

**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
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.¹

We restate the WCJ's conclusions to clarify that attorney's fee is not allowable under section 5813 without a finding of sanctionable conduct.

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).)

Furthermore, attorney's fee for med-legal providers cannot be allowed as a "cost" under section 5811. (*Costa v. Hardy Diagnostic* (2006) 72 Cal.Comp.Cases 1492 at p. 1497, fn. 3 (Appeals Board en banc); ["There are, however, limitations on the costs that may be reimbursed under section 5811. In addition to the fact that such costs are discretionary (*Sims v. Workers' Comp. Appeals Bd.* (1995) 60 Cal. Comp. Cases 1126 (writ den.), attorney's fees, for example, which are awarded under conditions specified in the Labor Code (see Lab. Code, §§ 4903, 5710, 5801, 5813, 5814, 5814.5), are not available as "costs" under section 5811. (*Holzer-Reyes v. Workers' Comp. Appeals Bd.* (1998)

¹ Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

63 Cal.Comp.Cases 84 (writ den.); *Santa Maria High School District v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 649 (writ den.)”] *Id.*

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/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 27, 2022

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

**LISA HILL SANDERS
DEANNA KAPELNIKOV
RESOLUTION PARTNERS**

LN/oo

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. Introduction

The above entitled matter was originally tried and submitted before the undersigned judge on November 13, 2019. I awarded partial attorney fees to the cost petitioner for Dr. Konstat's representation. Defendant filed a Petition for Reconsideration, objecting to any award of attorney fees as part of their argument. The WCAB granted the Petition, which resulted in another Petition for Reconsideration, but filed by cost petitioner, Dr. Konstat's, attorney, Ms. Kapelnikov. The matter was then remanded to the trial level before the undersigned WCJ on the issue of whether Defendant acted in bad faith to warrant "sanctionable conduct" which could then result in cost petitioner's attorney's fees being reimbursed by Defendant.

The matter was submitted the second time on February 9, 2022 with a Findings and Order issuing on April 8, 2022, this time concluding that not only did Defendant not act in bad faith, but that no award of attorney fees would issue. Ms. Kapelnikov filed a Petition for Reconsideration on April 27, 2022, again arguing that Defendant acted in bad faith and that its behavior was sanctionable which warrants an award attorney fees. The Defendant did not file an Answer.

Based upon a review of the entire record and the subject Petition, it is respectfully recommended that the Petition be denied.

II. Facts and Discussion on Sanctions and Attorney Fees

I issued a Findings and Order dated April 8, 2022, and found, once again, that Defendant did not act in bad faith, and that no sanctions were warranted, and so no attorney's fees were awarded either per former CCR Sections 10451.1(g)(1)(A)&(B) and 10561 (now 10421) and LC Section 5813. I originally found that cost petitioner should receive some attorney fees for the work done to effectuate the settlement with Defendant of Dr. Konstat's billing in mid-2019 when the petition for non-IBR Determination was filed on 3/5/2019. This is what triggered Defendant to discover the unit error of 7 vs. 74 for the first time, as the original request for secondary bill review the year before indicated the billing was erroneously down-coded from an ML104 to an ML101. That's why when the secondary bill review was requested, the bill review results of 4/24/18 indicated that Dr. Konstat's billing was duplicative and no further monies were owed, even though this second bill review showed 74 units. It was because the secondary bill review only requested an analysis under ML104, not ML101. It was not until the March 2019 non-IBR petition was served that Defendant discovered the 7 vs. 74 unit discrepancy issue.

After the petition issued in March 2019, the parties quickly negotiated a settlement for \$6,190.79 for the entirety of Dr. Konstat's billing, including sanctions, penalties and interest. The settlement left open the issue of attorney fees.

I found that when Defendant resolved the Dr. Konstat bill in April 2019, it was acting in good faith. Part of former CCR Section 10451.1(g)(1) is that due to bad faith actions or tactics, or if a defendant fails to comply with timeliness

requirements, they shall be liable for the provider's attorney fees. Bad faith actions may include failure to pay an uncontested portion of a medical-legal bill, or failing to make a good faith effort to timely comply. LC Section 5813 sanctions include when a party taking a position intended to harass or injury or done solely to cause unnecessary delay or needless increase in litigation costs. It also looks to whether there is no reasonable excuse or where there is a pattern of conduct. See CCR former Section 10561.

The point is that Defendant, while it underpaid originally, did not know it had underpaid until mid-March 2019. Then it settled the entire bill with the provider a month later, well within the 60 days to make a payment, if they were to re-run the billing using the 74 unit codes instead of the 7. It was never about a billing of ML 104 versus an ML 101. Neither party knew or discovered this, including Dr. Konstat apparently, until about March 2019. In fact, in the secondary bill review request and IBR request (which was denied because it was deemed untimely and not based on the merits), the issue of 7 vs. 74 was not raised.

Then there is the IBR request of 5/24/2018 which was clearly based on the same presumed reduction- from an ML104 to an ML101. But this had never happened. Even the petitioner did not know or notice at the time about the unit error and thought they had simply been down coded erroneously from an ML104 to an ML101. And that is why when Defendant received the second bill review request, it did not allow for more fees - it was because the Appeal concentrated on the ML104 vs. ML101 issue.

I am aware the language of the code indicates "shall be subject to attorney fees", costs, etc., but I also do not read the statute strictly so as to forgive mistakes versus acts clearly done in bad faith and the legislative intent. This was obviously a clerical error which was rectified when the non-IBR petition was received and defendant took immediate remedial measures to correct the situation and settle the bill within 30 days. I will not punish a party for correcting its errors right away upon discovering them. I even note in the 4/12/2019 emails between Resolution Partners and the provider's attorney (which was pointed out by petitioner itself at the Reconsideration, page 3), that Ms. Long of Resolution Partners indicated they would negotiate the attorney fees but stated, "I do want to take care of the doctor asap." To me, that is nothing close to "bad faith" warranting an attorney fee award. The defendant did not maliciously or intentionally underpay this bill or change the codes to reduce it somehow. If knowledge and intent is not attributed to the Defendant, nor a pattern or course of conduct, then neither can it be found that they acted in bad faith, frivolously, or with intent to delay, harass, costs, etc.

Another factor to consider on the lack of finding of bad faith or sanctionable conduct here was that when Defendant resolved the bill of the medical-legal provider in April 2019, it was paid in full plus penalties and interest. If Defendant intended to harass, delay, underpay, or avoid the provider in any way, they would not have voluntarily and so easily have paid it in full within 30 days, *plus* the requested penalties and interest, unless Defendant recognized immediately that it had made such a mistake. Most Defendants (at least in the Los Angeles area) would attempt to reduce and negotiate this bill, even in the face of such a mistake, but this Defendant did not.

Petitioner's attorney also argues at page 5 of the Reconsideration that it was also bad faith actions or tactics when Ms. Long of Resolution Partners allegedly failed or refused to negotiate further on her attorney fee demand after Dr. Konstat's bill was resolved in April 2019. The fact is defendant found the \$350 hourly rate claimed as unreasonable given the experience and years of practice of the attorney representing the provider. It was also an inflated amount of time stated. But the issues cannot be muddled here - the issue was whether defendant acted in bad faith when it mistakenly underpaid Dr. Konstat's bill, requiring her to hire an attorney and file the non-IBR petition. The issue was not whether Defendant refused or failed to negotiate with the attorney on her own bills after the doctor was resolved. I agreed with Defendant that the hourly rate and time spent (claimed) was excessive and I originally awarded fees but at a reduced amount. However, if one could claim "bad faith" and sanctions on every party that did not return emails or phone calls or negotiate further, the legal system would be bogged down for 100 years in advance. Cost petitioner did what it is legally entitled to do, and should do, to prosecute its fee demand - file a DOR to get on the WCAB calendar and try the issue before a judge.

Petitioner also argues in its petition that under LC Section 5811, it is owed attorney fees, but this section specifically deals with interpreters for medical-legal services and billing. It does not pertain to Dr. Konstat. It also does not pertain to where clerical errors have been made that neither party knew of until a year later.

Also, I have to point out that the provider, up until March 2019, had subjected itself to the IBR process and as far as the Defendant was concerned, its IBR request of April 2018 was denied as untimely in May 2018, so Defendant would have deemed the issue resolved and would have had no way of even knowing that a cost petition was going to be filed 10 or 11 months later as an alternative path for the PQME to collect her funds. They also could have simply contacted defendant by letter or email or phone call to bring their attention to the unit error issue. This was essentially the provider's "second bite at the apple" and still the Defendant paid it in full plus penalties and interest. In other words, the very first time Defendant became aware of the mistake was in mid-March 2019, and the issue was resolved in a few weeks.

Therefore, on remand on the limited issue of sanctionable conduct warranting attorney fees, I incorporate my prior Findings and Award and Order, as well as the present one from April 2022, to conclude Defendant did not act in bad faith here and no sanctions are warranted. If no sanctions would be awarded for bad faith conduct, then no attorney fees could be awarded either. If the fees must be based upon a bad faith finding (sanctionable behavior) against the defendant, then Dr. Konstat's attorney must take nothing.

III. Conclusion

Based upon the above and prior Findings and Awards/Orders and entirety of the record and the WCAB's instructions on remand on whether defendant acted in bad faith, it is hereby recommended that Mr. Kapelnikov's Petition for Reconsideration be denied.

DATE: May 17, 2022

Karinneh Aslanian
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE