] Drs. Qian and Tinsley" fails to assert that applicant engaged in an ex parte communication with the PQME. (*Id.*, pp. 7-8.) To the contrary, applicant's attorney is alleged to have simultaneously served the letter and the report upon defendant and the PQME, demonstrating that the letter attaching Dr. Whalen's report was not an ex parte communication. Therefore, we concur with the WCJ that "there is no evidence that an ex parte communication took place." (*Id*., p. 9.)

Accordingly, we discern no support for defendant's contention that the WCJ erroneously failed to impose sanctions for applicant's attorney's alleged ex parte communication to the PQME.

Next, we address defendant's contention that the WCJ erroneously failed to impose sanctions for applicant's attorney's alleged bad faith misrepresentations in applicant's petition for sanctions and costs.

Labor Code section 5813 provides that the WCJ "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." (Lab. Code § 5813(a).) WCAB Rule 10421 defines such actions or tactics

as those that result from a willful failure to comply with a statutory or regulatory obligation or are indisputably without merit. (See Cal. Code Regs., tit. 8. § 10421(b).) Such actions or tactics include the filing of a legal document without reasonable justification and executing a declaration or verification of a document filed with the WCAB that contains substantially misleading statements of fact for which a reasonable excuse is not offered or the offending party has demonstrated a pattern of such conduct. (Cal. Code Regs., tit. 8. § 10421(b)(2)(5)(A)(i)(ii)(B).)

Here, as stated in the Report, the record fails to show that applicant's petition for sanctions and costs was indisputably without merit or contained a substantially misleading statement of fact. (Report, pp. 9-11.) It follows that the WCJ did not abuse his discretion under Labor Code section 5813 in finding that defendant failed to establish entitlement to sanctions and costs.

Accordingly, we discern no support for defendant's argument that the WCJ erroneously failed to impose sanctions and costs for applicant's attorney's alleged misrepresentations.

We turn next to applicant's contention that the WCJ erroneously failed to impose Labor Code section 5814 penalties and Labor Code section 5814.5 attorney's fees for allegedly failing to provide timely medical treatment sought by Dr. Whalen.

In *Sandhagen v. Workers' Comp. Appeals Bd*. (2008) 44 Cal.4th 230 [73 Cal. Comp.Cases 981], the Supreme Court stated:

> The Legislature amended section 3202.5 to underscore that all parties, including injured workers, must meet the evidentiary burden of proof on all issues by a preponderance of the evidence. Accordingly, notwithstanding whatever an employer does (or does not do), an injured employee must still prove that the sought treatment is medically reasonable and necessary. That means demonstrating that the treatment request is consistent with the uniform guidelines (§ 4600, subd. (b)) or, alternatively, rebutting the application of the guidelines with a preponderance of scientific medical evidence (§ 4604.5).
> (*Sandhagen*, *supra*, at p. 990.)

Thus, to the extent that the issue of whether the medical treatment requested by Dr. Whalen is subject to the jurisdiction of the WCAB, it is applicant's burden to prove that she is entitled to the treatment sought in the RFA, and applicant may meet this burden by presenting substantial medical evidence that the treatment is reasonably required to cure or relieve her of injury. (See *Dubon v. World Restoration* (2014) 79 Cal.Comp.Cases 1298, 1312 (Appeals Board en banc); see also § 4610.5(c)(2) (defining "medically necessary" and "medical necessity" as treatment based on certain standards).)

In this case, as stated in the Report, applicant did not present evidence to meet her burden of proof of entitlement to the treatment sought by Dr. Whalen; and, therefore, there are no grounds to conclude that applicant is entitled to sanctions and costs for defendant's alleged delay of such treatment. (Report, pp. 15-17.)

Accordingly, we discern no merit to the contention that the WCJ erroneously failed to impose Labor Code section 5814 penalties and Labor Code section 5814.5 attorney's fees for allegedly failing to provide timely medical treatment sought by Dr. Whalen.

We next address applicant's contention that the WCJ erroneously failed to impose Labor Code section 5813 sanctions and costs for defendant's alleged failure to authorize chiropractic treatment and alleged frivolous assertion in its petition to suspend benefits that applicant was not participating in discovery.

Here, as stated in the Report, the record fails to show that defendant did not authorize chiropractic treatment but rather that applicant presented no evidence that a RFA for such treatment was submitted. (Report, p. 18.)

In addition, as stated in the Report, defendant's assertion that applicant was not participating in discovery was not frivolous but based upon applicant's apparent failure to attend a court-ordered MRI. (Report, pp. 18-19.)

Accordingly, we discern no merit to applicant's contention that the WCJ erred by failing to impose sanctions for defendant's alleged failure to authorize chiropractic treatment and alleged frivolous assertion in its petition to suspend benefits.

Lastly, we address applicant's contention that the WCJ erroneously failed to impose Labor Code section 5813 sanctions and costs for defendant's alleged bad-faith disregard of the stipulation that applicant sustained lower back injury.

Here, as stated in the Report, the issue of whether defendant was entitled to withdraw from the stipulation as to the lower back injury was adjudicated in defendant's favor based upon medical evidence obtained from the PQME. (Report, pp. 13-15.)

Consequently, there are no grounds to conclude that defendant disregarded the stipulation as to the lower back injury in bad faith.

Accordingly, we discern no merit to the contention the WCJ erred by failing to impose sanctions for defendant's disregard of the stipulation.

Accordingly, we will deny the Petitions for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings, Award, Order issued on July 17, 2024 is **DENIED**.

IT IS FURTHER ORDERED that applicant's Petition for Reconsideration of the Findings, Award, Order issued on July 17, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 21, 2024

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

ISABEL VALDEZ
ZUCKERMAN & WAX
LLARENA, MURDOCK, LOPEZ & AZIZAD

SRO/*cs*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS