

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

LISA HILL SANDERS, *Applicant*

vs.

**KAISER PERMANENTE, permissibly self-insured;
Administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ11998519
Los Angeles District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

We granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision after Reconsideration.¹

Elena Konstat, Ph.D. (cost petitioner), and her attorney of record, Deanna Kapelnikov, Esq., seek reconsideration of our Opinion and Decision After Reconsideration issued on January 17, 2020, in which we rescinded the workers' compensation administrative law judge's (WCJ) November 13, 2019 Findings and Award and substituted a new Findings and Award pursuant to, in part, *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Board en banc). In essence, we corrected the WCJ's Findings and Award based on the specific finding of no bad faith actions or tactics on the part of defendant. As a result, there was no basis to award cost petitioner's attorney's fees pursuant to former WCAB Rule 10451.1(g)(1). (Cal. Code Regs., tit. 8, former § 10451.1(g)(1).)²

¹ We note that defendant initially filed a Petition for Reconsideration of the November 13, 2019 Findings and Award. On January 17, 2020, we issued our Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration (Decision after Reconsideration). Thus, cost petitioner's Petition for Reconsideration of our January 17, 2020 Decision after Reconsideration is not a successive Petition for Reconsideration. (See *Navarro v. A&A Framing* (2002) 97 Cal.Comp.Cases 296 [2002 Cal. Wrk. Comp. LEXIS 1258] (Appeals Board en banc).)

² Effective January 1, 2020, former WCAB Rule 10451.1 is now 10786.

Cost petitioner contends that the actions of the insurance carrier and the carrier's representative constitute bad faith, and that her attorney's fees should be awarded under Labor Code section 5813.³ (Lab. Code, § 5813.) Alternatively, cost petitioner argues that the attorney's fee should be awarded under section 5811. (Lab. Code, § 5811.)

Defendant did not file an answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the contents of the Report with respect thereto, and our Decision After Reconsideration. Based on our review of the record, and for the reasons discussed below, we will affirm the January 17, 2020 Decision After Reconsideration, except that we will amend it to defer the issue of whether defendant engaged in bad faith action or tactics, and return this matter to the trial level for the WCJ to hold further proceedings consistent with this decision.

FACTUAL BACKGROUND

The parties stipulated that applicant, while employed on October 19, 2017, by Kaiser Permanente as a claims adjuster/auditor, sustained injury arising out of and in the course of employment to her psyche. (Minutes of Hearing (MOH), September 11, 2019, p. 2:5-7.)

Cost petitioner billed defendant \$5,825.00 for her medical-legal evaluation performed on February 16, 2018. As relevant herein, Dr. Konstat billed her medical-legal report under procedure code ML104 for "74 units" for \$4,625.00. (Cost Petitioner Ex. 1, Dr. Konstat Billing Statement, March 8, 2018.)

In a March 25, 2018 Explanation of Bill Review (EOR), defendant reduced cost petitioner's invoice to \$848.11. As relevant herein, defendant reduced the amount for procedure code ML104 by \$4,187.50 and paid \$437.50. Defendant specifically noted 7 instead of 74 units for procedure code ML104. (Joint Ex. 1, Explanation of Bill Review, March 25, 2018.) Defendant paid this amount soon thereafter.

On April 12, 2018, cost petitioner served its Request for Second Bill Review. Cost petitioner listed the following as the reason for a second bill review for ML104-95: "PQME ML104 EVALUATION WAS DONE AND PAID AS ML101. SEDGWICK COVER LETTER

³ All further statutory references are to the Labor Code unless otherwise stated.

WITH APPOINTMENT DATED 1/29/2018 AND DR KONSTAT REPORT DATED 03/05/2018.” (Petitioner Ex. 2, Request for Second Bill Review, April 5, 2018.)

On April 24, 2018, defendant issued an EOR in response to cost petitioner’s Request for Second Bill Review. Defendant denied, as relevant herein, further payments for procedure code ML104-95 for “74 Units.” (Joint Ex. 2, EOR, April 24, 2018.)

On May 24, 2018, cost petitioner filed a request for Independent Bill Review (IBR), which was denied as untimely on July 3, 2018. (Petitioner Ex. 3, Request for IBR, May 24, 2018; Joint Ex. 3, Denial of IBR, July 3, 2018.)

In February 2019, cost petitioner hired an attorney to represent her in collecting her medical-legal expenses.

On March 5, 2019, cost petitioner filed her “Petition for Determination of Non-IBR Medical-Legal Dispute Per Rule and Regulation §10451.1(c)(3); and Attorney Fees Under Labor Code §5813” (Petition for Non-IBR Determination). (Petitioner Ex. 4, Petition for Non-IBR Determination, March 5, 2019.)

On April 16, 2019, cost petitioner settled all of her outstanding bills and issues with defendant for \$6,190.79, excluding attorney's fees. (Ex. 4, Settlement Agreement, April 16, 2019.)

In April and May 2019, cost petitioner’s attorney and defendant attempted to resolve the issue of attorney’s fees. (Ex. 5, E-mails, April to May 2019.)

In its pleading, defendant admitted that its EOR contained an error showing “7 units” instead of “74 units,” and that it purportedly found this error after cost petitioner filed her Petition for Non-IBR Determination. (Defendant’s Petition for Reconsideration, November 16, 2019, p. 2.)

At the hearing on September 11, 2019, defendant raised the issue of its costs and sanctions, and cost petitioner raised the issue of attorney's fees.

On November 13, 2019, the WCJ found that cost petitioner was entitled to her attorney's fee pursuant to former WCAB Rule 10451.1 because correct payment for her services was not effectuated until after the hiring of her attorney. (Finding of Fact 9, Findings and Award, November 13, 2019.) The WCJ also made a finding related to former WCAB Rule 10451.1(g)(1)(A)&(B) and defendant’s actions. The WCJ stated that “a sanction has been considered for Defendant’s failure to timely pay the billing of the PQME and would otherwise be applicable and payable to the PQME. However, this does not pertain to the attorney fees” (Finding of Fact 13, Findings and Award, November 13, 2019.) The WCJ ordered defendant to

pay \$2,250.00 to cost petitioner's attorney as reasonable attorney's fees. (Findings and Award, Order, November 13, 2019.)

In the November 13, 2019 Opinion on Decision, the WCJ remarked that,

“[i]t should be noted here that the doctor's request for secondary bill review dated April 5, 2018[,] did not point out the errors of the EOR (7 units versus 74) but instead only pointed out some testing that had been underpaid. These were the items that were reduced by bill review and this is very likely why the bill reviewer on the second look indicated these were re-billed items for the same services provided. The carrier did not act in bad faith in 2018 when it reviewed what it thought to be correct. It was only discovered later in March or April 2019 that the coding had been wrong.”

(Opinion on Decision, November 13, 2019, p. 2.)

On November 16, 2019, defendant filed a Petition for Reconsideration of the WCJ's November 13, 2019 Findings and Award.

In the recitation of the facts in the Report, the WCJ stated, as relevant herein, that, “a timely second bill review issued by the defendant on April 24, 2018, indicating the [second bill review] request was being denied, and for valid reasons (at that time and unbeknownst to the parties as to why such a large reduction was made by defendant, to be later discovered in April 2019 to be a coding error). *Joint Exhibit 2.*” (Report, *supra*, at p. 3.)

On January 17, 2020, the WCAB issued its Decision After Reconsideration.

DISCUSSION

I.

Section 5502(d)(3) states that if a claim is not resolved at the mandatory settlement conference, “the parties shall file a pretrial conference statement noting the specific issues in dispute, . . .” (Lab. Code, § 5502(d)(3).) As relevant herein, the parties raised “[cost petitioner's] Attorney Fees for Non-IBR petition” as an issue in the pretrial conference statement, which is also reflected in the “Stipulations and Issues” in the Minutes of Hearing (MOH). (Minutes of Hearing, September 11, 2019, p. 2:12.) In cost petitioner's Petition for Non-IBR Determination, she based her recovery of attorney's fees on section 5813 and former WCAB Rules 10451.1 and 10561. (Petition for Non-IBR Determination, March 5, 2019, p. 6:5-25.) For the first time on reconsideration, however, cost petitioner argues a different mechanism to recover her attorney's fees: Labor Code section 5811. We will not address this issue on reconsideration until it has been raised by the parties and addressed by the WCJ at the trial level in the first instance. We are mindful

of defendant's right to due process. (See *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].)

II.

In her Petition, cost petitioner only seeks an order for attorney's fees.⁴ As relevant herein, cost petitioner requests that the appeals board specifically consider defendant's alleged bad-faith action subsequent to defendant's initial underpayment.

Section 5813(a) 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.

(Lab. Code, § 5813(a).)

Former WCAB Rule 10451.1(g)(1) states:

If the [WCAB] determines that, as a result of bad faith actions or tactics, a defendant failed to comply with the requirements, timelines, and procedures set forth in Labor Code section 4622, 4603.3, and 4603.6 and the related Rules of the Administrative Director, the defendant shall be liable for the medical-legal provider's reasonable attorney's fees, costs, and sanctions . . . [¶] For purposes of this subdivision, "bad faith" actions or tactics by a defendant may include but are not limited to:

(A) failing to timely pay any uncontested portion of a medical-legal provider's billing;

(B) failing to make a good faith effort to timely comply with applicable statutory or regulatory medical-legal timelines or procedures;

(Cal. Code Regs., tit. 8, former § 10451.1(g)(1)(A) & (B).)

Former WCAB Rule 10561(b) describes various bad faith actions or tactics that are subject to section 5813. For example, paragraph (6) states: "Bringing a claim, conducting a defense, or asserting a position: (A) this is: (i) indisputably without merit, (ii) done solely or primarily for the purpose of harassing or maliciously injury any person, and/or (iii) done solely or primarily for the

⁴ The failure of an aggrieved party to raise an issue by seeking reconsideration constitutes a waiver of the issue. (See Lab. Code, §§ 5902 and 5904; *Cedillo v. Workmen's Comp. Appeals Bd.* (1971) 5 Cal.3d 450, 455-456 [36 Cal.Comp. Cases 497, 501]; *U.S. Auto Stores v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 469, 476 [36 Cal.Comp. Cases 173, 177-178]; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp. Cases 650, 656].) Thus, the issue of sanctions is not before us.

purpose of causing unnecessary delay or a needless increase in the cost of litigation; and (B) where a reasonable excuse is not offered or where the offending party has not demonstrated a pattern of such conduct.” (Cal. Code Regs., tit. 8, former § 10561(b)(6)(A) & (B).)⁵

Here, cost petitioner filed a Petition for Reconsideration of the January 17, 2020 Decision After Reconsideration, in which we rescinded the WCJ’s November 13, 2019 Findings and Award. In the November 13, 2019 Findings and Award, the WCJ found that cost petitioner was entitled to attorney’s fees in the amount of \$2,250.00 pursuant to, as relevant herein, former WCAB Rule 10451.1. However, the WCJ also concluded that defendant’s failure to pay the uncontested billings for cost petitioner’s services was not “bad faith.” (Opinion on Decision, November 13, 2019, p. 5; Report, *supra*, at p. 4.) Thus, in our Decision after Reconsideration, we addressed this potential inconsistency, in part, as a *Hamilton* issue (see *Hamilton v. Lockheed Corp.* (2001 66 Cal.Comp.Cases 473 (Appeals Board en banc)) and accordingly issued our decision. We did not, however, need to look at the record and delve into the merits of the WCJ’s finding that the defendant’s action was or was not bad faith.

In cost petitioner’s Petition for Reconsideration, she raised, as relevant herein, an issue regarding defendant’s action as bad faith: “although [the] initial payment of Dr. Konstat’s charges was a mistake, the subsequent actions of the carrier constituted bad faith.” There appears to be no disagreement that defendant’s initial payment of \$437.50 to Dr. Konstat based on 7 units was a mistake. The disagreement appears to be when defendant learned of this mistake. As the issue of bad faith is directly before us on reconsideration, it is appropriate for us to address the merits of this issue.

The WCJ correctly concluded that cost petitioner’s Request for Second Bill Review did not mention the unit-error found in the March 24, 2018 EOR. However, it appears that the WCJ did not take into account that defendant may have corrected the unit-error issue in its April 24, 2018 EOR. Defendant’s April 24, 2018 EOR correctly identified the units at issue as 74. Therefore, it appears that there is evidence that defendant may have known that 74 units, not 7, were at issue by April 2018, and this evidence appears to undercut defendant’s argument that it became aware of the unit-error issue on March 5, 2019, when cost petitioner filed her Petition for Non-IBR Determination. Without considering all the relevant evidence, it is unclear if the WCJ’s findings

⁵ Effective January 1, 2020, former WCAB Rule 10561 is now 10421.

are supported by substantial evidence. (See Lab. Code §§ 5903, 5952(d); *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500] ["Any award, order, or decision by the board must be supported by substantial evidence in light of the entire record (citations omitted.)"]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 638, fn. 22 [35 Cal.Comp.Cases 16] ["The reviewing court must consider the entire record and may not isolate only the evidence which supports the board's findings and thus disregard relevant evidence in the record (citations omitted)."])

Additionally, as noted above, the WCJ found that cost petitioner was entitled to attorney's fees pursuant to former WCAB Rule 10451.1; however, the WCJ also found that defendant's actions were not bad faith so as to warrant the application of sanctions. Section 5813 and former WCAB Rules 10451.1 and 10561 require an underlying finding of bad faith action or tactics in order to award attorney's fees.

In order to bring clarity to this issue, we return this matter to the WCJ for a hearing on cost petitioner's request for attorney's fees pursuant to section 5813 based on a proper analysis of the entire record as well as the applicable statutes, regulations, and rules, including those discussed above.

Accordingly, we affirm the Decision After Reconsideration, except amend it to defer the issue of whether defendant engaged in bad faith actions or tactics, and return this matter to the trial level for further proceedings by the WCJ consistent with this decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Appeals Board's January 17, 2020 Decision After Reconsideration is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. The issue of whether defendant engaged in bad faith actions or tactics under former WCAB Rule 10451.1(g)(1) is deferred.

* * *

ORDER

1. The issue of whether cost petitioner is entitled to attorney's fees is deferred.

* * *

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 21, 2021

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

**ELENA KONSTAT, Ph.D.
LAW OFFICES OF DEANNA KAPELNIKOV
LISA HILL SANDERS
RESOLUTION PARTNERS
SEDGWICK CLAIMS MANAGEMENT SERVICES**

SS/abs

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