**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**OLGA JANET MOLINA,** ***Applicant***

**vs.**

**DESERT SHADES, INC. (A CORP.); SOUTHERN INSURANCE COMPANY,ADMINISTERED BY AMTRUST NORTH AMERICA,** ***Defendants***

**Adjudication Number: ADJ11065911**
**Long Beach District Office**

# OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**I CONCUR,**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

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

**December 27, 2022**

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

**OLGA JANET MOLINA**
**LAW OFFICES OF A. ALEXANDER SOLHI & ASSOCIATES**
**HANNA, BROPHY, MacLEAN, McALEER & JENSEN, LLP**

**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 OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION**

## I.

## INTRODUCTION

Southern Insurance Company, administered by Amtrust, represented by Mark Lee of Hanna, Brophy, McAleer, McLean and Jensen (hereafter Southern or Defendant), seeks reconsideration of the Findings and Order dated October 10, 2022, ordering Southern to pay a twenty-five hundred dollar ($2,500.00) sanction, joint and several, for conduct by them in violation of Labor Code Sections 5813 and 8 CCR 10421(b). Defendant's timely, verified Petition alleges that the court:

1. By its order, acted in excess of its powers;
2. That the evidence did not justify the Findings of Fact;
3. That the Findings of Fact do not support the Order.

Defendants contend that they should be relieved from the Court's Sanction Order because:

a.) The Appeals Board, not the WCJ, has the authority to notice and issue an Order of Sanctions under Labor Code Section 5813 and 8 CCR 10421(b);

b.) The Appeals Board granted reconsideration for further study of the WCJ's Findings and Order denying Defendant's Petition to Compel, before dismissing the reconsideration and denying the removal without sanctioning Defendant, rendering the issue of sanctions "moot"; and

c.) That Defendant should not be sanctioned for asserting a good faith argument, testing the limits of the law (Testing a novel theory of law) in good faith.

The issue of sanctions came to Trial on July 13, 2022, against Defendant. No testimony was offered by Southern in support of their contentions. Objections to the NOI dated June 1, 2022, and July 8, 2022, from Southern were received. The matter was then submitted.

## II.

## FACTS

Olga Janet Molina (hereafter Applicant) filed a cumulative trauma claim of injury against Desert Shades, Inc. alleging injury during the period October 12, 2016 to October 12, 2017. The case was denied by Southern. Southern and Applicant obtained a QME Panel #7170936 dated March7, 2018. Jeffrey Derkach, D.C., was chosen as QME. He first submitted a compensable report dated May 29, 2018, and subsequently provided supplemental reports and was deposed. Ohio Security Insurance Company, administered by Liberty Mutual (hereafter Liberty), was joined by Order dated January 11, 2018, as they had 48% of the cumulative trauma.

Liberty requested an orthopedic panel on May 14, 2020 (Exhibit A). They obtained panel #7335214 on May 15, 2020, made their strike, and served the panel on Applicant's attorney (Exhibit B). On May 18, 2020, Applicant elected against Southern by letter (Exhibit 1). On May 20, 2020, Applicant objected to panel #733521 (Exhibit 2). Liberty had no further involvement in discovery before settlement pursuant to LC 5500.5 (c). Southern, through their counsel, proceeded to schedule an appointment with James Hamada, M.D., from panel #7335214, obtained by Liberty. The parties have stipulated to the taking of judicial notice of the Minutes of Hearing dated June 25, 2020, wherein the WCJ John Siqueiros approved the election.

The appointment letter from defense counsel to Dr. Hamada was dated June 22, 2020, scheduling the appointment for July 23, 2020 (Exhibit C). In light of notice and approval of the election, Applicant refused to attend the examination with Dr. Hamada scheduled by Southern from the panel obtained by Liberty.

Southern then filed a Petition to Compel Attendance at Examination on August 6, 2020. Trial before the undersigned took place on August 27, 2020, where Southern sought a court order compelling Applicant to attend the appointment with Dr. Hamada. The Findings and Order denying the Petition issued on October 15, 2020. Southern filed a Petition for

Reconsideration/Removal November 2, 2020, arguing that the Applicant should be compelled to attend the additional QME. Initially, reconsideration was granted for further study. Eventually, reconsideration was dismissed and removal was denied on September 9, 2021.

As set forth in the Petition for Reconsideration, these facts are undisputed.

Contrary to the assertions of Southern, the appointment with Dr. Hamada was scheduled more than a month after the parties had notice of the election.

## DISCUSSION

## III.

## AUTHORTY OF THE WCJ

Initially, Southern contends that a Workers' Compensation Judge does not have the authority to raise sanctions on his or her own motion. Workers' Compensation Judge and Workers' Compensation Referee, as used in the statutes and regulations, are interchangeable (Labor Code Section 27).

The Workers' Compensation Appeals Board's jurisdiction is derived from Labor Code Section 133, to wit:

> The Division of Workers' Compensation including the Administrative Director and the Appeals Board shall have the power and the jurisdiction to do all things necessary or convenient to in the exercise of any power or jurisdiction conferred upon it under this code.

Labor Code Section 5813 provides the following:

> 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 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 submitted to the General Fund.
>
> b.) The determination of sanctions shall be made after written application by the party seeking sanctions or upon the Appeals Board's own motion.

Code of Regulations Section 10421(a) further provides that:

> On its own motion or upon the filing of a petition pursuant to rule 10510, the Workers' Compensation Appeals Board may order payment of reasonable expenses, including attorney's fees and costs and, in addition sanctions as provided in Labor Code Section 5813.

Code of Regulations Section 8 CCR 10330 provides insofar as is pertinent:

> …Orders, Findings, Decisions and Awards issued by the Workers' Compensation Judge shall be the Orders, Findings, Decisions and Awards of the Workers' Compensation Appeals Board unless reconsideration is granted.

Therefore, a Workers' Compensation Judge functions on behalf of the Appeals Board until reconsideration is granted, and is authorized under Labor Code Section 5813, regulations 8 CCR 10330, and 8 CCR 10421(a), to act in his or her discretion to raise and address the issue of sanctions where warranted. It is apparent in this case, as in any other, that the Appeals Board may remove to itself or grant reconsideration of any matter, limit, deny or augment sanctions as they see fit.

## IV.

## IS THE ISSUE OF SANCTIONS MOOT

Defendant contends that the Appeals Board reserves to itself whether or not the filing of a Petition for Reconsideration is frivolous or in bad faith (Memorial Hospital Association v. WCAB (Harris) (2002) 62 CCC 975). In Harris, the WCJ sanctioned a party for filing a reconsideration that was time barred and was denied. The Appeals Board found that generally speaking, they reserve to themselves the determination as to whether a Petition is frivolous or in bad faith. When the Petition for Reconsideration/Removal was addressed in this case the WCAB was not asked to address sanctions. It is unlikely that they were intending to have the dismissal of reconsideration and denial of removal interpreted as addressing Defendant's conduct. In this instance, as was noted in the Opinion, Defendant's conduct was not treated as just the filing of a pleading, but of a continuing course of conduct involving co-opting the QME panel of another party after obtaining their own QME, ignoring an election, improperly scheduling a medical appointment (Dr. Shopping), seeking an Order to Compel Attendance at an improperly scheduled medical examination, and finally, the filing of a Petition for Reconsideration/Removal of the Order Denying the Petition to Compel.

It is well established that the Appeals Board, having original jurisdiction, may retain jurisdiction on any issue (Labor Code Section 133). By regulation they retain exclusive authority to address certain issues (8 CCR 10320). None of the matters exclusively reserved by the appeals board relate to the matter of sanctions. The authority to sanction a party for their conduct still begins with the judge, derived from the appeals board under these facts, unless or until, the appeals board grants reconsideration.

Defendant contends that the WCAB's failure to sanction renders the issue moot. Moot is defined as "a subject for argument; unsettled; undecided. A moot point is one not settled by judicial decisions" (Black's Law Dictionary, 4th Ed., Page 1159). We agree that the matter of sanctions remains undecided because it was not addressed at the time that the Appeals Board issued its decision dismissing reconsideration and denying removal.

## V.

## SOUTHERN'S CLAIM THAT THEY ARE TESTING A NOVEL THEORY IN GOOD FAITH

Southern contends that there is no authority that specifically prohibits their action in asserting dominion over Liberty's deferred discovery rights and to assert them as their own. Their actions defy the regulations set forth, the election statute, the rules against doctor shopping, as well as the legislative intent behind Labor Code Sections 4060 to 4062.2 which limit access to multiple medical evaluations for the same injury.

Southern asserts that the presence of the QME panel obtained by Liberty is "part of the record" and infers that this gives Southern the right to an additional QME evaluation which they characterize as "discovery". They cite authority for this proposition, case law that holds the opposite under these facts (Chanchavec v. LB Industries, Inc. 2015 Wrk. Comp. PD, Lexis 516).

In Chachavec, it was found that each defendant could obtain their own QME in a cumulative trauma case to preserve their right to due process of law. It was also noted in the case that the Applicant could protect themselves from litigating against multiple defendants by exercising an election, as was done here. There is nothing in the case that could be construed as allowing a party an additional PQME without meeting the requirements of 8 CCR 31.5 or 8 CCR 31.7.

8 CCR 31.5 sets forth sixteen (16) grounds under which the Medical Director or the court may allow replacement of an existing panel. Southern suggests that as an Orthopedist, Dr. Hamada, would be in the appropriate specialty for musculoskeletal injuries, rather than chiropractor, Derkach. However, they did not offer any evidence to support replacement pursuant to 8 CCR 31.5(a) (10) and did not pursue a legally justified replacement.

CCR 31.7 addresses the appointment of an additional QME when a panel has previously been obtained, a QME has been selected, and a report obtained, as in this case. The regulation requires that additional panels may be obtained by agreement of the parties (8 CCR 31.7 (a).) If an agreement cannot be reached, an additional panel may be obtained upon receipt of a court order, based on a showing of good cause [8 CCR 31.7 (c)].

The purpose of the election statute is to mitigate the delay, expense, and hardship when multiple insurance carriers or employers are involved (Harrison v WCAB (1974) 39 CCC 867).

Until contribution is litigated, after a final Order or Award, a defendant who has been elected out cannot conduct discovery (Kelm v Loret (1981) 46 CCC 113).

Labor Code Section 5500.5(c) provides in pertinent part:

> …Any employer joined as a defendant subsequent to the first hearing or subsequent to the election provided herein shall not be able to participation any of the proceedings prior to the appeals board's final decision, nor to any continuance of further proceedings…On supplemental proceedings, the right of the employer to full and complete examination or cross-examination shall not be restricted.

Southern went through the QME process when Dr. Derkach was appointed from panel #7170936. Under the circumstances, Southern cannot claim that an additional QME was necessary absent a showing of good cause. After the election on May 18, 2020, Liberty had no right to conduct, nor did they attempt to pursue further discovery. As of that date, discovery related panel # 7335214 obtained by Liberty, should have been deferred until the case-in-chief was resolved, at which time it could be used in a further proceeding for contribution [See Labor Code Section 5500 (c)].

Southern did not seek an additional panel by agreement or order before seeking the evaluation from the panel obtained by their co-defendant. The regulations requiring agreements between the parties or a court order, after a showing of good cause, to obtain a replacement or additional panel, is intended to prevent "doctor shopping".

Doctor Shopping is defined as "the practice of obtaining additional medical opinion on the same issues, hopefully better, than an earlier one" (Workers' Compensation Index, 13th Edition, Page D-56 (2017). In this instance, the initial QME, Dr. Derkach submitted a compensable report in a denied case, followed by several supplemental reports and a deposition. As a chiropractor he assessed the musculoskeletal issues. The appointment scheduled with an orthopedist, Dr. Hamada, would require evaluation of the same medical issues.

In the absence of a showing that Dr. Derkach was unavailable or otherwise unable to address the medical issues in the case, a medical report from Dr. Hamada obtained by Southern would have been inadmissible doctor shopping (Barney v. State Compensation Insurance Fund (1994) 59 CCC 1051). Southern for an improper purpose, and without agreement or a court order, despite having already obtained a QME, stepped into the shoes of Liberty and proceeded to schedule an appointment with James Hamada, M.D., from panel #7335214.

Defendant has engaged in a course of conduct, after being elected, co-opting the QME panel of the elected out party, ignoring the election statute, not complying with the rules and regulations that would allow for another evaluation, and doing so to obtain a medical report which would have been inadmissible at trial, flagrantly violating LC 5813 and 8 CCR 10421(b). Their course of conduct defines actions that are frivolous, without merit, pursued for an improper purpose and demonstrate a willful failure to comply with the applicable statutes and regulations. It is for these reasons that the sanction is appropriate.

The amount of the sanction takes into consideration the nature of the violation, the persistence in pursuing an improper purpose, and the disregard for compliance with the applicable statutes, rules and regulations.

## VI.

## RECOMMENDATION

The Petition for Reconsideration should be denied and the sanction should be undisturbed.

DATE: November 10, 2022

Daniel Nachison
WORKERS' COMPENSATION JUDGE