

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

BICHNGA NGUYEN, *Applicant*

vs.

**PACIFIC DENTAL SERVICES, LLC;
OLD REPUBLIC INSURANCE COMPANY,
administered by GALLAGHER BASSETT SERVICES, INC.,
*Defendants***

**Adjudication Number: ADJ12784423
Santa Ana District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND
NOTICE OF INTENT TO IMPOSE
SANCTIONS AND COSTS**

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 grant reconsideration, issue a Notice of Intent to amend the Amended Findings and Order to include *Negar Matian (CA BAR #223868)*, in their individual capacity and Matian Law Group. Barring receipt of a response showing good cause to the contrary, we will amend the Amended Findings and Order pursuant to this Notice, and otherwise affirm the decision of March 26, 2024.

Defendant filed a "Defendant's Petition for Leave to Respond to Report and Recommendation on Petition for Reconsideration and Proposed Response" on May 16, 2024, (Supplemental Petition). Pursuant to our authority, we accept the pleadings and have reviewed the Supplemental Petition herein. (Cal. Code Regs., tit. 8, § 10964.) Based on our review of the record, it does not appear that defendant was denied due process in this matter.

Accordingly, we grant the Petition for Reconsideration and give Notice of our Intent to amend the Amended Findings and Order to find and order that *Negar Matian and Matian Law*

Group *jointly and severally* pay sanctions and reasonable expenses, including attorney's fees and costs, and to otherwise affirm the decision.

Responses must be filed within twenty (20) days plus five (5) additional days for mailing (Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10600) after service of this Notice.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Amended Findings and Order issued by the WCJ on March 26, 2024 is **GRANTED**.

NOTICE IS HEREBY GIVEN that absent written objection in which good cause to the contrary is demonstrated, within twenty (20) days plus five (5) additional days for mailing (Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10600) after service of this Notice that pursuant to Labor Code section 5813 and WCAB Rule 10421 (Cal. Code Regs., tit. 8, § 10421) the Appeals Board will **AFFIRM** the March 26, 2024 Amended Findings and Order, except that the Appeals Board will **AMEND** the Amended Findings and Order to find and order that **NEGAR MATIAN (CA BAR #223868) and MATIAN LAW GROUP jointly and severally** pay sanctions and reasonable expenses, including attorney's fees and costs, pursuant to the Amended Findings and Order as amended:

FINDINGS OF FACT

1. Bichnga Nguyen, while employed on December 24, 2018, as a dental assistant in Laguna Niguel, California, by Pacific Dental Services, LLC, sustained injury arising out of and in the course of employment to her neck, shoulders, upper extremities, right middle finger, back, and left hip.

2. At the time of injury, Pacific Dental Services, LLC 's workers' compensation carrier was Old Republic Insurance Company.

3. *Negar Matian and Matian Law Group* acted in and utilized bad faith tactics in their discovery practices that were frivolous and solely intended to cause unnecessary delay.

4. As a result of the bad faith actions of *Negar Matian and Matian Law Group*, the applicant incurred costs of \$11,093.75.

5. An appropriate sanction for the bad faith actions of *Negar Matian and Matian Law Group* is \$750.00.

ORDER

IT IS HEREBY ORDERED that *Negar Matian and Matian Law Group* jointly and severally pay sanctions per Labor Code Section 5813 and WCAB Rule 10421 in the amount of \$750.00, payable by check **within 20 days** of service of this Order to **Workers' Compensation Appeals Board** Tax ID 94-3160882 for transmission to the General Fund and **shall reference the case name and the case number on the memo portion of the check**. The check shall be mailed with a copy of this Order to:

ANNE SCHMITZ
Secretary and Deputy Commissioner
WORKERS' COMPENSATION APPEALS BOARD
P.O. Box 429459
San Francisco, CA 94142-9459
Attn: Julie Podbereski

IT IS FURTHER ORDERED that *Negar Matian and Matian Law Group* jointly and severally pay costs of \$11,093.75.

Payment to issue to:

LAW OFFICES OF HENRY KHALILI, PC
17151 NEWHOPE ST STE 105,
FOUNTAIN VALLEY, California, 92708

IT IS FURTHER ORDERED that all responses to this Notice by any party must be filed within twenty (20) days plus five (5) additional days for mailing (Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10600) after service of this Notice, and shall be filed only with the Office of the Commissioners of the Workers' Compensation Appeals Board at its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102), its e-mail address (WCABgrantforstudy@dir.ca.gov), or electronically filed in the Electronic Adjudication System (EAMS). To be timely, any written response must be received at one of those addresses or electronically filed in EAMS within twenty (20) days plus five (5) additional days for mailing (Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10600) after service of this Notice.

Untimely or misfiled responses may not be accepted or considered.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 17, 2024

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

**BICHNGA NGUYEN
LAW OFFICES OF HENRY KHALILI
MATIAN LAW GROUP**

LN/pm

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

1. Applicant's occupation: Dental Assistant
Applicant's Age : 56
Date of Injury : December 24, 2018
Parts of Body Injured: neck, shoulders, upper extremities, right middle finger, back, and left hip
Manner in which it occurred: Specific Incident
2. Identity of Petitioner: Matian Law Group
Timeliness : Petition is timely
Verification : Petition is verified
3. Date of Order: March 26, 2024
4. Petitioner contends that the WCJ erred in finding that:
 - a) Matian Law Group acted in and utilized bad faith tactics in its discovery practices that were frivolous and solely intended to cause unnecessary delay and
 - b) Ordering Matian Law Group to pay costs of \$11,093.75 to the applicant for attorney fees.

**II.
BACKGROUND
CASE HISTORY**

Given the nature of the findings of the undersigned Judge and the assertions of defense counsel in its petition for reconsideration, the undersigned Judge is providing a detailed history based on the evidentiary evidence submitted by the parties to provide a context for the decisions made.

The disputes in this matter began when Dr. Douglas Hackman, acting as the panel- qualified medical examiner for the applicant's orthopedic complaints, initially evaluated the applicant on February 4, 2020 [APPLICANT'S 40: PQME Report, Dr. Douglas Hackman, chiropractor, dated 2-4-2020], and then again on February 23, 2021. [APPLICANT'S 39: PQME Report, Dr. Douglas Hackman, chiropractor, dated 2-23-2021.]

Dr. Hackman diagnosed the applicant with bilateral shoulder pain, neck pain, dizziness, post-surgical cervical spine, right arm/forearm pain, right-hand pain, trigger finger right middle finger, subluxation of right thumb M.P. joint with joint laxity and pain, low back pain, left sacroiliitis, lumbar radiculitis paresthesia of the right angle of the jaw to the chin, right lateral forearm, right index finger, and memory loss. As of February 23, 2021, Dr. Hackman found that the applicant had not been found to have reached MMI status. Dr. Hackman recommended orthopedic evaluations and treatment of her right middle trigger finger, orthopedic evaluations and treatment for her lower back, hip, and leg, and neurologic evaluation of her dizziness and memory loss to determine the etiology and any necessary treatment. [APPLICANT'S 39: PQME Report, Dr. Douglas Hackman, chiropractor, dated 2-23-2021.]

Dr. Saeed Nick saw the applicant for a neurological consultation on October 13, 2021. Dr. Nick assessed the applicant as having cognitive impairment, dizziness, depression and anxiety, dizziness. Dr. Nick recommended an MRI of the brain, thyroid function test, VIT B12 level, referral to a psychiatrist for depression and anxiety as a cause of pseudo-dementia, possible CBT session, meclizine 25mg and PO BID PRN-60. [APPLICANT'S 41: PTP Progress Report PR-2, Dr. Saeed Nick, dated 10-13-2021.] The applicant objected to the opinions of Dr. Saeed Nick on October 19, 2021. [DEFENSE S: Applicant's objection to Dr. Saeed Nick's reporting, dated 10-19-2021.]

The applicant had been scheduled to be reevaluated by Dr. Douglas Hackman on November 30, 2021. [APPLICANT'S 37: Defense attorney letter to applicant, dated 8-27-2021.] However, a notice of cancellation was issued by the defense counsel. No reason was provided in the notice for the cancellation of the examination. [APPLICANT'S 35: Defense attorney cancellation notice to the applicant, dated 11-12-2021.]

The evaluation by Dr. Hackman was rescheduled to take place on July 12, 2022. APPLICANT'S 34: Applicant attorney appointment notice to defense attorney, dated 5-5-2022; DEFENSE DD: Notice of PQME Re-evaluation, dated 5-23-2022.⁸ Defense counsel issued a notice that this evaluation was rescheduled to September 27, 2022. A statement in the notice provided that the defense counsel's office had made the arrangements. There was no reason provided in the notice for the rescheduling. [APPLICANT'S 33: Defense attorney cancellation notice to applicant, dated 6-14-2022; DEFENSE EE: Notice of Rescheduled of PQME Re-evaluation, dated 6-14-2022.]

Ten months after the original re-evaluation date, September 27, 2022, Dr. Hackman completed his evaluation and issued a report on the same date. Dr. Hackman provided that the applicant's overall condition as to her neck, shoulders, right arm and hand, trigger finger, lower back, hip, and leg has either resolved, stabilized, or remained relatively the same, it would be reasonable to conclude that the applicant had all of the treatment that was medically reasonable and necessary with respect to characterizing her as being permanent and stationary. Dr. Hackman deferred the determination of the applicant's other complaints to the appropriate specialists. [APPLICANT'S 38: PQME Report, Dr. Douglas Hackman, chiropractor, dated 9-27-2022.]

On November 3, 2021, the applicant filed a Declaration of Readiness to Proceed to an Expedited hearing raising the issues of authorization for a pain consultation and an additional panel in neurology per the reporting of Dr. Hackman. [EAMS Doc ID: 38892713; DECLARATION OF READINESS TO PROCEED TO EXPEDITED HEARING, Dated 11/3/2021.]

On November 22, 2021, the parties appeared before the undersigned Judge and presented a stipulation that the "[p]arties agree to use Dr. Mark Levine as an Agreed PQME. Authorization for Dr. Andrew Messiha for pain management consultation." [EAMS Doc ID: 74910306; MOH-NGUYEN Dated 11/22/2021.]

The neuropsychiatry issue was resolved by the agreement to use Dr. Mark Levine as an Agreed PQME. This agreement had been reached as an alternative to obtaining a panel in neurology.

The parties sent a letter to Dr. Mark Levine advising him that the parties had agreed to have him act as the Agreed PQME in Neuropsychology. [DEFENSE U: Agreed PQME joint agreement, dated 1-13-2022 (APPLICANT'S EXHIBIT 7).] An appointment for Dr. Levine was set for April 2, 2022. [APPLICANT'S EXHIBIT 8: Applicant attorney's letter to Dr. Levine regarding the appointment of the evaluation, dated 1/10/2022.]

On March 15, 2022, defense counsel served on the applicant the defendant's proposed advocacy letter. [DEFENSE V: Defendant's proposed advocacy letter to Dr. Mark Levine, dated 3-15-2022. (JOINT EXHIBIT Y).]

In addition, the defendant's attorney's office sent a communication to the applicant's attorney's office advising the applicant's attorney that the advocacy

letter, after being amended by the applicant's attorney, was acceptable. [DEFENSE AA: Defense attorney E-mail chain to applicant attorney, dated 3-15-2022 (APPLICANT'S EXHIBIT 6).]

The applicant's attorney forwarded the applicant's advocacy letter to Dr. Levine on March 29, 2022, as amended on March 11, 2022. [DEFENSE BB & DEFENSE NN: Applicant attorney advocacy letter to Dr. Mark Levine, dated 3-29-2022.]

On March 22, 2022, the applicant objected to some of the language included in the proposed advocacy letter as inaccurate and requested that defense counsel remove the language. [DEFENSE W: Applicant attorney letter to defendant, dated 3-22-2022. (APPLICANT'S EXHIBIT 5).]

The Matian Law Group responded on March 31, 2022, taking issue with the applicant's request to remove the inaccuracies and stating that defense counsel did not believe that Dr. Levine was a neuropsychologist but rather a clinical psychologist. The Matian Law Group asserted that the agreement to use Dr. Levine was not binding. The defense attorney advised the applicant's attorney that they would be canceling the evaluation on April 4, 2022. [JOINT EXHIBIT X: Defense attorney's letter to Applicant's attorney, dated 3/31/2022. (DEFENSE CC).]

On April 1, 2022, the applicant filed a Declaration of Readiness to Proceed to Expedited hearing request enforcement of the stipulation to use Dr. Levine as an Agreed Medical Examiner. [EAMS Doc ID: 40803118; DECLARATION OF READINESS TO PROCEED TO EXPEDITED HEARING Dated 4/1/2022.]

On April 21, 2022, the parties returned to the Court to try the issue of whether the defendant could withdraw from the agreement to utilize Levine as an Agreed PQME.

The matter was submitted to the Undersigned Judge. A Finding and Order was issued on July 21, 2022, finding that 1) Dr. Mark Levine was an Agreed Medical Examiner, 2) that the defendant could not unilaterally withdraw from the agreement to utilize Dr. Levine as the Agreed Medical Examiner, and 3) that there was inaccurate information contained in the proposed advocacy letter that needed to be removed. [EAMS Doc ID: 75739900; F&O AND OPINION ON DECISION-NGUYEN, B. Dated 7/21/2022.]

After the Court's July 21, 2022, Finding and Order, the parties advised Dr. Levine of the Court's determination and requested that Dr. Levine schedule the applicant for an evaluation. [APPLICANT'S 31: Joint letter to AME Dr. Mark Levine, dated 8-23-2022; & DEFENSE GG: AME joint agreement to Dr. Mark Levine, dated 8-23-2022.] The applicant was scheduled to be evaluated by Dr. Levine on February 7, 2023. [APPLICANT'S 27: Applicant attorney appointment notice to defense attorney, dated 9-8-2022, & APPLICANT'S 28: AME Dr. Mark Levine E-mail to applicant attorney and defense attorney, dated 9-2-2022.]

The parties appear to have been unable to reach an agreement regarding the communication with Dr. Levine and, as such, elected to send separate advocacy letters.

On January 3, 2023, the Matian Law Group wrote to the applicant's attorney insisting that the applicant undergo diagnostic studies, including an MRI of the Brain, Thyroid Function Test, VIT B12 Level, Psychiatric evaluation for depression and anxiety as a cause of pseudo-dementia, Possible CBT sessions, and Meclizine 25 mg based on the report of Dr. Nick [DEFENSE HH: Defendant's request for testing, dated 1-3-2023; APPLICANT'S 41: PTP Progress Report PR-2, Dr. Saeed Nick, dated 10-13-2021.]

On January 5, 2023, the applicant's attorney advised defense counsel that they had objected to the opinions of Dr. Saeed Nick and his opinions and recommendations but that the applicant would undergo diagnostic testing if requested by Dr. Levine. [DEFENSE II: Applicant's objection to testing, dated 1-5-2023.]

On January 26, 2023, [APPLICANT'S 25: Applicant attorney resubmission of advocacy letter to the AME Dr. Mark Levine, dated 1-26-2023; DEFENSE D: Applicant's advocacy letter to AME Dr. Mark Levine, dated 1-26-2023.] the applicant served on defense counsel and Dr. Levine the March 2022 letter and records previously stated were acceptable by defense counsel on March 15, 2022. [DEFENSE AA: Defense attorney E-mail chain to applicant attorney, dated 3-15-2022 (APPLICANT'S EXHIBIT 6).]

On February 1, 2023, via email, defense counsel provided the applicant with its' Proposed Advocacy Letter to Dr. Mark Levine for the appointment scheduled on February 7, asking that the applicant send her objections and tell defense counsel if she was willing to agree to a 20-day waiver as the appointment

is coming up soon. [APPLICANT'S 23: Defense attorney E-mail to applicant attorney, dated 2-1-2023.]

On February 6, 2023, at 4:44 p.m. and 4:58 p.m., defense counsel sent multiple emails. Defense counsel asserted that they had not received a response to their proposed advocacy letter stating that Dr. Levine would not see the applicant without a cover letter, necessitating the continuance of the evaluation. [APPLICANT'S 19: Defense attorney E-mail to applicant attorney, time stamped 4:44 p.m., dated 2-6-2023.] The second email advised the applicant's attorney that the following day's evaluation with Dr. Levine was canceled. [APPLICANT'S 18: Defense attorney E-mail to applicant attorney, time stamped 4:58 p.m., dated 2-6-2023.]

On February 6, 2023, at 5:00 p.m., the applicant's attorney responded to the defense counsel's emails stating that they should not cancel the appointment and that doing so would result in the applicant taking action and requesting sanctions. [APPLICANT'S 21: Applicant attorney E-mail to defense attorney, time stamped 5:00 p.m., dated 2-6-2023.]

Defense counsel issued a notice of cancellation of the February 7, 2023, AME evaluation on February 6, 2023, at 4:58 p.m. [APPLICANT'S 20: Defense attorney cancellation notice to applicant, dated 2-6-2023.]

On February 6, 2023, at 5:22 p.m., the applicant advised defense counsel that Dr. Levine had previously been served with a cover letter and records on January 26, 2023, and requested that defense counsel rescind the cancellation of the evaluation. [APPLICANT'S 22: Applicant attorney E-mail to defense attorney, time stamped 5:22 p.m., dated 2-6-2023.]

On February 16, 2023, the applicant sent a communication to defense counsel, objecting to the omission of accepted injuries and the inclusion of language the applicant believed to be inaccurate. [APPLICANT'S 17: Applicant attorney letter to defense attorney, dated 2-16-2023.]

