WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BRENT REYNOLDS, *Applicant*

vs.

HOSTESS BRANDS; FORMERLY SELF-INSURED ADMINISTERED BY SELF-INSURED SECURITY FUND VIA TRISTAR, *Defendants*

Adjudication Number: ADJ9714303
San Bernardino 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/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 7, 2023

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

BRENT REYNOLDS
LERNER, MOORE, SILVA, CUNNINGHAM & RUBEL
GALE SUTOW & ASSOCIATES

AS/ara

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

REPORT AND RECOMMENDATIONS
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1.	Applicant's Occupation:	Sales representative
	Applicant's Age:	58
	Date of Injury:	October 16, 2012
	Parts of Body Injured:	Shoulder; wrist
2.	Identity of Petitioner:	Defendant has filed the Petition.
	Timeliness:	The petition is timely.
	Verification:	A verification is attached to the petition.
3.	Date of service of Findings and Award:	November 18, 2022

II
CONTENTIONS

1. That by the Decision, the Appeals Board acted without or in excess of its powers.

III
FACTS

The Applicant, Brent Reynolds, sustained an injury on October 16, 2012 to his shoulder and wrist that arose out of and in the course of his employment as a sales representative for Hostess Brands.

During the course of the litigation of this case, the parties have agreed to use Dr. Robert Fenton as an Agreed Medical Evaluator in Orthopedic Surgery. As part of the discovery process, Defense counsel scheduled Dr. Fenton's cross-examination to take place on August 15, 2016. On or around May 6, 2016, Dr. Fenton transmitted a proposed deposition fee agreement to Defense counsel's office, seeking Defendant's acknowledgment and agreement to pay a $781.25 non-refundable deposit for the schedule cross-examination. (Joint Exhibit A-1.) Defense counsel executed this agreement on or around May 11, 2026. (*Ibid.*) Defense counsel did not copy opposing counsel when transmitting this now fully executed agreement back to Dr. Fenton. The deposition was eventually re-scheduled to October 31, 2016. (Joint Exhibit A-2.) The Defendant would ultimately pay the requested deposit, which Dr. Fenton would receive on or around October 19, 2016. (Joint Exhibit A-3.)

Applicant counsel sought to travel out of state to enjoy the MLB World Series, and therefore requested that the October 31, 2016 cross-examination be re-scheduled. Dr. Fenton refused to

waive his non-refundable deposit policy, and intended to charge the parties with an additional $781.25 for any re-scheduled deposition. (Joint Exhibit A-5.)

Around this time, Applicant counsel learned of the Defendant's payment of a $781.25 non-refundable deposit, which he then objected to as being in excess of fee schedule. Applicant counsel then wrote a letter directly to Dr. Fenton on October 27, 2016, objecting to the cross-examination in its entirety, contending that Dr. Fenton was paid in excess of the fee schedule. (Joint Exhibit A-4.) He further filed a Request to Strike Dr. Fenton and Petition for Costs, Sanctions, and Attorney's Fees for Bad Faith Tactics, which in no uncertain terms accused Defendant of paying fees in excess of the fee schedule to attempt to sway Dr. Fenton to provide a more favorable opinion; Dr. Fenton was copied on this Petition. (Joint Exhibit A-6.)

In response, Defendant filed its own Petition for Costs and Sanctions on October 31, 2016 and its own Petition to Strike Dr. Fenton on November 2, 2016. WCALJ Judge Banks ultimately ordered that Dr. Fenton be stricken as the agreed medical evaluator, but deferred action on the competing Petitions for Fees and Costs. The parties obtained a QME Panel upon which Dr. Soheil Aval was selected to serve as the Orthopedic PQME. The parties would eventually settle the case via Stipulations with Request for Award based on Dr. Aval's reporting.

This matter proceeded to Trial and was ultimately submitted on September 22, 2022. The undersigned WCALJ found that Applicant counsel's challenge of the AME Dr. Fenton's cross-examination fees was not bad faith as he possessed the statutory right to challenge the same. However, the Applicant's conduct in communicating his objections to Dr. Fenton were in violation of Labor Code section 4062.3. The undersigned further found that Petitioner's payment of the $781.25 deposit was not done in bad faith as the fee was not in excess of the medical-legal fee schedule. However, Petitioner also violated Labor Code section 4062.3 for failing to serve opposing party with the cross-examination fee agreement.

IV
DISCUSSION

Under Labor Code section 5900(a), a Petition for Reconsideration may only be taken from a "final" order, decision, or award. A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal. App. 3d 1171, 1180) or determines a threshold issue that is fundamental to the claim for benefits (*Maranian v. Workers' Comp. Appeal Bd.* (2000) 81 Cal. App. 4th 1068, 1070.) Pursuant to Labor Code section 5903, any person aggrieved by any final order, decision, or award may petition for reconsideration upon one or more of the following grounds:

> (a) That by the order, decision, or award made and filed by the appeals board or the workers' compensation judge, the appeals board acted without or in excess of its powers.
>
> (b) That the order, decision, or award was procured by fraud.
>
> (c) That the evidence does not justify the findings of fact.

(d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing.

(e) That the findings of fact do not support the order, decision, or award.

Defendant Petitioner asserts under Labor Code section 5903 that the undersigned acted without or in excess of his powers by denying its Petition for Costs and Fees

Ex Parte Communications per Labor Code section 4062.3(f)

To summarize, the undersigned WCALJ found that neither party violated Labor Code section 5813. However, the undersigned found that both parties violated subsections within Labor Code section 4062.3. Specifically, Applicant counsel violated the aforementioned section when he submitted *information* to agreed medical evaluator Dr. Fenton without first consulting the Petitioner to agree upon the language. Furthermore, Petitioner violated the aforementioned section by sending an ex parte *communication* that the undersigned did not deemed nonsubstantial to Dr. Fenton without also serving opposing party. Because both parties had violated Labor Code section 4062.3, the undersigned in his discretion did not find it necessary to award costs/fees, issue sanctions, or charge either party with contempt.

Petitioner now challenges the finding that their May 6, 2016 communication with Dr. Fenton was ex parte.

Communications with an agreed medical evaluator shall be in writing, and shall be served on the opposing party when sent to the agreed medical evaluation. (*Lab. Code*, § 4062.3(f).) Oral or written communications with physician staff or, as applicable, with the agree 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 communications. (*Ibid*.) (*Emphasis added*.)

First, Petitioner asserts that the correspondence dated May 6, 2016 between his office and Dr. Fenton that memorializes Defendant's agreement to pay a non-refundable $781.25 deposit for an August 15, 2016 cross-examination (subsequently rescheduled to October 31, 2016) was not an ex parte communication as being a nonsubstantial communication. Petitioner asserts that this correspondence was just administrative, and therefore did not violate Labor Code section 4062.3(f). And if Petitioner did not violate Labor Code section 4062.3(f), Petitioner asserts that he did not act with unclean hands, and therefore should be awarded fees and costs. However, Petitioner does not provide any legal authority or convincing reasoning to support the contention that his communication with Dr. Fenton upon which he agreed to pay a $781.25 deposit with a strict cancellation/re-scheduling policy is nonsubstantial.

Petitioner states that communications discussing the "logistics for payment of deposition fees… [are] *purely administrative*." (Defendant's Petition for Reconsideration, pg. 7, line 12-13.) (*Emphasis added*.) Petitioner further states that "[the] payment of an agreed medical examiner is [a *nonsubstantial*] *administrative task*, which is regularly undertaken in our system to timely pay our QME and AME evaluators." (*Id.*, at pg. 7, lines 16-18.) (*Emphasis added*.) However, these statements are entirely conclusory. Petitioner does not cite any authority that holds that

communications with an agreed medical evaluator regarding cross-examination fees are nonsubstantial and purely administrative so as to obviate the need to serve the opposing party with the same. Further, the Petitioner does not provide any compelling reasoning as to why such communications should be considered nonsubstantial under Labor Code section 4062.3(f).

The only explanation Petitioner provides to support his conclusion that communications with an agreed medical evaluator regarding deposition fees are nonsubstantial is that this is "currently part of the CA workers' compensation culture," (*Id*., at pg. 11, lines 1-3) and that a finding from the WCAB that these communications "must be copied on *all parties* would essentially require a re-ordering of our whole workers' compensation system." (*Id*., at pg. 11, lines 7-9.) (*Emphasis added*.)

The undersigned is not convinced by the argument that communications regarding deposition fees are not substantial because that is part of CA workers' compensation culture. This argument lacks any persuasive reasoning and is akin to saying, "we do not copy opposing counsel because that how everyone has done it." Furthermore, Petitioner is concerned that copying *all parties* with these fee agreements would disrupt the Workers' Compensation process. However, Labor Code section 4062.3(f) does not require a party to copy *all parties* when it relates to communications with an agreed medical evaluator that do not relate to nonsubstantial matters; instead, a meticulous reading of Labor Code section 4062.3(f) shows that a party is only required to serve such communications on the *opposing* party. And Petitioner does not explain how serving one addition recipient (in most cases) would result in the "re-ordering of the workers' compensation system."

The undersigned WCALJ determined that a fee agreement for a scheduled cross-examination goes beyond what the Petitioner characterized as "simple messages or administrative tasks." (*Id*., pg. 7, line 6.) There are various sections within the Labor Code and California Code of Regulations that seemingly aim to standardize the compensation allowed for the services provided by medical-legal evaluators, such as a cross-examination of an agreed medical evaluator. Labor Code section 5307.6(a) tasks the administrative director to adopt and revise a fee schedule for medical legal expenses, the schedule of which is memorialized in California Code of Regulations section 9795(c), which was most recently amended on March 30, 2021. Other sections, such as Labor Code sections 139.2(o) and 5307.6(b), (d)(1) place an emphasis on disallowing compensation to providers that are in excess of the fees enumerated in the fee schedule or that could create a conflict. And Labor Code section 5307.6(b) provides the parties the statutory right to contest fees in excess of those set forth in the medical-legal fee schedule.

These various protections that are designed to prevent a provider from receiving excessive fees support the conclusion that communications with an agreed medical evaluator regarding the payment of or an agreement to pay fees/deposit for a cross-examination cannot be deemed a nonsubstantial matter, particularly in light of the parties' statutory right to challenge such fees. The opposing party is at a disadvantage if he is not timely apprised of the amount of fees the other party has paid or agreed to pay.

Interestingly, Petitioner relies upon the facts and holding in *Chaides v. Kroger Co., 2016 Cal. Wrk. Comp. P.D. LEXIS 143*, which shares similar facts to the instant case. In *Chaides*, the WCAB denied Defendant's request for a replacement panel when PQME Dr. Michael Klassen required a

payment of a $1,000.00 deposit 11 days in advance of a scheduled cross-examination. The WCAB in *Chaides* identified that this deposition policy likely conflicted with the Code of Civil Procedure section 2034.450(a), which allows for payment of the deposition fee at the commencement of the deposition, and violated the applicable fee schedule at the time per California Code of Regulations section 9795.

The facts in this case are similar to the extent that Dr. Fenton also required a deposit in advance of the deposition, which was seemingly more restrictive given that the deposit was non-refundable if the cross-examination was canceled or rescheduled. (Joint Exhibit A-1.) The language pertaining to the amount requested seemingly caused confusion as to whether it was in excess of the established fee schedule. In addition to the dispute as the amount, Dr. Fenton's deposit and cancellation policy added to the contention between the parties. With Dr. Fenton refusing to waive his cancellation policy, Petitioner would ultimately decline to re-schedule the October 31, 2016 cross-examination, though the Court does recognize the Petitioner's initial willingness to cooperate. However, like in the *Chaides* case, Dr. Fenton's non-refundable deposit policy seemingly conflicts with Code of Civil Procedure section 2034.450(a). Despite this, Defendant paid the deposit, which Dr. Fenton received on October 19, 2016. (Joint A-5.) It is unclear why Defendant did not challenge this restrictive deposit and cancellation policy given that the Code of Civil Procedure section 2034.450(a) allows parties to issue payment at the commencement of the cross-examination. And this further supports the importance of apprising the opposing party of any such fee agreement.

Accordingly, the undersigned finds that the May 6, 2016 communication at issue cannot be considered nonsubstantial and that Petitioner's failure to serve a copy of the same on opposing counsel when originally transmitted to Dr. Fenton amounts to an ex parte communication, which exposes Petitioner to contempt, costs, and attorney's fees under Labor Code section 4062.3(h). As such, the undersigned WCALJ maintains that both the Petitioner and Applicant counsel violated sections with Labor Code section 4062.3(f). Therefore, the undersigned further maintains that neither party acted with clean hands, and that both Defendant and Applicant's respective Petitions for Costs and Fees are denied.

V
RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the Defendant's Petition for Reconsideration be denied.

DATE: December 16, 2022

JASON L. BUSCAINO
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE