

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

OLISAEMEKA EZE, *Applicant*

vs.

FEDEX GROUND PACKAGE SYSTEM, INC.;
permissibly self-insured, administered by SEDGWICK CMS, *Defendants*

Adjudication Numbers: ADJ15619594; ADJ17474924; ADJ17017203
Santa Rosa District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
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. We also accept applicant's request to file supplemental pleading pursuant to our authority. (Cal. Code Regs., tit. 8, § 10964.) Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will grant reconsideration, amend the WCJ's decision as recommended in the report, and otherwise affirm the September 27, 2023 Findings, Award, and Orders.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the September 27, 2023 Findings, Award, and Orders is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the September 27, 2023 Findings, Award, and Orders is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. Good cause exists for a replacement QME panel in psychology (PSY).

* * *

ORDERS

IT IS ORDER that the Medical Unit shall issue a replacement Psychology (PSY) panel, within a reasonable geographic distance of zip code 94928, to be served on all parties. Applicant shall then select a QME from the panel in accordance with Labor Code section 4062.1. Neither party shall unilaterally cancel a scheduled QME evaluation absent prior approval by the WCJ. All other issues related to the QME are deferred, with jurisdiction reserved at the trial level.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 22, 2023

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

**OLISAEMEKA EZE
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

PAG/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**

I

INTRODUCTION

Applicant, Olisaemeka Eze, acting in pro per, filed a timely, verified Petition for Reconsideration challenging the Findings and Order dated September 27, 2023.

Mr. Eze suffered a psychological industrial injury on a cumulative basis ending on August 25, 2021 during the course of his employment as an operations coordinator for the employer, FedEx Ground Package System, Inc. The injury occurred as a result of cumulative job duties. He was age 55 on the date of injury.

In a Findings and Order dated September 27, 2023, the undersigned WCJ found that the applicant is entitled to obtain medical treatment outside the Medical Provider Network at defendant's expense, only subject to the Official Medical Fee Schedule and California Workers' Compensation Law. The Medical Unit was ordered to issue a replacement Qualified Medical Evaluator panel in the specialty of psychiatric (MPD).

The court also found that the provision of medical treatment was unreasonably delayed by the defendant pursuant to Labor Code section 5814 in a penalty amount to be determined upon further development of the record. The applicant's request for sanctions pursuant to Labor Code section 5813 was denied.

Petitioner requests:

- a. QME Panel change to Psychology
- b. Sanction granted for trial cost due under 5 813
- c. Benefit penalty for each 21 counts of unreasonable delay under 5814
(*Petition, p.1*)

II

FACTS

Applicant sustained an industrial injury to his stress/psych, sleep disorder, anxiety and mental exhaustion during the cumulative period ending on August 25, 2021 in the course of his employment as an operations coordinator for FedEx Ground Package System, Inc.

Sequential History

The relevant facts are set forth below:

On October 6, 2021, a DWC-1 Claim Form was provided to the employer. (Def. Exh. KKK.)

On October 26, 2021, Sedgwick's claims administrator provided the Medical Provider Network (MPN) link to the applicant via email. (App. Exh. E1.) On November 2, 2021, the MPN Concierge Agent, Nichole Merry, forwarded a directory of Occupational Medicine doctors within the FedEx/Sedgwick MPN within 15 miles of zip code 94928. (App. Exh. E55.) The applicant notified the claims administrator on November 9, 2021 that he set up his first treatment visit the next day. (App. Exh. E7/Def. Exh. EEE.)

On November 10, 2021, the applicant saw Dr. Eibschutz from the Occupational Health at Kaiser Permanente Petaluma. (App. Exh. E8.) However, as he notified the claims administrator, Dr. Eibschutz only handles physical injuries. (App. Exh. E8.)

A Doctor's First Report of Occupational Injury or Illness was completed by Dr. Eibschutz, M.D. on November 10, 2021. (Def. Exh. AA.) Dr. Eibschutz requested a consultation with a psychologist. (Id.)

On November 12, 2021, Sevda Lucchese of Sedgwick, told the applicant that she "did not hold any power over FedEx MPN providers listed on FedEx site unfortunately therefore I am of little help on that front." (App. Exh. E1/Def. Exh. FFF.) She continued to state, "We will have you attend psych consultation once scheduled which hopefully we can get scheduled next week". (App. Exh. E1/Def. Exh. FFF.)

On November 14, 2021, the applicant emailed Ms. Lucchese stating, "I should see a specialist that handles stress and sleep disorders as their Occupational Medicine Dr. specialists (sic) in physical injuries only." (App. Exh. E97.)

On November 22, 2021, Ms. Lucchese emailed that she was calling Kaiser that day for updates as to "when and w/whom you will be scheduled for the psych evaluation." (App. Exh. E57.)

On December 7, 2021, the applicant emailed Sevda Lucchese that he was "awaiting a response from my Doctor's office for referral to Dr. Daniel Haycraft in Calistoga. Haycraft is on your network list ... " (App. Exh. E12.)

On December 10, 2021, Ms. Lucchese again notified the applicant that she had been calling "the psych multiple times a week with little movement. It seems they are extremely backed up. I just got what I needed from them today and sent it back". (App. Exh. E60/Def. Exh. HHH.)

On December 14, the applicant notified the claims administrator that he was contacted by "Trauma and Stress Recovery Center", as a referral from Kaiser Occupation Medicine. (Def. Exh. CCC/Def. Exh. III.)

On December 30, 2021, the claim was denied. (Def. Exh. VV.)

On March 16, 2022, Sedgwick accepted liability for applicant's August 25, 2021 industrial injury. (Def. Exh. K.)

On April 20, 2022, the applicant emailed Mr. Geronimo requesting he find the applicant a primary care physician accepting new patients in the network. (App. Exh. E27 .)

On April 18, 2022 and May 17, 2022, the applicant was seen by Mollie Heckel-Munc, M.D., referred by his private physician, Dr. Levin. Dr. Heckel-Munc recommended a follow up with behavioral health to reduce stress and improve sleep as well as a therapist for long-term treatment to assist with stress and possible trauma. (App. Exh. E105/E106.)

On May 20, 2022, the defendant provided the applicant with the information of Dr. Vladimir Bokarius of San Mateo, claiming that "it took awhile but his client found a provider and is confirming he can take you as a new patient". (App. Exh. E30/Def. Exh. L.) The applicant stated that he didn't "see that as a viable option as at the moment". (App. Exh. E31.)

On July 22, 2022, the Field Case Manager, Roxaima Reeves, emailed the claims adjuster stating that "I am continuing to look for a psych PTP in Sonoma County for Olisaemeka. My goal is to have one by August 20, 2022, I will update you when I completed calling providers..." (Def. Exh. S.)

On August 23, 2022, Ms. Reeves wrote that "I have left voicemail's for each of the providers listed. I don't think that they will accept a PTP role as they are PhD's not MD's, I may be able to get one of them to accept as a consultant and then the claimant will need to follow up at an occupational medicine clinic, I am really out of options. Would you like me to close this task assignment once I get responses." (Def. Exh. Z.)

At an Expedited Hearing on August 25, 2022, the defendant agreed to authorize psychologist Anthony Dragonette Psy.D. as a treating physician "subject to California law and fee schedule", (MOH/SOE, 8/25/22, p. 3, line 13-14.)

On August 26, 2022 the applicant emailed Dr. Dragonette stating that he called him twice and left voice messages with an email and no response. (App.' Exh. E72) Dr. Dragonette responded, saying that he is unable to talce on any new patients at this time due to other unexpected professional obligations. (App, Exh. E72.) On August 30, 2022, the applicant notified the defense attorney that Dr. Dragonette backed out "presumably out of fear of dealing with your client and with workers comp process," (App. Exh. E73/ Def. Exh. UU.)

Nonetheless, on August 31, 2022, the claims administrator provided authorization for Dr. Dragonette to be the applicant's Primary Treating Physician, (Def. Exh. WW.)

This matter was submitted after four days of trial on the following issues: 1) Proper QME panel; 2) Applicant's contention of unreasonable delay of medical treatment pursuant to Labor Code section 5814; and 3) Applicant's request for Sanctions pursuant to Labor Code section 5813.

A Findings, Award, and Order issued on September 27, 2023, finding that the provision of medical treatment was unreasonably delayed by the defendant and there is good cause exists for a replacement QME panel in Psychiatry (MPD). Applicant's request for sanctions pursuant to Labor Code section 5813 was denied. It is from this Findings, Award and Order that petitioner seeks reconsideration.

Newly-Submitted Evidence

The applicant attached three documents to the Petition for Reconsideration, not previously submitted, referring to them as "New Evidence Supporting Willful Bad Faith Conduct". (Petition, p. 5.)

The first, and most notable, attachment was an email presumably inadvertently copied to the applicant from the defense attorney, wherein he refers to the applicant as "certifiably crazy". (Recon-1)

Although this language is disrespectful, the alleged offending party must be given notice and an opportunity to be heard prior to an order for Sanctions issue. (CCR §10421(a).) As such, no action can be taken on this newly-submitted evidence at this time.

The other two documents supplied by the petitioner are search results from the California Bar Association attorney search function (Recon-2) and a page from Sedgwick's website. (Recon-3.) Similarly, these documents filed with the Petition for Reconsideration will not be considered at this time.

III

DISCUSSION

A. GOOD CAUSE EXISTS FOR A REPLACEMENT QME PANEL IN PSYCHOLOGY (PSY).

Here, the court issued an Order for a replacement QME panel in Psychiatry (MPD) based on the applicant's own requests within the evidentiary record. However, as it appears that the applicant now desires a replacement QME panel in Psychology (PSY), this specialty is appropriate pursuant to Labor Code section 4062.1 (b). It is respectfully requested that the court's order shall be amended for the Medical Unit to issue a replacement Psychological (PSY) panel, within a reasonable geographic distance of zip code 94928.

B. THE COURT PROPERLY FOUND UNREASONABLE DELAY PENALTIES UNDER LABOR CODE SECTION 5814.

The petitioner asserts that "the penalty ordered falls short of fair compensation given the havoc defendant's unreasonable delay has wrecked on applicant's overall wellbeing". (Petition, p. 1.) In that regard, Petitioner contends that the purpose of the law is to make whole and requests trial costs under 5813 in the total of \$65,780.94. (Petition, p. 6.)

It is important to emphasize that the court ruled in the petitioner's favor and found the defendant unreasonably delayed the provision of medical treatment. Penalties pursuant to Labor Code section 5814 were awarded to the applicant with the exact amount deferred upon further development of the record. Specifically, the Opinion on Decision stated,

The record shows futile efforts of the claims administrator to procure a primary treating physician within the MPN for the applicant. It is evident that Sedgwick knew or reasonably should have known that their MPN list was deficient. Yet, they did not make timely efforts to assist the applicant to procure a primary treating physician, either inside or outside of the MPN.

In order to accomplish a fair balance and substantial justice between the parties, it is necessary to further develop the record. The value of the treatment unreasonably delayed cannot be determined based on the existing record. The exact amount of the value of penalty is deferred with jurisdiction reserved at this time. The penalty is best calculated only when the applicant obtains regular consistent medical treatment and evidence can be provided regarding the frequency and cost of care.
(Opinion on Decision, p. 6.)

The specific basis for the petitioner's requested fee, as stated above, remains unclear to the court. Penalties are assessed by the amount of the benefits unreasonably delayed, which is not yet determined in this case. Further, contrary to petitioner's claim, the Workers' Compensation system is unique in that its purpose and function is not to "make someone whole". (Petition, p. 6.) The California Supreme Court in *Department of Rehabilitation/State of California v. WCAB (Lauher)* stated,

"Our system of workers' compensation does not provide a make-whole remedy. The Workers' Compensation Law is intended to award compensation for disability incurred in employment. The purpose of the award is not to make the employee whole for the loss which he has suffered but to prevent him and his dependents from becoming public charges during the period of his disability. The purpose of workmen's compensation is to rehabilitate, not to indemnify, and its intent is limited to assuring the injured workman subsistence while he is unable to work and to effectuate his speedy rehabilitation and reentry into the labor market."
(*Department of Rehabilitation/State of California v. WCAB (Lauher)*(2003)
68 CCC 831, 844.)

Considering the above and the evidentiary record, it remains the opinion of the court that further development of the record is necessary to determine the exact amount of the benefits unreasonably delayed.

C. THE RECORD DOES NOT SUPPORT THE IMPOSITION OF SANCTIONS PURSUANT TO LABOR CODE SECTION 5813.

Labor Code section 5813(a) provides in full as follows:

"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. (Emphasis added.)

More specifically, the Regulations provide clarification regarding actions that may support the imposition of sanctions under section 5813 in pertinent part as follows:

"Bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay include actions or tactics 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).) (Emph. added.)

Petitioner relies on the court's finding of unreasonable delay to evince defendant's willful and intentional acts of bad faith pursuant to Labor Code section 5813, (Petition p. 4.) The court finds no merit in this claim.

Labor Code section 5813 sanctions differ from penalties pursuant to Labor Code section 5814. Penalties are intended to ensure benefits are promptly rendered to the applicant. Section 5813 sanctions, on the other hand, are designed to protect against litigation abuses before the Workers' Compensation Appeals Board. (*Duncan v. Workers' Comp. Appeals Bd. (Silva)* (2008) 166 Cal. App. 4th 294, 302.)

Here, while the defendant's actions caused a delay in the applicant's treatment, the record is devoid of any bad faith or frivolous behavior. The delay in treatment emanated from a complicated timeline not solely created by the defendant. For instance, the defendant confirmed Dr. Bokarius was amenable to treat but the applicant felt that the defendant's arrangement with that provider did not meet his health needs. (MOH/SOE, 3/2/23, p. 14, line 6; lines 19-22.)

In another instance, at an Expedited Hearing on August 25, 2022, the defendant agreed to authorize Dr. Dragonette, outside the MPN, payable pursuant to the fee schedule. (MOH/SOE, 7/12/23, p. 2, lines 35-37.) The applicant attempted to reach Dr. Dragonette at the Expedited Hearing and could not reach him. Dr. Dragonette subsequently stated he was unable to take on any new patients. (App. Exh. E-72.)

Considering the examples above and the evidentiary record as a whole, there is insufficient evidence that the defendant's failure to provide medical treatment was willfully done with the intention to delay or disrupt proceedings. There is nothing in the petition to disrupt this finding.

IV.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be granted solely relating to the petitioner's request for a QME in Psychology (PSY) and denied in all other regards.

Dated: October 31, 2023

Respectfully submitted,

Katie F. Boriolo
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE