# WORKERS' COMPENSATION APPEALS BOARD

## STATE OF CALIFORNIA

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| **JULIE GARCIA,**<br><br>*Applicant,*<br><br>**vs.**<br><br>**THE VONS COMPANY, INC., Permissibly Self-Insured,**<br><br>*Defendant(s).* | **Case No. AHM 0057674**<br><br>**OPINION AND NOTICE OF INTENTION TO AWARD SANCTIONS (EN BANC)** |

The Board, on its own motion, removed this matter to itself under Labor Code section 5310. Removal was ordered so the Board could consider whether the filing of an untimely petition for reconsideration by Valley Subrogation and Associates (Valley Subrogation) on behalf of lien claimant, La Mirada Chiropractic Group (La Mirada), was sanctionable conduct resulting from "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay," within the meaning of Labor Code section 5813 and Board Rule 10561 (Cal. Code of Regs., tit. 8, §10561).

Because of the important and novel legal issue presented, and in order to secure uniformity of decision in the future, the Chairman of the Board, upon a majority vote of its members, has reassigned this case to the Board as a whole for an *en banc* decision. (Lab. Code, §115.) Based on our review of the relevant law, we conclude: (1) that a petition for reconsideration is a "pleading, petition or legal document" within the meaning of Board Rule 10561; (2) that the filing of a petition for reconsideration is a sanctionable "bad faith action or tactic" if the filing is done for "an improper motive or is indisputably without merit" with no "reasonable justification," including (but not limited to) a clear failure to meet the jurisdictional statutory deadlines for filing a petition for reconsideration; (3) that, on the present record, it appears that Valley Subrogation's

act of filing a petition for reconsideration some six months after the October 6, 1999 Findings and Order of the workers' compensation administrative law judge (WCJ) was "indisputably without merit" and was without "reasonable justification;" and (4) that, therefore, the Board will issue a notice of intention to award sanctions of $300.00 against Valley Subrogation, together with reasonable attorney's fees and costs payable to defendant for responding to Valley Subrogation's petition for reconsideration.

## I. BACKGROUND

The essential history is as follows.

On February 5, 1997, applicant, Julie Garcia, filed an application for adjudication of claim alleging that she had sustained an industrial injury while employed as a cashier/retail clerk by defendant, The Vons Company, Inc..

On September 14, 1998, La Mirada filed a lien claim for $4,982.06, representing the unpaid balance of charges for chiropractic and other services it rendered to applicant.

On November 18, 1998, the Board issued notice for a January 7, 1999 mandatory settlement conference (MSC). La Mirada was served with this notice of hearing.

La Mirada did not appear at the January 7, 1999 MSC. The minutes of the MSC, however, reflect that La Mirada's lien was placed in issue for trial. The trial was set for March 23, 1999.

On or about March 10, 1999, Valley Subrogation served the Board with notice that it was now representing La Mirada. The letterhead of Valley Subrogation's notice of representation showed its address to be "P. O. Box 18531, Encino, CA 91416."

On March 23, 1999, the matter came on for trial on all pending issues, including La Mirada's lien. Kurt Flanagan, a hearing representative employed by Valley Subrogation, appeared on behalf of La Mirada. At the trial, applicant and defendant entered into (and the WCJ approved) stipulations which, among other things, provided that defendant would pay, adjust, or litigate various liens, including La Mirada's. The matter was then continued for a lien trial on May 18, 1999.

On May 18, 1999, defendant and Valley Subrogation (by Kurt Flanagan) appeared for the lien trial. At that time, the lien trial was continued to June 21, 1999. Therefore, Valley Subrogation was then placed on notice of the new trial date.

On May 20, 1999, the Board served notice of the June 21, 1999 lien trial on La Mirada.

On May 21, 1999, defendant served notice of the June 21, 1999 lien trial on La Mirada and also on Valley Subrogation at "P.O. Box 18531, Encino, CA 91416."

Neither La Mirada nor Valley Subrogation, however, appeared at the June 21, 1999 lien trial. Therefore, the WCJ issued a notice stating that La Mirada's lien would be disallowed unless it filed a written objection within 15 days showing good cause to the contrary.

On July 9, 1999, Valley Subrogation filed a letter objecting to the June 21, 1999 notice of intention to disallow La Mirada's lien. Valley Subrogation's letterhead now showed its address to be "P. O. Box 18526, Encino, CA 91436."

On July 16, 1999, the WCJ issued an order rescinding the June 21, 1999 notice of intention. The July 16, 1999 order also set the issue of La Mirada's lien for another trial on August 31, 1999. The Board's record reflects that the July 16, 1999 order was served by mail on La Mirada, but not on Valley Subrogation.

On July 19, 1999, the Board issued a second notice that this matter had been set for a lien trial on August 31, 1999. This notice also reflects that La Mirada was served with it, but not Valley Subrogation.

On July 22, 1999, defendant sent a letter to Valley Subrogation at "P. O. Box 18531, Encino, CA 91416," proposing settlement of La Mirada's lien. The July 22, 1999 letter, however, also specifically noted the August 31, 1999 trial date.

At the August 31, 1999 lien trial, defendant appeared, but neither La Mirada nor Valley Subrogation appeared.

On September 7, 1999, the WCJ issued notice that the issue of La Mirada's lien claim would be submitted for a decision on the record, absent a showing of good cause to the contrary filed within 15 days. The notice of intention stated that any objection must address not only the

merits, but also the repeated failures of La Mirada to appear for the lien trials.

The September 7, 1999 notice of intention was served that day on La Mirada and was served on September 8, 1999 on Valley Subrogation at "P. O. Box 18526, Encino, CA 91436" (the last address that Valley Subrogation had provided to the Board). The September 8, 1999 mailing to Valley Subrogation, however, was returned to the Board by the Post Office with the notation: "Not Deliverable as Addressed - Unable To Forward."

The Board did not receive any opposition to the September 7, 1999 notice of intention.

On October 6, 1999, the WCJ issued the Findings and Order disallowing La Mirada's lien. In her Opinion on Decision, the WCJ summarized the history recited above, including the fact that the September 7, 1999 notice of intention had been served on Valley Subrogation at "precisely the address that had been represented in [Valley Subrogation's last] correspondence," but the notice of intention had been returned by the Post Office as undeliverable. Accordingly, the Findings and Order expressly provided:

> "Since the notice sent to lien claimant's representatives at Valley Subrogation and Associates has been returned as being unable to forward, *the Court will resume service directly on the lien claimant.*" (Emphasis added.)

In accordance with this provision, the October 6, 1999 Findings and Order was served by mail on La Mirada, but it was not served on Valley Subrogation.

On October 20, 1999, Kurt Flanagan of Valley Subrogation executed a "Request to View a WCAB Case File" form. The form stated that Mr. Flanagan was requesting review of the Board file in this matter. There is no indication in the Board's record that Mr. Flanagan's request was denied or not acted upon.

On April 12, 2000, over six months after the WCJ's October 6, 1999 Findings and Order, Valley Subrogation (on behalf of La Mirada) filed a petition for reconsideration. The petition for reconsideration listed Valley Subrogation's address as "P. O. Box 18531, Encino, CA 91416," i.e., the original address Valley Subrogation had provided to the Board. The petition contended, among other things, (1) that La Mirada was denied due process because Valley Subrogation was not properly served with the various notices of hearing, with the September 7, 1999 notice of

intention to submit, or with the October 6, 1999 Findings and Order, and (2) that Valley Subrogation's failures to appear at the June 21, 1999 and August 31, 1999 lien trials were due to excusable neglect. Valley Subrogation also asserted that, notwithstanding the fact that its petition for reconsideration was being filed more than six months after the October 6, 1999 Findings and Order, the petition was timely because the Board's service of the Findings and Order had been "defective." In so asserting, however, the petition for reconsideration failed to acknowledge that service of the October 6, 1999 Findings and Order had been timely and properly made on La Mirada itself, that service was not made on Valley Subrogation only because it had breached its duty to provide the Board with its correct address, and that Valley Subrogation (through Kurt Flanagan) had reviewed the Board's file (which included the October 6, 1999 Findings and Order) on October 20, 1999.

Defendant filed an answer to Valley Subrogation's petition for reconsideration.

On May 30, 2000, the Board issued an "Opinion and Order Dismissing Petition for Reconsideration and Order Granting Removal on Board Motion."

In that decision, we observed that, ordinarily, a party has twenty-five days within which to file a petition for reconsideration from a final decision that has been served by mail on an address in California. (Lab. Code, §§5900, subd. (a), 5903, 5316; Code of Civil Proc., §1013; Cal. Code of Regs., tit. 8, §10507.) This timely filing requirement is jurisdictional. (*Rymer* v. *Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott* v. *Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co.* v. *Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 548 [27 Cal.Comp.Cases 73, 75].) Where, however, the Board's service of its decision is defective, the statutory time period for filing a petition for reconsideration does not begin to run until the decision is actually received. (*Hartford Accident and Indemnity Co.* v. *Workers' Comp. Appeals Bd. (Phillips)* (1978) 86 Cal.App.3d 1 [43 Cal.Comp.Cases 1193, 1195]; *cf., State Farm Fire & Casualty Co.* v. *Workers' Comp. Appeals Bd. (Felts)* (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622, 624].)

We noted that La Mirada's petition for reconsideration was not filed until April 12, 2000,

well over 25 days (i.e., 189 days) after the WCJ's October 6, 1999 decision. Therefore, the petition for reconsideration would be timely only if the Board's service of its October 6, 1999 decision was defective.

We concluded, however, that the Board's service of its October 6, 1999 decision was *not* defective. The Board's record established that the October 6, 1999 decision was timely and properly served by mail on La Mirada itself. (Cal. Code of Regs., tit. 8, §10500 [which provides that the Board "shall serve all parties and lien claimants of record ... [with] any final order, decision, or award"].) Although the Board will also ordinarily serve a decision on the attorney or agent of a represented party or lien claimant (Cal. Code of Regs., tit. 8, §10510), Valley Subrogation was not served with the October 6, 1999 decision only because, when the Board had served its September 7, 1999 notice of intention to submit on Valley Subrogation at the last address it had provided, the notice of intention was returned as undeliverable. Thus, Valley Subrogation was not served with the October 6, 1999 decision *only because it had breached its duty to apprise the Board of its correct address.* (Cal. Code of Regs., tit. 8, §10396.)

We also observed that, even if service of the WCJ's October 6, 1999 decision was somehow defective, La Mirada's petition for reconsideration was still untimely.

On October 20, 1999, Kurt Flanagan of Valley Subrogation had made a request to review the Board's file, just fourteen days after the WCJ's October 6, 1999 Findings and Order. Under the Board's rules (Cal. Code of Regs., tit. 8, §10753) and other provisions of law (e.g., Govt. Code, §6250 *et seq.* [the Public Records Act]), Mr. Flanagan had a right to inspect the Board's file and there was no indication in the Board's record that his request was denied or not acted on. Accordingly, we inferred that Mr. Flanagan's request was honored (Evid. Code, §664 [presumption that an official duty was regularly performed]) and that he did review the Board's file on October 20, 1999. We also inferred that, at that time, Mr. Flanagan reviewed the WCJ's October 6, 1999 decision denying La Mirada's lien.[1]

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[1] This inference was particularly supported by the fact that, as of October 20, 1999, the October 6, 1999 Findings and Order would have been the topmost document in the Board's file.

We concluded that, because La Mirada's representative gained personal knowledge of the WCJ's October 6, 1999 decision on October 20, 1999, and because La Mirada's April 12, 2000 petition for reconsideration was not filed within twenty days (or even twenty-five days) after October 20, 1999, La Mirada's petition for reconsideration was untimely, even if the Board's service of October 6, 1999 decision were somehow deemed defective.

Accordingly, we dismissed La Mirada's petition for reconsideration as untimely. That decision is now final.

Moreover, based upon our review of the record, we stated our belief that La Mirada's petition for reconsideration may have been the "result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay," within the meaning of Labor Code section 5813 and Board Rule 10561 (Cal. Code of Regs., tit. 8, §10561). Therefore, in accordance with Labor Code section 5310, we removed this matter to ourselves to consider whether sanctions should be imposed against La Mirada, Valley Subrogation, and/or Kurt Flanagan.

We now address that question.

## II. DISCUSSION

Labor Code section 5813 provides, in relevant part:

> "The ... 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, ... 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."

Board Rule 10561 (Cal. Code of Regs., tit. 8, §10561) provides, in relevant part:

> "On its own motion ..., 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. Before issuing such an order, the alleged offending party or attorney must be given notice and an opportunity to be heard. In no event shall the Appeals Board, ... impose a monetary sanction pursuant to Labor Code section 5813 where the one subject to the sanction acted with reasonable

> justification or other circumstances make imposition of the sanction unjust.
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> "A bad faith action or tactic is one which results from a willful failure to comply *with a statutory or regulatory obligation* or from a willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board.
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> "*A frivolous bad faith action or tactic is one that is done for an improper motive or is indisputably without merit.*
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> "Violations subject to the provisions of Labor Code section 5813 shall include but are not limited to the following:
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> "*... Filing a pleading, petition or legal document shall be deemed a bad faith action or tactic which is frivolous or solely intended to cause unnecessary delay unless there is some reasonable justification for filing such a document.*" (Emphasis added.)

The April 12, 2000 petition for reconsideration Valley Subrogation filed on La Mirada's behalf is a "pleading, petition or legal document" within the meaning of Board Rule 10561.[2]

Moreover, it appears from the present record that Valley Subrogation had no "reasonable justification" for filing its petition for reconsideration on La Mirada's behalf on April 12, 2000, some *six months* after the WCJ's October 6, 1999 decision disallowing La Mirada's lien, and that its act of filing an untimely petition for reconsideration was "indisputably without merit." As discussed above, La Mirada itself was timely served with the WCJ's October 6, 1999 decision. That decision expressly apprised La Mirada that Valley Subrogation was *not* being served because the Board's previous mailing to Valley Subrogation had been returned as undeliverable (a situation that resulted from Valley Subrogation's breach of its duty to apprise the Board of its correct address (Cal. Code of Regs., tit. 8, §10396)). Also, the Board's record establishes that Mr. Flanagan of Valley Subrogation gained personal knowledge of the October 6, 1999 decision on October 20, 1999, when he reviewed the Board's file at the district office. Accordingly, Valley Subrogation's petition for reconsideration on La Mirada's behalf should have been filed

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[2] A petition for removal or a petition for disqualification is also a "pleading, petition or legal document" under Board Rule 10561.

within twenty-five days of October 6, 1999 (when La Mirada was served with the WCJ's decision and was given notice that Valley Subrogation was not being served) or, at a minimum, it should have been filed within twenty days of October 20, 1999 (when Mr. Flanagan of Valley Subrogation gained personal knowledge of the October 6, 1999 decision). The petition, however, was not filed until April 12, 2000, some six months later. When the petition was filed, the only explanation offered for its lateness was that the Board's service of the October 6, 1999 Findings and Order had been "defective," yet, there was no reference to the facts that service of the Findings and Order had been timely and properly made on La Mirada itself, that service was not made on Valley Subrogation only because it had breached its duty to provide the Board with its correct address, and that Valley Subrogation (through Kurt Flanagan) had reviewed the Board's file (including the October 6, 1999 Findings and Order) on October 20, 1999.

Because it appears from this record that Valley Subrogation had no "reasonable justification" for filing the seriously untimely petition for reconsideration and because it appears its act of filing the untimely petition for reconsideration without adequate explanation or justification was "indisputably without merit," we shall issue a notice of intention to impose sanctions of $300.00 against Valley Subrogation, together with reasonable attorney's fees and costs payable to defendant. Valley Subrogation will be given 15 days to object in writing to this notice. If Valley Subrogation timely objects within 15 days, the matter will be sent to the district office for the issuance of a notice of trial before the WCJ on the sanctions issue. Thereafter, the WCJ will hear any testimony and receive any documentary evidence (and make any appropriate incidental rulings), then prepare a Minutes of Hearing and Summary of Evidence, and then return the matter to us for final disposition.

While, here, we are noticing our intention to award sanctions based on an egregiously untimely petition for reconsideration (filed without providing any significant explanation of why its lateness might have been justified), we observe that sanctions may also be proper for a timely petition, if it is indisputably without merit under the circumstances of the particular case.

Also, although we are issuing a notice of intention to award sanctions under the particular

factual circumstances of this case, we emphasize our action does *not* constitute an open invitation for parties to request sanctions in every matter pending before the Board on reconsideration, removal, or disqualification. Indeed, a request for sanctions that fails to clearly and specifically articulate reasonable justification for the request may itself be sanctionable.

For the foregoing reasons,

**NOTICE IS HEREBY GIVEN** that, absent written objection filed and served within fifteen (15) days, it will be ordered: (1) that Valley Subrogation and Associates shall pay sanctions of $300.00 to Dennis J. Hannigan, Secretary, Workers' Compensation Appeals Board, P.O. Box 429459, San Francisco, CA 94142, ATTENTION: Rehearing Unit, for transmission to the General Fund; and (2) that Valley Subrogation and Associates shall pay reasonable attorney's fees and costs to defendant, The Vons Company, Inc., for responding to Valley Subrogation's petition for reconsideration, with the amount of the reasonable attorney's fees and costs to be adjusted by the parties with jurisdiction reserved.

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**IT IS FURTHER ORDERED** that any written objection to the above notice of intention shall be filed with the Workers' Compensation Appeals Board, P.O. Box 429459, San Francisco, CA 94142-9459, and not with any district office.

***WORKERS' COMPENSATION APPEALS BOARD (EN BANC)***

*MERLE C. RABINE, Chairman*

*ROBERT N. RUGGLES, Commissioner*

*COLLEEN S. CASEY, Commissioner*

*ROBERT E. BURTON, Commissioner*

*WILLIAM K. O'BRIEN, Commissioner*

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

MAR 1 4 2001

***SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD EXCEPT LIEN CLAIMANTS, BUT INCLUDING PETITIONING LIEN CLAIMANT LA MIRADA CHIROPRACTIC GROUP, AND ITS REPRESENTATIVE, VALLEY SUBROGATION AND ASSOCIATES.***

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