WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JEANETTE CLARK, *Applicant*

vs.

CALSTAR; STARR INDEMNITY AND LIABILITY COMPANY; SUTTER VALLEY MEDICAL FOUNDATION; CIGA FOR ATLANTIC MUTUAL, IN LIQUIDATION, ADMINISTERED BY SEDGWICK, *Defendants*

Adjudication Number: ADJ14265479
Sacramento 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.

We observe that pursuant to Labor Code section 5813, 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. (Cal. Lab. Code, § 5813.)

In addition, WCAB Rule 10421 provides that "[o]n 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." (Cal. Code Regs., tit. 8, §10421(a).) Rule 10421 further defines "bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay" as those action 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." (Cal. Code Regs., tit. 8, § 10421(b).) Such actions include:

> (6) Bringing a claim, conducting a defense or asserting a position:
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> (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; and
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> (B) Where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct.
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> (7) Presenting a claim or a defense, or raising an issue or argument, that is not warranted under existing law -- unless it can be supported by a non-frivolous argument for an extension, modification or reversal of the existing law or for the establishment of new law -- and where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct. In determining whether a claim, defense, issue or argument is warranted under existing law, or if there is a reasonable excuse for it, consideration shall be given to:
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> (A) Whether there are reasonable ambiguities or conflicts in the existing statutory, regulatory or case law, taking into consideration the extent to which a litigant has researched the issues and found some support for its theories; and
>
> (B) Whether the claim, defense, issue or argument is reasonably being asserted to preserve it for reconsideration or appellate review.
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> This subdivision is specifically intended not to have a "chilling effect" on a party's ability to raise and pursue legal arguments that reasonably can be regarded as not settled.

(Cal. Code Regs., tit. 8, § 10421(c)(6)-(7).)

Here, the WCJ determined that "CIGA obtained the reporting of Dr. William Ransey improperly, without issuing any proper objection per the Labor Code." (Findings of Fact and Orders with Opinion on Decision and Notice of Intent to Impose Sanctions, May 3, 2023, p. 1, Finding of Fact No. 3.) The WCJ has further determined that CIGA improperly deposed applicant in this matter twice. (Report and Recommendation on Petition for Reconsideration, June 20, 2023, p. 2.) We agree with the WCJ that the defendant's actions and tactics undertaken as part of its discovery efforts were inconsistent with both its statutory obligations and with our discovery rules,

and we further agree that such conduct merits the imposition of sanctions and costs. We deny reconsideration, accordingly.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 14, 2023

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

JEANETTE CLARK
BENTHALE, MCKIBBIN & MCKNIGHT
CALSTAR
DIETZ, GILMOR & CHAZEN
SEDGWICK/CIGA
SUTTER VALLEY MEDICAL FOUNDATION
TWOHY, DARNEILLE & FRYE

SAR/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Applicant, California Insurance Guarantee Association (CIGA), filed a timely and verified Petition for Reconsideration from the Order Imposing Sanctions and Costs, issued on May 22, 2023, which found, in pertinent part, that CIGA improperly conducted pre-application discovery in this matter. I ordered CIGA to pay sanctions to the General Fund of $500.00 and costs to applicant of $2,000.00.

CIGA alleges that I erred in imposing sanctions and costs because its failure to comply with the law was not willful, but inadvertent, and thus, sanctions are not proper. CIGA argues, in the alternative, that its conduct in this matter was lawful and that the court was mistaken in imposing sanctions and costs. Next, CIGA alleges that its right to due process was violated because the Notice of Intent to Impose Sanctions was issued in conjunction with the decision. CIGA argues that the court should have been raised the issue of sanctions prior to creating a record and reviewing the evidence. Next, CIGA raises an issue with the amount of costs awarded. Lastly, CIGA alleges that regardless of its conduct, pursuant to Ins. Code 1063.1(c)(4), it cannot be sanctioned by any court of this state.

Having thoroughly reviewed the contents of the Board's file and the Petition for Reconsideration, I respectfully recommend that CIGA's Petition for Reconsideration be DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

This matter proceeded to a trial wherein the primary issue was injury AOE/COE with CIGA alleging that applicant sustained a new cumulative trauma injury and requesting a change of administrator. (Minutes of Hearing and Summary of Evidence (MOH), April 17, 2023.)

A Findings and Order issued on May 3, 2023, wherein I found the following:

> 3. CIGA obtained the reporting of Dr. William Ransey improperly, without issuing any proper objection per the Labor Code. Accordingly, the report is inadmissible and shall be stricken from the record.
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> (Findings of Fact and Orders with Opinion on Decision and Notice of Intent to Impose Sanctions, (F&O) May 3, 2023, p. 1.)

CIGA sought no appeal of the F&O.

I also issued a notice of intent to impose sanctions and award costs in this matter as it had appeared that CIGA improperly engaged in pre-application discovery by obtaining a defense QME

report on a closed filed while applicant was pro-per and without any objection pending under Labor Code sections 4060, 4061, or 4062. CIGA further improperly obtained applicant's deposition twice, both times in violation of Labor Code 5710.

CIGA responded to the Notice of Intent on May 15, 2023. In its response CIGA did not offer any genuine apology for any of its conduct in this matter. CIGA took no responsibility for any of its failures to follow proper Labor Code procedure. Reviewing the Objection to the Notice of Intent, it appeared that CIGA believed its conduct was entirely proper. CIGA's response did not warrant any order vacating the Notice of Intent, or a reduction in the notice of sanctions or costs. Accordingly, I issued an order imposing sanctions and costs per the notice.

DISCUSSION

A. Pre-application discovery / Estoppel

First, to the extent that CIGA's petition attempts to relitigate the issue of whether Dr. Ramsey's report was properly obtained, I issued a Finding of Fact that CIGA improperly obtained the report. CIGA did not see reconsideration of that finding. I decline to address CIGA's argument relitigating that issue.

CIGA improperly obtained Dr. Ramsey's reporting because it failed to issue any objection under the Labor Code. That issue has been decided and is no longer subject to reconsideration.

B. Pre-application discovery / Deposition

CIGA improperly deposed applicant in this matter twice. Depositions in workers' compensation cases follow the Code of Civil Procedure's Civil Discovery Act. (§ 5710(a).) Per the Civil Discovery Act:

> (a) Once any party has taken the deposition of any natural person, including that of a party to the action, neither the party who gave, nor any other party who has been served with a deposition notice pursuant to Section 2025.240 may take a subsequent deposition of that deponent.
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> (Code Civ. Proc., § 2025.610.)

The only exceptions to the code are when the parties stipulate that a second deposition may occur or where a court finds good cause and issues the appropriate order. (Ibid.) No stipulation is

on file. Again, it appears that Ms. Clark simply did not understand her right to object. I do not find Ms. Clark's attendance at deposition as an agreement. Absent an agreement or court order, it was not permissible for CIGA to conduct two depositions of Ms. Clark beyond the initial deposition. This is particularly so when the focus of the depositions consisted of pre-application discovery of the case at bar. (*Yee-Sanchez v. Permanente Med. Group*, 68 Cal. Comp. Cases 637 (Cal. Workers' Comp. App. Bd. April 29, 2003).)

C. Ins. Code 1063.1

CIGA alleges that regardless of its conduct, pursuant to Ins. Code 1063.1(c)(4), it cannot be sanctioned by any court of this state. CIGA's allegation on this point appears frivolous.

Insurance Code 1063.1 addresses CIGA's obligation to state entities arising under a contract of insurance. Sanctions are imposed by a court as a way for the court to manage the conduct of the parties before it. CIGA's conduct here is very similar to its conduct in prior cases where CIGA was sanctioned. (See *Yee-Sanchez v. Permanente Med. Group*, 68 Cal. Comp. Cases 637 (Cal. Workers' Comp. App. Bd. April 29, 2003).)

CIGA's responses throughout these proceedings appear to be growing more and more flippant. CIGA is being order to pay sanctions due to its own bad faith conduct and not as part of any contract of insurance. CIGA's argument that it may act in bad faith without any sanctions recourse reinforces the need to sanction CIGA for improper behavior.

D. The Amount of Costs

CIGA argues for the first time on reconsideration that the amount of costs was not appropriately decided. CIGA failed to raise this as an issue in its objection to the Notice of Intent. Seeing no objection to the amount of costs, I awarded cost per the Notice of Intent.

E. Due Process

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is ". . . one of 'the rudiments of fair play' assured to every litigant . . ." (Id. at 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, [The]

commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law. (*Id.* at 577.)

CIGA was provided notice and an opportunity to be heard. CIGA's right to due process was not violated. CIGA did not request a hearing on the issue of sanctions and costs in its objection. CIGA did not request the opportunity to call witnesses. CIGA requested that I hold off issuing any order until the May 3 F&O became final. I incorporated this request in the order of sanctions, by delaying the order of payment if CIGA decided to file a petition for reconsideration.

Had CIGA requested a hearing on the issue of sanctions, I would have granted it. No such request was made. No violation of due process occurred.

CIGA argues that a notice of intent to impose sanctions should have issued in the Minutes of Hearing and Summary of Evidence. That does not raise any valid issue of due process.

CIGA attaches new evidence in the form of witness statements to its petition for reconsideration. It does not appear that CIGA has followed the rules regarding newly discovered evidence. (Cal. Code Regs., tit. 8, § 10974.)

F. Conclusion

CIGA's petition for reconsideration fails to raise any point that would warrant a reduction in sanctions and costs. CIGA offers no genuine apology. CIGA offers no assurance that its conduct will not recur. At its core, CIGA argues that pre-application discovery is acceptable so long as it is performed under an existing case number. I agree that there are proper ways to raise this issue in CIGA's original case. The proper way is to object to the provision of medical treatment under the Labor Code, provide applicant notice of her rights, and properly follow the Code of Civil Procedure. Having not followed any proper procedure, I found that CIGA's conduct constituted impermissible pre-application discovery.

CIGA's conduct in this case is strikingly similar to its conduct in *Yee-Sanchez*, which was decided in 2003. CIGA was sanctioned $500.00 in that case, in which the board commented as follows: "Indeed, CIGA's conduct in this regard was so egregious, we believe that the imposition of sanctions well in excess of $500.00 might well have been appropriate." (*Yee-Sanchez v. Permanente Med. Group*, 68 Cal. Comp. Cases 637, 651.) Adjusting for inflation, CIGA's sanction

of $500.00 may have been inappropriately how; however, I decline to readdress the issue at this stage.

I recommend that CIGA's Petition for Reconsideration be denied.

Date: June 20, 2023

Eric Ledger
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE