

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**MARCUS SUTTI, *Applicant***

**vs.**

**CRYSTAL CREAMERY, permissibly self-insured,  
administered by  
GALLAGHER BASSETT. *Defendants***

**Adjudication Numbers: ADJ17468996; ADJ17468267  
Lodi District Office**

**OPINION AND ORDERS  
DISMISSING PETITION  
FOR REMOVAL AND DENYING  
PETITION FOR RECONSIDERATION**

Defendant sought removal in response to the Order continuing the trial to May 28, 2024, issued by the workers' compensation administrative law judge (WCJ) on May 7, 2024. Defendant contended that discovery was not complete.

Defendant also seeks reconsideration of Findings of Fact, Award & Orders issued by the WCJ on August 12, 2024, wherein the WCJ found in pertinent part that applicant was entitled to medical care, including lumbar surgery as requested in the February 5, 2024 Request for Authorization (RFA) and that defendant engaged in activity warranting sanctions for its failure to respond to two orders by the WCJ and for its failure to appear at the trial on May 7, 2024. The WCJ deferred the issued of whether defendant should be sanctioned for its failure to appear at the May 28, 2024 trial. Defendant contends that the finding that applicant is in need of medical treatment for his industrial injury, including lumbar spine surgery, was not based on substantial evidence and was not consistent with Labor Code section 4610(i)(1)<sup>1</sup> and that its conduct did not rise to the level of bad faith actions under section 5813.

We did not receive an Answer from applicant.

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<sup>1</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

We received Reports and Recommendations from the WCJ, recommending that we deny the Petition for Removal and deny the Petition for Reconsideration.

We have considered the allegations in the Petition for Removal and the Petition for Reconsideration. We first note that as set forth in the WCJ's Report, trial proceeded on May 28, 2024. Accordingly, the Petition for Removal is now moot, and we will dismiss it.

Based on our review of the record, for the reasons discussed by the WCJ in Opinion on Decision and for the reasons discussed below, we will deny the Petition for Reconsideration.

Former 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, 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 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 September 20, 2024, and 60 days from the date of transmission is November 19, 2024. This decision is issued by or on November 19, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

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 Board to

act on a petition. 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 September 20, 2024, and the case was transmitted to the Appeals Board on September 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 20, 2024.

Accordingly, we dismiss the Petition for Removal, and we deny the Petition for Reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Removal of the Order continuing the trial issued by the WCJ on May 7, 2024 is **DISMISSED**.

**IT IS FURTHER ORDERED** that the Petition for Reconsideration of the F&O issued by the WCJ on August 12, 2024 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



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

**November 19, 2024**

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

**MARCUS SUTTI  
T MAE YOSHIDA, ESQ.  
DAVID JANE & ASSOCIATES**

**AS/mc**

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

**REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**

&

**NOTICE OF TRANSMISSION TO THE APPEALS BOARD**

I

**INTRODUCTION**

A.

Defendant has filed a timely Petition for Reconsideration asserting 1) the Board acted without, or in excess of, its powers, 2) the evidence does not justify the findings of fact, and 3) that Defendant has discovered new, material evidence that could not have been discovered and produced before trial with reasonable diligence.

It is recommended [that] the Petition for Reconsideration be denied.

B.

Defendant failed to appear in person at three scheduled trials (Expedited and Regular). Defendant appeared electronically due to personal reason at a fourth scheduled trial. A summary of the trials follows:

Defendant did not appear at Expedited Hearing on August 30, 2023.

Minutes of Hearing issued placing the matter OTOC noting “Defendant Attorney is ordered to provide/file written explanation why did not appear today within 15 days of today. Defendant did not appear for trial in person.”

On April 3, 2024, Defendant made electronic appearance at Expedited Hearing due to a personal issue. The matter was converted to MSC and the parties and the WCJ were able to complete and circulate a Pre-Trial Conference Statement (PTCS) which includes “Parties agree to trial on May 7, 2024, in person in Lodi. Defendant to respond to 08/30/2023 minutes.”

Defendant has not replied to the orders that Defendant explain failure to appear on August 30, 2024.

On May 7, 2024, Defendant did not appear for trial. Minutes of Hearing and Order Continuing 2 Hour Trial issued setting both ADJ17468996 and ADJ17468267 for trial on May 28, 2024, in person at the Lodi District Office.

Defendant did not appear for trial on May 28, 2024, and ADJ17468996 was tried with Minutes of Hearing, Summary of Evidence (MOH), Notice of Intent to Submit, and Order ADJ17468267 OTOC, issued June 3, 2024.

The day of trial[,] Defendant filed a Petition for Removal, seeking to challenge the Minutes of Hearing and Orders issued May 7, 2024. The Petition for Removal remains pending before the WCAB.

There being no objection, ADJ17468996 was Ordered Submitted on June 24, 2024, with submission effective June 19, 2024.

Findings of Fact, Award & Orders issued August 12, 2024, finding sanctions against Defendant and awarding medical care including lumbar surgery, from which Defendant seeks removal.

## II

### **DISCUSSION**

#### 1.

#### *Labor Code §5813*

The Workers' Compensation Appeals Board, in recent *En Banc* decisions, has discussed the process for considering sanctions under LC §5813.

The Appeals Board is authorized to impose sanctions under section 5813, which states, in pertinent part:

(a) The workers' compensation referee or appeals 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. In addition, a workers' compensation referee or the appeals board, in its sole discretion, may order additional sanctions not to exceed two thousand five hundred dollars (\$2,500) to be transmitted to the General Fund.

(§ 5813(a).)

As detailed in the Notice, WCAB Rule 10421(b) provides a comprehensive but non-exclusive list of actions that could be subject to sanctions. As applicable here, subdivision (b) states that a party may be subject to sanctions where the party has

engaged in the following actions:

- (1) Failure to appear or appearing late at a conference or trial where a reasonable excuse is not offered or the offending party has demonstrated a pattern of such conduct.
- (2) Filing a pleading, petition or legal document unless there is some reasonable justification for filing the document.

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- (4) Failing to comply with the Workers' Compensation Appeals Board's Rules of Practice and Procedure . . . or with any award or order of the Workers' Compensation Appeals Board, including an order of discovery, which is not pending on reconsideration, removal or appellate review and which is not subject to a timely petition for reconsideration, removal or appellate review. . .

(Cal. Code Regs., tit. 8, § 10421(b).)

Sanctions under section 5813 are designed to punish litigation abuses and to provide the court with a tool for curbing improper legal tactics and controlling their calendars. (*Duncan v. Workers' Comp. Appeals Bd.* (2008) 166 Cal.App.4th 294, 302.) Accordingly, sanctions are similar to penalties under section 5814, in that they are designed to have both remedial and penal aspects. (See *Ramirez v. Drive Financial Services*, (2008) 73 Cal.Comp.Cases 1324 (Appeals Board En Banc).)

Abel Hidalgo, et al. vs. Roman Catholic Archbishop, et al., WCAB *En Banc*, August 7, 2024, Case No. ADJ13332737, ADJ15218980, ADJ12640295, pages 3– 4, 89 Cal. Comp Case.

A.

*Failure to Comply with Discovery Order*

Here defendant failed to appear in person at a duly noticed Expedited Hearing on August 30, 2024, and failed to respond to the Minute Order of that date that “Defendant Attorney is ordered to provide/file written explanation why did not appear today within 15 days of today.” Neither did defendant respond when the Order was repeated in the April 3, 2024, PTCS “Defendant to respond to 08/30/2023 minutes.”

Defendant's failure to respond to two Orders requiring Defendant explain not appearing at a duly noticed Expedited Hearing, clearly violates Title 8 CCR 10421(b)(4) as "Failing to comply with the Workers' Compensation Appeals Board's Rules of Practice and Procedure . . . or with any award or order of the Workers' Compensation Appeals Board" such that the imposition of sanctions is warranted. Due to the complete lack of response to two distinct orders, a sanction of \$250.00 was found.

Defendant's Petition for Reconsideration does not provide any reason why defendant did not comply with these two orders, and, consequently, there is no basis to disturb the sanction of \$250.00.

B.

*Failure to Appear at Trial*

Defendant's Petition for Reconsideration makes several misleading or clearly erroneous statements in effort to justify failing to appear.

For example Defendant asserts he "appeared by telephone" at the August 30, 2023, Expedited Hearing. (Petition page 3, lines 6 – 9). The hearing was scheduled in person and no order allowing electronic appearance had issued. As such, Defendant did not appear on the Court's conference line or Lifesize and spoke exclusively with Applicant's counsel on apparently private telephones.

Applicant's counsel, who was present, represented to the Court that the matter had been resolved and requested OTOC. Defendant's failure to appear at trial was the trigger for the Order that Defendant provide written explanation for not appearing. This is confirmed by Defendant's statement "The Applicant, however, appeared and Applicant and Defendant informally reached a resolution of the issues electronically without involvement of the Workers' Compensation Judge." (Petition page 3, lines 16 – 18).

Defendant did not "appear" at the August 30, 2023, Expedited Hearing. Despite participating in drafting as well as signing the PTCS of April 3, 2024, which set this matter in person for trial on May 7, 2024, Defendant did not appear for trial on May 7, 2024. The PTCS of April 3, 2024, is not the subject of a Petition for Removal or Petition for Reconsideration.



In addition, Defendant’s argument for not appearing at the May 7, 2024, trial is at best misleading. “Therefore, WCJ converted the Expedited Hearing on April 3, 2024, to a MSC and then set the matter for regular Trial conditioned upon receipt of the medical records of UC Davis Health Medical Center, which would assist him in reaching a decision regarding Applicant’s entitlement to medical treatment.” (Petition page 15, lines 1-4; emphasis added). Nowhere in the April 3, 2024, PTCS is the trial setting “conditioned upon receipt of the medical records.”

Defendant did not appear at the May 7, 2024, trial.

Defendant appears to be engaging in a pattern of not appearing in person for trials, however for purposes of sanctions, only the failure to appear on May 7, 2024, is considered.

Title 8 CCR 10421(b)(1) provides as a basis for sanctions: “Failure to appear or appearing late at a conference or trial where a reasonable excuse is not offered.” As this is the second sanctionable action of Defendant considered, and as Defendant has provided no reasonable excuse for not appearing, a sanction of \$500.00 for failure to appear at the May 7, 2024, trial is appropriate.

## 2.

### *Need for Medical Treatment (Substantial Evidence)*

An injured worker is entitled to all care reasonably required to cure or relieve the worker from the effects of an industrial injury. California Labor Code (LC) §4600(a).

Utilization Review (UR) of a Request for Authorization (RFA) is mandated by California Labor Code (LC) §4610. The timeline for defendant to review a request is set out in LC §4610(i)(1) as follows:

Except for treatment requests made pursuant to the formulary, prospective or concurrent decisions shall be made in a timely fashion that is appropriate for the nature of the employee’s condition, not to exceed five normal business days from the receipt of a request for authorization for medical treatment and supporting information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician.

Therefore, defendant has five normal business days and possibly up to fourteen days from receipt of an RFA to issue a decision. If a UR decision is untimely, the determination of medical necessity may be made by the WCAB based on substantial medical evidence consistent with Labor Code section 4604.5. Dubon v. World Restoration, (*Dubon II*), 79 CCC 1298, 1300, (WCAB *En Banc*, October 6, 2014)

Here, RFA for lumbar laminectomy posterior L3-4 surgery issued February 5, 2024. (EXH 4).

The treating physician appears to have made reasonable attempts to have the RFA reviewed (see EXH 3).

It is clear, however, that Applicant's counsel sent a demand for authorization of lumbar surgery by letter on February 23, 2024, to the Defense Attorney of Record in this matter. (EXH 5). The letter was sent to the same address listed on Defendant's Notice of Representation filed May 3, 2023.

The April 3, 2024, Pre-Trial Conference Statement (PTCS), was signed by Defendant and includes in the issues listed by Defendant that "Defendants never received any of the RFA's until March 25, 2024 letter from the Applicant's Attorney." The February 5, 2024, laminectomy RFA was listed by Applicant as an exhibit. (PTCS of April 3, 2024, pages 3 & 5).

Despite defendant having acknowledged receipt of the RFA by the time of completing the Pre-Trial Conference Statement on April 3, 2024, the record contains *no UR decision to the present* from defendant on the RFA for lumbar laminectomy posterior L3-4 surgery issued February 5, 2024. It is now more than 14 days after Defendant acknowledged receipt of the RFA. There is no UR decision. Therefore, any decision in this matter is untimely and the determination of medical necessity may be made by the WCAB based on substantial medical evidence consistent with Labor Code section 4604.5. Duban supra.

The recommended guidelines set forth in the medical treatment utilization schedule adopted by the administrative director pursuant to Section 5307.27 shall be presumptively correct on the issue of extent and scope of medical treatment. LC §4604.5.

The Administrative Director's Treatment Orders for the low back can be found at: <https://www.dir.ca.gov/dwc/DWCPropRegs/2021/MTUS-Evidence-Based-Update-August/Low-Back-Guideline.pdf>.

Under the Treatment Order for the lumbar spine, decompressive surgery (laminectomy) is recommended where there is 1) radicular pain, 2) MRI imaging that shows stenosis, and 3) continuing pain and symptoms lasting after at least 4 – 6 weeks and despite treatment. These conditions are met in the present matter. (See EXH's 1, 3, 6, & XX). Applicant's credible testimony corroborated the medical evidence of record. The January 11, 2024, Progress Note from Safdar Nasim Khan, MD, is well reasoned, substantial, and supports the requested surgery.

While not controlling, PQME Ciepela was clearly prescient when he stated: "I suspect he is going to require extensive surgery for the lumbar spine."  
(EXH XX).

Applicant is entitled to an Award of Medical Care to include lumbar laminectomy as requested in the February 5, 2024, RFA.

There is no apportionment of the expenses of medical treatment. *Granado v WCAB* (1968) 69 C2d 399, 33 CCC 647. Applicant is entitled to an unapportioned Award of medical care.

### 3.

#### *Allegation of Newly Discovered Evidence*

Defendant asserts discovery of new, material evidence that Defendant could not have discovered and produced before trial with reasonable diligence.

Specifically, "the subpoenaed records of UC Davis were received by Defendant on July 14, 2024." (Petition page 11, line 28).

Applicant's counsel sent a demand for authorization of lumbar surgery by letter on February 23, 2024, to the Defense Attorney which triggered defendant's duty to obtain evidence necessary to make a determination of the request. Title 8 CCR §10101.1(e), (k), (l), & (n). There is no explanation as to why the records were not obtained until July 14, 2024.

More troubling is Defendant's failure to comply with the requirements of Title 8 CCR §10974(c)-(e), to at least provide "an offer of proof, specific and detailed" as to how the UC Davis records would have any effect on the decision.

Defendant has not established how the UC Davis records are relevant, let alone how they would impact the decision in this matter. Defendant's Petition for Reconsideration should be denied.

### III

#### **SUMMARY & RECOMMENDATION**

Although Defendant filed a Petition for Removal of the May 7, 2024, Minutes of Hearing continuing trial to May 28, 2024, filing a petition to remove does not terminate the WCJ's authority to proceed in a case and does not continue or cancel an established hearing date. Farmer Bros. Coffee v WCAB (Hatcher) (1987) 52 CCC 348 (writ denied).

Defendant did not appear for the scheduled trial on May 28, 2024. After consulting with the Presiding Workers' Compensation Judge, this WCJ proceeded with the trial. At conclusion a Notice of Intent to Submit was served with the MOH & SOE. No objection was received, and the matter was submitted June 19, 2024, by Order dated June 24, 2024.

Defendant's failure to appear at the multiple scheduled trials, including the trial resulting in Defendant's Petition for Reconsideration, impaired the trial Judge's ability to meaningfully balance the Applicant's entitlement to an expeditious resolution of the lumbar surgery request (which is now more than seven months out from the RFA) with the parties' right to due process. Had Defendant appeared at trial, Defendant could have provided evidence on issues, such as MPN and treating physician, that it now seeks to litigate by means of the Petition for Reconsideration. Any consequence of Defendant's failure to appear should be borne by Defendant and not be a shield used by Defendant to deny or delay benefits to which the Applicant is reasonably entitled.

It is recommended that the Petition for Reconsideration be denied.

**NOTICE OF TRANSMISSION**

Pursuant to Labor Code, Section 5909, the parties and the appeals board are hereby notified that this matter has been transmitted to the appeals board on date set out below.

Respectfully submitted,

**Paul Saltzen**

Workers' Compensation Judge

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## OPINION ON DECISION

### A.

#### MEDICAL HISTORY

On August 14, 2023, PQME Ciepiela reported. Diagnosis includes, 3. Lumbar radiculopathy with neurogenic claudication secondary to aggravation of underlying stenosis. I am ordering . . .

EMG/NCV of the lower extremities. Unfortunately, his spine MRI looks very similar to mine and I suspect he is going to require extensive surgery for the lumbar spine. (EXH XX report pages 16 - 17).

October 11, 2023. MRI, Lumbar Spine. IMPRESSION: No significant change from prior examination. 1. Developmental spinal canal stenosis with superimposed degenerative changes most prominent at L3-L4. 2. Multilevel degenerative disc disease and spondylitic changes. (EXH 1).

January 11, 2024, Progress Note from Safdar Nasim Khan, MD. I reviewed the spine Imaging and developed the assessment and plan. Marcus Sutti is a 43yr-old male who presents today with a 1.5- year history of low back pain, as well as left lower extremity radiculopathic symptoms. He states that his symptoms began after he had an accident at work as a forklift driver, where the forklift was backed off a 6 foot tall ramp, and axially loaded his body while he was sitting. He had immediate pain and developed left lower extremity paresthesias/tingling/pain to his left buttock and posterior thigh. He was initially seen by our neurosurgery colleagues and Dr. Ebinu in April 2023 who recommended a trial of nonoperative management but would consider surgical intervention if he had ongoing symptoms, He now follows up with us with overall no change in his symptoms over the last few months. He has done physical therapy got an epidural steroid injection and tried oral medications as well as activity modification. He is very eager to get back to work. Still has axial low back pain, with left buttock/posterior thigh radiating pain worse with prolonged activities or walking. IMPRESSION/ RECOMMENDATIONS; Marcus Sutti presents today with left lumbar radiculopathy in the setting of a L3/4 disc herniation. He has failed conservative management at this point, including physical therapy, injection, and medication/activity modifications. His symptoms have persisted for quite some time now, and he is very interested in proceeding with a surgical intervention. We will plan for a L3/L4 laminectomy and discectomy. He met with our surgery scheduling team today. (EXH 3, pages 1 & 3).

February 5, 2024. Request for Authorization (DWC Form RFA). LAMINECTOMY SPINE LUMBAR POTSERIER L3-4. Hal Le. MD. (EXH 4).

February 15, 2024. Referral Notes: Called W/C adjuster Martha Garcia at 714.-923-9874 and LVM requesting for status of auth request. Stated the date & time auth request was faxed as well as the fax number I sent it to. Advised to give me a call back at 4-7463 for

status on request. Also advised I can re-fax order and notes if needed. Narayan, Krishna, UC Davis Spine Center. (EXH 3 page 8).

February 22, 2024, UC Davis Progress note, Pegah Moradi, PA. Marcus Sutti presents with L3-L4 left paracentral disc herniation causing left lumbar radiculopathy and is indicated for Posterior spin microdiscectomy, laminectomy/ hemilaminotomy/ foraminotomy, at levels: L3-L4 and intraoperative spinal monitoring, with Dr. Khan. (EXH 6).

February 23, 2024, Letter from Applicant's Attorney to Defense Attorney: By report dated 2/05/2024 the Primary Treating Physician, Benjamin Schanker, M.D., requested the following medical treatment/diagnostic studies: (1) Laminectomy Spine Lumbar Posterior L3-4. Demand is hereby made for authorization for the medical treatments/diagnostic tests or an explanation of denial, either on a medical or legal basis, why the treatment/diagnostic tests should not be authorized. The letter appears to include the February 5, 2024, RFA for laminectomy. (EXH 5).

March 5, 2024, Referral Notes: Called W/C adjuster Martha Garcia at 714-923-9874 and LVM requesting for status of auth request. Stated the date & time auth request was faxed as well as the fax number I sent it to. Advised to give me a call back at 4-7463 for status on request. Also advised I can re-fax order and notes if needed. Narayan, Krishna, HUSC. (EXH 3 page 7).

March 25, 2024. Proof of Service and filed electronically in EAMS: Letter dated 3/25/2024 and Supporting Documents. Includes service on David Jane & Associates Attn: David Na, Esq. (EXH 3 page 12).

## **B.**

### **PROCEDURAL HISTORY**

On August 8, 2023, Applicant filed a Declaration of Readiness to Proceed to Expedited Hearing in ADJ17468996 seeking authorization for medical treatment. (EAMS #47633645).

EAMS reflects Notice of Hearing issued August 10, 2023, setting the matter for Expedited Hearing on August 30, 2023.

Defendant did not appear at Expedited Hearing on August 30, 2023. The Applicant, however, appeared and Applicant and Defendant informally reached a resolution of the issues electronically without involvement of the Workers' Compensation Judge. Minutes of Hearing issued placing the matter OTOC noting "Penalty and attorney costs are deferred. Defendant Attorney is ordered to provide/file written explanation why did not appear today within 15 days of today. Defendant did not appear for trial in person." (EAMS #77107689).

On March 14, 2024, Applicant filed a Declaration of Readiness to Proceed to Expedited Hearing in ADJ17468996 seeking authorization for medical treatment that was recommended by the primary treating physician. (EAMS #50929472).

On April 3, 2024, Defendant did not appear in person due to a personal emergency and requested electronic appearance. The matter was converted to MSC and the parties and the WCJ were able to complete and circulate a Pre-Trial Conference Statement (PTCS) electronically. Page one of the PTCS includes dispositions and orders of “Parties agree to trial on May 7, 2024, in person in Lodi. Defendant to respond to 08/30/2023 minutes. Discovery remains open and the parties may amend the exhibit lists at time of trial.” (EAMS #77810228).

On May 7, 2024, Defendant did not appear in person for trial. Minutes of Hearing and Order Continuing 2 Hour Trial issued setting both ADJ17468996 and ADJ17468267 for trial on May 28, contained the following:

(1) ADJ1746899 was set for Exp Hrg in person on 8/30/2023. Defendant did not appear in person. The Minutes included Order that defendant provide written explanation for not appearing. It does not appear that Defendant has complied with this Order. (2) This matter was next set for Exp Hrg on 4/3/24 in person. Defendant did not appear in person due to personal emergency. PTCS was completed as Exp Hrg was converted to MSC and matter was set for trial in person 5/7/24 (today). The parties agreed to in person trial 5/7/24 and it was noted Defendant was to respond to 8/30/23 Minute Order. Defendant failed to appear today and appears to have not replied to 8/30/23 Minute Order. (3) It appears that applicant has two lumbar injury dates with this Employer and the Employer is represented by the same defense counsel in both claims. (4) Applicant is seeking lumbar laminectomy surgery per RFA dated 2/5/24.

ORDERS (1) Both ADJ17468996 and ADJ17468267 are set for trial – 2 hour – on May 28, 2024, at 8:30 AM in person at the Lodi District Office. (2) Defense Attorney David Na is ordered to appear in person for trial. (3) Issues for trial are (A) RFA dated 2/5/24, (B) Sanctions on Board’s motion for failure to comply with 8/30/23 Minute Order, failure to appear at trial 5/7/24, and failure to comply with 8 CCR

§10101.1(e) re tx records relevant to 2/5/24 RFA. (3) Defendant is to file any PQME/AME reports at least 10 days before trial. (4) Parties are to file proposed exhibits 10 days before trial.

Defendant did not appear for trial on May 28, 2024, and ADJ17468996 was tried with Minutes of Hearing, Summary of Evidence (MOH), Notice of Intent to Submit, and Order ADJ17468267 OTOC, issued June 3, 2024. (EAMS #78016662). Applicant’s testimony at trial was consistent with the medical record.

The day of trial, and prior to the scheduled trial time, Defendant filed a timely Petition for Removal, seeking to challenge Minutes of Hearing and Orders issued May 7, 2024. (EAMS #52107716). The Petition for Removal remains pending before the WCAB.



There being no objection, ADJ17468996 was Ordered Submitted on June 24, 2024, with submission effective June 19, 2024. (EAMS #78092134).

**C.**  
**ANALYSIS**

The burden of proof in a Workers' Compensation claim is a preponderance of the evidence. California Labor Code (LC) §3202.5 and §5705. The burden of proof rests on the party holding the affirmative of an issue. LC §5705.

**1.**

*Need for Medical Treatment*

An injured worker is entitled to all care reasonably required to cure or relieve the worker from the effects of an industrial injury. California Labor Code (LC) §4600(a).

Utilization Review (UR) of a Request for Authorization (RFA) is mandated by California Labor Code (LC) §4610. The timeline for defendant to review a request is set out in LC §4610(i)(1) as follows:

Except for treatment requests made pursuant to the formulary, prospective or concurrent decisions shall be made in a timely fashion that is appropriate for the nature of the employee's condition, not to exceed five normal business days from the receipt of a request for authorization for medical treatment and supporting information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician.

Therefore, defendant has five normal business days and possibly up to fourteen days from receipt of an RFA to issue a decision. If a UR decision is untimely, the determination of medical necessity may be made by the WCAB based on substantial medical evidence consistent with Labor Code section 4604.5. Dubon v. World Restoration, (*Dubon II*), 79 CCC 1298, 1300, (WCAB *En Banc*, October 6, 2014)

Here, RFA for lumbar laminectomy posterior L3-4 surgery issued February 5, 2024. (EXH 4).

The treating physician appears to have made reasonable attempts to have the RFA reviewed (see EXH 3).

It is clear, however, that Applicant's counsel sent a demand for authorization of lumbar surgery by letter on February 23, 2024, to the Defense Attorney of Record in this matter. (EXH 5). The letter was sent to the same address listed on Defendant's Notice of Representation filed May 3, 2023. (EAMS #46224961, *Judicial Notice*).

The April 3, 2024, Pre-Trial Conference Statement (PTCS), was signed by Defendant and includes in the issues listed by Defendant that “Defendants never received any of the RFA’s until March 25, 2024 letter from the Applicant’s Attorney.” The February 5, 2024, laminectomy RFA was listed by Applicant as an exhibit. (PTCS of April 3, 2024, pages 3 & 5; *Judicial Notice*, EAMS #77810228).

Despite defendant having acknowledged receipt of the RFA by the time of completing the Pre-Trial Conference Statement on April 3, 2024, the record contains no decision from defendant on the RFA for lumbar laminectomy posterior L3-4 surgery issued February 5, 2024. It is now more than 14 days after Defendant acknowledged receipt of the RFA. There is no UR decision. Therefore, any decision in this matter is untimely and the determination of medical necessity may be made by the WCAB based on substantial medical evidence consistent with Labor Code section 4604.5. Duban *supra*.

The recommended guidelines set forth in the medical treatment utilization schedule adopted by the administrative director pursuant to Section 5307.27 shall be presumptively correct on the issue of extent and scope of medical treatment. LC §4604.5. The Administrative Director’s Treatment Orders for the low back can be found at: <https://www.dir.ca.gov/dwc/DWCPropRegs/2021/MTUS-August/Low-Back-Guideline.pdf>. Evidence-Based-Update-

Under the Treatment Order for the lumbar spine, decompressive surgery (laminectomy) is recommended where there is 1) radicular pain, 2) MRI imaging that shows stenosis, and 3) continuing pain and symptoms lasting after at least 4 – 6 weeks and despite treatment. All of these conditions are met in the present matter. (See EXH’s 1, 3, 6, & XX). Applicant’s credible testimony corroborated the medical evidence of record. The January 11, 2024, Progress Note from Safdar Nasim Khan, MD, is well reasoned, substantial, and supports the requested surgery.

While not controlling, PQME Ciepela was clearly prescient when he stated: “I suspect he is going to require extensive surgery for the lumbar spine.” (EXH XX).

Applicant is entitled to an Award of Medical Care to include lumbar laminectomy as requested in the February 5, 2024, RFA.

There is no apportionment of the expenses of medical treatment. Granado v WCAB (1968) 69 C2d 399, 33 CCC 647. Applicant is entitled to an Award of medical care.

2.

*Labor Code §5813*

The Workers' Compensation Appeals Board, in recent *En Banc* decisions, has discussed the process for considering sanctions under LC §5813, and most recently stated:

The Appeals Board is authorized to impose sanctions under section 5813, which states, in pertinent part:

(a) The workers' compensation referee or appeals 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. In addition, a workers' compensation referee or the appeals board, in its sole discretion, may order additional sanctions not to exceed two thousand five hundred dollars (\$2,500) to be transmitted to the General Fund.

As detailed in the Notice, WCAB Rule 10421(b) provides a comprehensive but non-exclusive list of actions that could be subject to sanctions. As applicable here, subdivision (b) states that a party may be subject to sanctions where the party has engaged in the following actions: Failure to appear or appearing late at a conference or trial where a reasonable excuse is not offered or the offending party has demonstrated a pattern of such conduct.

- (1) Failure to appear or appearing late at a conference or trial where a reasonable excuse is not offered or the offending party has demonstrated a pattern of such conduct.
- (2) Filing a pleading, petition or legal document unless there is some reasonable justification for filing the document.

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- (4) Failing to comply with the Workers' Compensation Appeals Board's Rules of Practice and Procedure . . . or with any award or order of the Workers' Compensation Appeals Board, including an order of discovery, which is not pending on reconsideration, removal or appellate review and which is not subject to a timely petition for reconsideration, removal or appellate review.

