WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JUAN MARTINEZ, ***Applicant***

vs.

CREAM OF THE CROP AG SERVICE, INC.; CA FARM MANAGEMENT, INC.; Administered By PACIFIC CLAIMS MANAGEMENT, ***Defendants***

Adjudication Number: ADJ11080934
Fresno District Office

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

Applicant seeks reconsideration of our Decision After Reconsideration of August 4, 2025, wherein we found that a workers' compensation administrative law judge's (WCJ) Findings of Fact and Order of April 30, 2025 was not justified by the evidence. (Lab. Code, § 5903, subd. (c).) In so finding, we reversed findings that "Defendant's failure to authorize a neuropsychology evaluation … was a frivolous tactic that violates Labor Code Section 5813" (Finding No. 2) and "Defendant's refusal to agree to additional panels after an 11/30/23 trial that was ordered off calendar for development of the medical record … was a frivolous tactic that caused unnecessary delay and violates Labor Code Section 5813." (Finding No. 4.) The WCJ had ordered that defendant pay Labor Code section 5813 sanctions in the form of $20,500.00 in attorneys' fees to applicant's counsel. The sanctions were imposed after the issuance of a Notice of Intention to Impose Sanctions of December 2, 2024 and a hearing which took place on March 18, 2025. In our August 4, 2005 decision, we rescinded the WCJ's decision and ordered the Notice of Intention discharged, as we found that the record did not evince bad faith conduct on the part of the defendant. In this matter, while employed on March 4, 2017 as a tractor driver, applicant sustained admitted industrial injury to the head and in the form of hearing loss and alleges industrial injury to the neck, brain, nervous system, psyche and "internal."

Applicant has now filed a Petition for Reconsideration, which does not appear to challenge the substance of our August 4, 2025 decision. In its Petition, applicant appears to seek clarification regarding our standard of review, states that we did not "address" the applicant's Answer to

defendant's Petition for Reconsideration, that we did not address certain specific sub-issues in defendant's Petition, and that in making our decision we focused on applicant's conduct rather than on defendant's conduct. We have received an Answer.

We will deny applicant's Petition for the reasons stated in our Opinion and Decision of August 4, 2025 and for the additional reasons stated below.

Regarding the standard of review applicable to reconsideration proceedings, pursuant to a constitutional grant of authority (Cal. Const., art. XIV, §§ 1, 4), the Legislature expressly vested the Appeals Board with "judicial powers." (Lab. Code, § 111(a); see also, *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 355-356 [the WCAB has "been legislatively endowed with judicial powers pursuant to a specific constitutional authorization"].) Although WCJs conduct hearings and make initial decisions pursuant to a delegation of its judicial power by the Appeals Board (Lab. Code, §§ 5309, 5310; Cal. Code Regs., tit. 8, § 10348), and although the decision of a WCJ will become the decision of the Appeals Board if it does not grant reconsideration (Cal. Code Regs., tit. 8, § 10348), the fact remains that, on reconsideration, the Appeals Board may affirm, *amend*, *or rescind* a WCJ's decision based on the existing record and/or on new evidence (Lab. Code, §§ 5906, 5907, 5908(a)) and, in so doing, it may determine that the evidence does not "justify" the WCJ's decision. (Lab. Code, § 5903(c).)

Thus, the Appeals Board is the ultimate finder of fact. (See Lab. Code, § 5953.) On reconsideration, it is empowered to re-evaluate the record, to reject the findings of the WCJ, and to enter its own findings, provided that its findings are supported by substantial evidence. (*Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]. The Appeals Board may not act arbitrarily or capriciously on reconsideration, but it has "considerable discretion," "enjoys broad authority to correct injustices" (*Redner v. Workmen's Comp. Appeals Bd*. (1971) 5 Cal.3d 83, 92 [36 Cal.Comp.Cases 371]), and it can "redetermine the case upon the existing record" and take a "different view of the same evidence" than the WCJ. (*Argonaut Ins. Exchange v. Industrial Acc. Com*. (*Bellinger*) (1958) 49 Cal.2d 706, 709-712 [23 Cal.Comp.Cases 34].) This is particularly true where a WCJ's findings are not based predominantly on the witnesses' credibility (see *Garza v. Workmen's Comp. Appeals Bd*., *supra*, 3 Cal.3d at pp. 318-319) but are instead based largely on an assessment of documentary evidence such as medical reports, which is an assessment that is "as well made by the [Appeals Board] as the trial judge."

(*County of San Bernardino v. Workers' Comp. Appeals Bd.* (*Ramirez*) (1981) 125 Cal.App.3d 679, 686 [46 Cal.Comp.Cases 1200].)

Here, we found there was no evidence of bad faith litigation tactics and we thus rescinded the WCJ's decision on that basis.

With regard to the evidentiary record, we expressly stated in our prior opinion:

> The Opinion on Decision states that "Applicants' Attorney's relevance objection to all the Defendant trial exhibits is sustained, except regarding Exhibit D, the 5/3/18 QME report of Dr. Bhatia (EAMS Doc ID #48990107), All remaining exhibits are excluded from evidence." We note that Trial Exhibits A through Y were listed at the November 25, 2024 hearing without objection and the WCJ has expressly relied upon these exhibits in his December 2, 2024 decision, expressly referring to Exhibits E, X, S, T, U, and W in the Opinion on Decision. (December 2, 2024 Opinion on Decision at pp. 3-5.) In fact, the WCJ expressly refers to Exhibits S, X, T, U, and W in his discussion of potential penalties. We note that there is no objection to these exhibits in either the minutes of the November 25, 2024 or the March 18, 2025 hearings, and the WCJ's decision itself contains no order excluding any documents from evidence. Contrary to the Opinion on Decision, these documents were already admitted into the evidentiary record and never excluded. However, if there had been a proper order excluding these documents from evidence, we would have reversed such an order, as many of these documents are clearly highly relevant to the sanctions issue, and summarized in the Opinion below.

(August 4, 2025 Opinion and Order at p. 1, fn. 1.)

Thus, while we noted that the WCJ purported to exclude these exhibits in the Opinion on Decision, the Opinion on Decision is not an actual finding or order. It is a separate document explaining the grounds of the actual findings, decision or order. (Lab. Code, § 5313.) These exhibtis were already admitted into the evidentiary record at the November 25, 2024 trial. Since there was no formal order excluding them from evidence, as clearly explained in our prior decision, these documents formed part of the evidentiary record. As we also clearly explained, had they been formally excluded, we would have issued an order including them. A WCJ cannot exclude highly relevant records that were already admitted into the evidentiary record and relied upon. However, since there was no formal order excluding them from the record, there was no reason for us to issue a formal order to include them.

With regard to whether we answered every sub-issue raised in defendant's Petition or applicant's Answer, we covered every issue relevant to the issue of whether defendant's conduct constituted bad faith conduct pursuant to Labor Code section 5813. Although we appreciate the

parties' help in framing the issues, we need not address every sentence of the parties' briefs when they are not relevant to the ultimate resolution of the issue at hand, or when they have been rendered moot by other findings. Here, applicant complains that we did not address his request for additional penalties. Clearly, since we found that defendant did not engage in bad faith litigation tactics, there was and continues to be no basis for the award of attorney's fees. Applicant also complains that we did not address his opposition to defendant's Petition for Judicial Notice, but we denied the request for Judicial Notice. (August 4, 2025 Opinion and Order at pp. 8-9.) If there was something lacking in our substantive analysis, applicant was free to raise the issue in the instant Petition for Reconsideration.

Finally, with regard to the contention that we shifted our focus from defendant's conduct to applicant's conduct, our focus was always whether defendant's conduct constituted bad faith pursuant to Labor Code section 5813. We noted that failing to pursue discovery, without more, constituted negligence rather than bad faith conduct. A party does not engage in litigation in a vacuum, and thus our determination may have been different had the defendant defied court orders or somehow hampered applicant's efforts to complete discovery. Our decision merely noted the absence of these conditions in our determination that there was insufficient evidence of bad faith conduct on the part of defendant.

We therefore deny the applicant's Petition. The relevant portions of our prior decision is quoted below:

OPINION AND ORDER DENYING REQUEST FOR JUDICIAL NOTICE, GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

> Defendant seeks reconsideration of a workers' compensation administrative law judge's Findings of Fact and Order of April 30, 2025, wherein it was found that "Defendant's failure to authorize a neuropsychology evaluation … was a frivolous tactic that violates Labor Code Section 5813" (Finding No. 2) and "Defendant's refusal to agree to additional panels after an 11/30/23 trial that was ordered off calendar for development of the medical record … was a frivolous tactic that caused unnecessary delay and violates Labor Code Section 5813." (Finding No. 4.) It was thus ordered that defendant pay Labor Code section 5813 sanctions in the form of $20,500.00 in attorneys' fees to applicant's counsel. The sanctions were imposed after the issuance of a Notice of Intention to Impose Sanctions of December 2, 2024 and a hearing which took place on March 18, 2025. [FOOTNOTE 1: The Opinion on Decision

states that "Applicants' Attorney's relevance objection to all the Defendant trial exhibits is sustained, except regarding Exhibit D, the 5/3/18 QME report of Dr. Bhatia (EAMS Doc ID #48990107), All remaining exhibits are excluded from evidence." We note that Trial Exhibits A through Y were listed at the November 25, 2024 hearing without objection and the WCJ has expressly relied upon these exhibits in his December 2, 2024 decision, expressly referring to Exhibits E, X, S, T, U, and W in the Opinion on Decision. (December 2, 2024 Opinion on Decision at pp. 3-5.) In fact, the WCJ expressly refers to Exhibits S, X, T, U, and W in his discussion of potential penalties. We note that there is no objection to these exhibits in either the minutes of the November 25, 2024 or the March 18, 2025 hearings, and the WCJ's decision itself contains no order excluding any documents from evidence. Contrary to the Opinion on Decision, these documents were already admitted into the evidentiary record and never excluded. However, if there had been a proper order excluding these documents from evidence, we would have reversed such an order, as many of these documents are clearly highly relevant to the sanctions issue, and summarized in the Opinion below.] In this matter, while employed on March 4, 2017 as a tractor driver, applicant sustained admitted industrial injury to the head and in the form of hearing loss and alleges industrial injury to the neck, brain, nervous system, psyche and "internal."

Defendant contends that the WCJ erred in his implicit finding that defendant engaged in "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay" and in the consequent order to pay $20,500.00 in attorneys' fees. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

As explained below, we find insufficient evidence that defendant's actions were "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." We therefore grant reconsideration, rescind the Findings and Order of April 30, 2025, and discharge the Notice of Intention of December 2, 2024.

[Discussion of Labor Code 5909 omitted.]

Turning to the merits, applicant was initially evaluated by neurologist panel qualified medical evaluator Perminder Bhatia, M.D. on February 23, 2018. Dr. Bhatia issued a report on March 19, 2018 in which he found applicant permanent and stationary and able to return to his customary work duties on a neurological basis. In a supplemental report of May 3, 2018, in response to interrogatories posed by applicant's former counsel, Dr. Bhatia wrote, "[applicant's counsel is] asking about whether the applicant should have additional panel QME evaluation in neuropsychology and answer to that is yes, traumatic brain injury can cause mental status changes, memory loss along with stress, anxiety, and sleep and so it is reasonable to have a panel QME physician in field of neuropsychology." (May 3, 2018 report at p. 2.)

Despite Dr. Bhatia's opinion that applicant should undergo evaluation by a neuropsychologist, the record does not reveal any efforts by either party to conduct this discovery. There is no record of any attempts at discovery for years. In late 2020, applicant filed a Declaration of Readiness to Proceed (DOR) on the issue of AOE/COE and temporary disability. On February 8, 2021, a hearing was held, and the matter was taken off calendar with the only discovery discussed at the hearing being an audiological test and further reporting from the otolaryngologist QME. No mention was recorded on the minutes regarding the need for a neuropsychological evaluation. There were no further hearings in the case until defendant filed a DOR to Proceed in April of 2023 on the issues of permanent disability and further medical treatment. On May 22, 2023, applicant objected to the DOR mentioning only vocational evidence as outstanding discovery. No mention was made in the objection or in the May 22, 2023 Minute Order taking the matter off-calendar of any need for a neuropsychological evaluation. On September 12, 2023, defendant filed another DOR seeking WCAB assistance with settlement. No objections to the DOR appear in the electronic file, and a mandatory settlement conference was held on November 6, 2023. In the Pre-Trial Conference Statement (PTCS) completed at the MSC, the only further discovery referenced is "Applicant asserts P&S report from PTP Dr. Sharma is required." No mention was made in the PTCS of the need for any neuropsychological evaluation. The MSC judge set the case for hearing "over obj[ection] due to delay in obtaining [vocational rehabilitation] consult and no timely objection to the DOR setting this case for hearing. [Applicant's attorney] advised that if [primary treating physician] PR-4 report obtained prior to trial it would be admissible." Nothing was recorded in the minutes regarding the need for any neuropsychological evaluation. Trial was set for November 30, 2023.

Two days before the scheduled trial, applicant filed a trial brief raising three issues: (1) wages, (2) body parts, and (3) stale reporting. With regard to the issue of body parts, applicant wrote:

> The applicant's claim was not denied, and therefore LC 5402(b) applies. The evidence will show that it's more likely than not that the applicant sustained psychiatric and/or brain injury and disability making going forward with trial only to be vacated a waste of time. The fact that there is no PR-4 from a treating physician addressing permanent disability when permanent disability is in dispute is duplicative.

(Applicant's Trial Brief of November 28, 2023 at p. 3.)

With regard to the issue of stale reporting, applicant wrote:

> The applicant was last evaluated by PQME Dr. Ross on September 26, 2018. The applicant was last evaluated by PQME Dr. Bhatia on

> September 25, 2019. Both of these reports are probably stale at this point, making trial a waste of time.

(Applicant's Trial Brief of November 28, 2023 at p. 3.)

It is unclear what evidence the applicant was referring to with regard to the psychiatric and/or brain injury or the reports being stale, or what was meant by permanent disability being duplicative. Nevertheless, the WCJ presiding over the November 30, 2023 trial took the matter off-calendar, writing in the Minutes, "The matter is ordered off-calendar for further development of the record based on points 2+3 of pg. 3 [in] applicant's brief of 11/28/2023 over defendant's objection."

On January 16, 2024, applicant filed an Amended Application for Adjudication of Claim adding an allegation that applicant sustained unspecified "internal" injury as a result of the March 4, 2017 work incident.

On January 19, 2024, applicant's counsel faxed defense counsel a Rule 31.7 Additional Panel Request signed by applicant's counsel. It appears that applicant's counsel filed the same document with the WCAB on the same day. The copy faxed to defense counsel was not accompanied by any cover letter or even a note on the fax cover sheet, which solely states "Juan Martinez." Defendant, believing that applicant had filed the Additional Panel request with the DWC Medical Unit filed an Objection with the Medical Unit on January 24, 2024 stating:

> Our office received an Additional Panel Request from the applicant's attorney dated January 19, 2024. The original panel number listed is 7146263 for claim number 17-096984.
>
> This correspondence represents Defendant's objection to the additional panel request. It is an improper unilateral request without any medical evidence or court order. Defendant was never presented with the request for an additional panel. In any event, Defendant disagrees that additional panels are warranted.

On the same date, defense counsel wrote to applicant's counsel:

> [W]e received a request for an additional panel that you submitted to the Medical Unit. It appears you are seeking an internal medicine and clinical neuropsychology panel. Again, there are no medical records or medical-legal opinions to justify these panels. If you disagree then please forward the information you are using and relying on.

On January 26, 2024, applicant's counsel responded by email simply asking, "Are you going to sign this? Thanks." On January 31, 2024 applicant's counsel

again emailed defense counsel asking if they were going to sign the "order." On February 1, 2024, defense counsel wrote to applicant's counsel referring to the January 24, 2024 correspondence as setting forth its position. It does not appear that applicant ever set forth its position in support of further discovery.

Over six months later on August 15, 2024, applicant filed a DOR stating, "Defendant has refused to sign applicant's request for additional panels and sent email correspondence that they would not be signing. Applicant's counsel will be seeking 5814.5 reimbursement for the MSC and trial if need be on this issue." Defendant filed an Objection to the DOR on August 23, 2024 in which it wrote:

> California Code or Regulations, tit. 8, section 31.7, sub. (b) requires a showing of good cause that a panel in a different specialty is needed. The section defines good cause as a written agreement with a represented injured worker or an order by a Workers' Compensation Administrative Law Judge. An order must be based on facts and medical evidence.
>
> The applicant and his attorney have not presented evidence supporting good cause or an order of additional panel specialties in internal medicine, clinical neuropsychology, or any other specialty. The applicant has not produced any medical evidence to support an alleged internal injury seven years after his alleged incident, let alone a diagnosis of any such condition.
>
> On January 24, 2024, Defendant requested medical evidence to support a demand for additional panels. There was no response.
>
> ***
>
> The applicant and his attorney have made no genuine effort to support this or any other issue they have raised since the Mandatory Settlement Conference on November 6, 2023 and Trial on November 30, 2023. This includes disputes over the applicant's indemnity rate and whether the medical-legal reports are substantial medical evidence. Defendant is unaware of any treatment, industrial or private, since August 15, 2018.

On December 2, 2024, the WCJ issued a Findings, Award, and Order finding, in pertinent part, that applicant was entitled to qualified medical evaluator panels in psychiatry and internal medicine and appointing Marcel Ponton, PhD as a Labor Code section 5701 independent medical evaluator in the field of neuropsychology. Buried in the decision, after the Opinion on Decision, was a Notice of Intention to Impose Sanctions. The Notice of Intention is procedurally defective in that it is buried on page 6 of the decision and does not identify by name who is to be made subject to the potential sanctions. Nevertheless, the Notice of Intention gives notice that a hearing will be set on the issue of whether the failure to "authorize" an examination with a neuropsychologist after Dr. Bhatia's May 2018 report or failure to agree to additional panels relating to

delayed body parts after January 2024 constituted bad-faith actions pursuant to Labor Code section 5813.

On April 30, 2025, the WCJ issued the decision currently under review finding that Labor Code section 5813 sanctions were appropriate because defendant did not "authorize" and neuropsychological evaluation and did not deal "fairly and in good faith" with applicant.

Labor Code 5813 states, in pertinent part, "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." WCAB Rule 10421(b), for its part, states, "Bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay include actions or tactics that result from a willful failure to comply with a statutory or regulatory obligation, that result from a willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board, or that are done for an improper motive or are indisputably without merit."

We find insufficient evidence in this case of bad-faith actions or tactics that are frivolous or that result from a willful failure to comply with a statutory or regulatory obligation. Although the WCJ is correct that the parties should have sought a neuropsychological evaluation when it was recommended by Dr. Bhatia, we see no evidence this was a willful failure by the defendant. We do not believe that the onus for seeking such discovery fell solely on the defendant's shoulders. Indeed, applicant was represented and has the burden of proving industrial injury. Given that there is no evidence at all of applicant mentioning the need for a neuropsychological evaluation for nearly six years after Dr. Bhatia's report, it is unclear how defendant's actions could be found "willful" and or that a finding could be made that defendant did not deal fairly and in good faith. During this time, applicant could have engaged defendant in discussions regarding the need for further discovery or setting forth good cause for further panels before the WCAB and obtaining an order for further discovery. We find nothing in the record that defendant obstructed any such efforts.

When applicant finally did articulate the desire for further discovery in January of 2024, while the WCJ did ultimately find applicant entitled to further discovery, we do not find the defendant's position to be frivolous. Rule 31.7 expressly requires good cause to order further panels, and defendant's position that it required a factual basis to engage in further discovery was not frivolous, especially in light of the fact that applicant had apparently not previously sought this discovery. We note that applicant never sought to confer in good faith over the need for this discovery, presenting documents for signature without so much as a cover note, and not responding to defendant's requests for information.

Finding no evidence of willful breaches or bad faith, we will rescind the WCJ's decision and find that the Notice of Intention of December 2, 2024 is discharged.

We note that defendant has devoted two pages of its Petition discussing the WCJ's alleged bias against it, although it does not explicitly ask for disqualification. To the extent that defendant intended this is a Petition for Disqualification, it does not meet the format and time limitations of Appeals Board Rule 10960 (Cal. Code Regs., tit. 8, § 10960), and thus we do not consider it a Petition for Disqualification. In any case, as we noted in *Robbins v. Sharp Healthcare* (2006) 71 Cal.Comp.Cases 1291, 1310 (Appeals Bd. Significant Panel Decision), "A judge's disagreement with an attorney's legal arguments, and even erroneous rulings by a judge, ordinarily are not sufficient to establish bias or prejudice…. [Citations.]"

We deny defendant's Request for Judicial Notice. As stated in Note 1, *ante*, there is no order or finding in the Minutes or in any decision excluding an item from evidence. Exhibits A through Y were introduced at the prior trial and relied upon by the WCJ. As far as Exhibits Z through DD, we see no objection to these Exhibits in the Minutes of trial, and therefore any objection was waived. Nevertheless, we agree that the records regarding alleged prior injuries are not relevant to the sanctions issue. Defendant did not know about these records at the time of the behavior under review and thus the existence of these records is not relevant to defendant's good faith or lack thereof.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of our Decision After Reconsideration of August 4, 2025 **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 28, 2025

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

JUAN MARTINEZ
CLAYTON PERRY
BRADFORD & BARTHEL

DW/oo

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