. . . Executing a declaration or verification to any petition, pleading or other document filed with the Workers' Compensation Appeals Board: (A) That:

- (i) Contains false or substantially false statements of fact;
- (ii) Contains statements of fact that are substantially misleading;
- (iii) Contains substantial misrepresentations of fact;

- (iv) Contains statements of fact that are made without any reasonable basis or with reckless indifference as to their truth or falsity;
  - (v) Contains statements of fact that are literally true, but are intentionally presented in a manner reasonably calculated to deceive; and/or
  - (vi) Conceals or substantially conceals material facts . . .
- (6) Bringing a claim, conducting a defense or asserting a position: (A) That is:
- (i) Indisputably without merit;
  - (ii) Done solely or primarily for the purpose of harassing or maliciously injuring any person; and/or
  - (iii) Done solely or primarily for the purpose of causing unnecessary delay or a needless increase in the cost of litigation . . .
- (7) Presenting a claim or a defense, or raising an issue or argument, that is not warranted under existing law . .
- (8) Asserting a position that misstates or substantially misstates the law . . .

(Cal. Code Regs., tit. 8, § 10421(b).)

Sanctions under section 5813 are designed to punish litigation abuses and to provide the court with a tool for curbing improper legal tactics and controlling their calendars. (*Duncan v. Workers' Comp. Appeals Bd.* (2008) 166 Cal.App.4th 294, 302.) Accordingly, sanctions are similar to penalties under section 5814, in that they are designed to have both remedial and penal aspects. (See *Ramirez v. Drive Financial Services*, (2008) 73 Cal.Comp.Cases 1324 (Appeals Board En Banc).) Abel Hidalgo, et al. vs. Roman Catholic Archbishop, et al., WCAB *En Banc*, August 7, 2024, Case No. ADJ13332737, ADJ15218980, ADJ12640295, pages 3 – 4, 89 Cal. Comp Case.

Defendant filed a Petition for Removal of the May 7, 2024, Minutes of Hearing continuing trial to May 28, 2024. Filing a petition to remove does not terminate the WCJ's authority to proceed in a case and does not continue or cancel an established hearing date. Farmer Bros. Coffee v WCAB (Hatcher) (1987) 52 CCC 348 (writ denied).

After consulting with the Presiding Workers' Compensation Judge of the Lodi District Office, this WCJ proceeded with the duly noticed trial on May 28, 2024. Issue number 2 listed on the MOH is "Sanctions pursuant to Labor Code Section 5813." Notice of Intent to Submit was served with the MOH SOE and, no objection being received, the matter was submitted June 19, 2024, by Order dated June 24, 2024.

Sanctions pursuant to Labor Code Section 5813 are at issue pursuant to the MOH of May 28, 2024, which is not subject to Defendant's Petition for Removal.

Here defendant failed to appear in person at a duly noticed Expedited Hearing on August 30, 2024, and failed to respond to the Minute Order of that date that "Defendant Attorney is ordered to provide/file written explanation why did not appear today within 15 days of today." Neither did defendant respond when the Order was repeated in the April 3, 2024, PTCS "Defendant to respond to 08/30/2023 minutes."

Defendant's failure to respond to two Orders requiring Defendant explain not appearing at a duly noticed Expedited Hearing, clearly violates Title 8 CCR 10421(b)(4) as "Failing to comply with the Workers' Compensation Appeals Board's Rules of Practice and Procedure . . . or with any award or order of the Workers' Compensation Appeals Board" such that the imposition of sanctions is warranted. Due to the complete lack of response to two distinct Orders, a sanction of \$250.00 is ordered.

Despite participating in drafting as well as signing the PTCS of April 3, 2024, which set this matter in person for trial on May 7, 2024, Defendant did not appear for trial on May 7, 2024. The PTCS of April 3, 2024, is not the subject of a Petition for Removal or Petition for Reconsideration. Defendant appears to be engaging in a pattern of not appearing, however for purposes of sanctions only the failure to appear on May 7, 2024, is considered. See Title 8 CCR 10421(b)(1): "Failure to appear or appearing late at a conference or trial where a reasonable excuse is not offered." As this is the second sanctionable action of Defendant, a sanction of \$500.00 is ordered.

As defendant did not appear at trial on May 28, 2024, it was not possible to create a record on Defendant's compliance with Title 8 CCR §10101.1(e) regarding the February 5, 2024, RFA. As a consequence, this issue is deferred.

Defendant failed to appear at trial on May 28, 2024. This trial was set by Order of May 7, 2024, which was subject of Defendant's Petition for Removal (*see* Title 8 CCR 10421(b)(4)). As such, Defendant is put on notice that sanctions pursuant to LC §5813 for Defendant's failure to appear at trial on May 28, 2024, is at issue, but that issue is deferred.

The issue of reasonable expenses, including costs and attorney's fees was ordered deferred at trial. (MOH SOE, May 28, 2024, page 3, lines 15 -16).

[END OPINION AND ORDER]