On February 21, 2023, defense counsel served on the applicant a communication stating that the attorney was correct in his impression that defense counsel withheld their proposed Advocacy Letter to Dr. Levine last March, pending the outcome of the 04/21/22 Expedited hearing. Defense counsel asserted that the applicant's statement that the prior Advocacy Letter was sent was a misstatement and that no Advocacy Letter had been previously

sent to Dr. Levine by this office. [APPLICANT'S 16: Defense attorney letter to applicant attorney, dated 2-21-2023.]

On February 27, 2023, defense counsel served on the applicant their proposed Revised Advocacy Letter and Schedule of Records. [APPLICANT'S 15: Defense attorney proposed letter to AME Dr. Mark Levine, dated 2-27-2023.]

On March 13, 2023, the applicant's attorney issued notice of the rescheduling of the evaluation with Dr. Levine for May 3, 2023. [DEFENSE JJ: Notice of AME evaluation, dated 3-13-2023; & APPLICANT'S 14: Applicant attorney letter to defense attorney, dated 3-13-2023.]

On March 14, 2023, the applicant objected to some of the language included in the proposed advocacy letter as inaccurate and requested that defense counsel remove the language. [APPLICANT'S 13: Applicant attorney letter to defense attorney, dated 3-14-2023.]

Dr. Levine finished his evaluation of the applicant on June 21, 2023. [APPLICANT'S 43: AME Report, Dr. Mark Levine, dated 11-24-2023.]

In his evaluation, Dr. Levine utilized a number of diagnostic tests, including the Wechsler Adult Intelligence Scale (WAIS-IV), Matrix Reasoning, WAIS-IV Digit Span subtest, Wechsler Memory Scale IV Logical Memory subtest, CVLT II, and MCMI 111. Dr. Levine did not recommend or request that the applicant undergo an MRI of the Brain, Thyroid Function Test, VIT B12 Level, Psychiatric for depression and anxiety as a cause of pseudo-dementia, Possible CBT sessions, or Meclizine 25 mg. [APPLICANT'S 43: AME Report, Dr. Mark Levine, dated 11-24-2023.]

The applicant filed a petition for costs and sanctions asserting that defense counsel was acting in bad faith and using tactics that were frivolous and intended to cause unnecessary delay. The petition specifically identified the alleged bad faith actions as unreasonable cancellations of the AME appointment, unreasonable delay in the AME appointment, and unreasonable cancellations of the PQME Hackman appointment. [EAMS Doc ID: 45765864 PET FOR PENALTIES AND SANCTIONS, dated 4/3/2023.]

A Declaration of Readiness to Proceed was filed on February 9, 2023, stating that the applicant sought penalties and sanctions for repeated bad faith

cancellations of AME and PQME appointments "as well as other bad faith conduct." [EAMS Doc ID: 76415219, DECLARATION OF READINESS TO PROCEED, 2/9/2023.]

The parties appeared before the undersigned Judge on April 4, 2023, and the matter was set for trial on the issue of sanctions on May 15, 2023. [EAMS Doc ID: 76629921, NGUYEN BICHNGA-MOH 4/4/2024.]

The matter was continued multiple times at the request of the parties, both jointly and individually. The matter was ultimately submitted on December 21, 2023, to the Undersigned Judge for determination on the issues of Attorney fees, Penalties, and sanctions against Matian Law Group for alleged bad-faith discovery abuses and penalties and sanctions against applicant's attorney for alleged frivolous filing of petitions and penalties.

The undersigned Judge issued his Findings and Award on March 25, 2024, finding that the Matian Law Group acted in and utilized bad faith tactics in its discovery practices that were frivolous and solely intended to cause unnecessary delay, that as a result of the bad faith actions of the Matian Law Group, the applicant incurred costs of \$11,093.75 and that an appropriate sanction for the bad faith actions of Matian Law Group is \$750.00.

The Matian Law Group filed a Petition for reconsideration to the March 25, 2024 Findings and Award asserting that the Undersigned Judge acted without or in excess of his powers, that the evidence did not justify the findings of fact, and that the findings of fact do not support the order, decision or award.

III. **DISCUSSION**

A. The cancellation of exams does not support a finding of Labor Code 5813 Costs and Sanctions

The Matian Law Group asserts that the Labor Code and Code of Regulations do not provide that cancellations of qualified medical examinations are a basis for sanctions. The Matian Law Group directs the Appeals Board to Regulation 10561 for the enumerated bad-faith actions or tactics that would subject a party to sanctions. Regulation 10561 [8 CCR 10561] was renumbered to 8 CCR 10421 in 2019 does not provide the guidance suggested by the Matian Law Group. However, the Undersigned Judge believes that The Matian Law

Group inadvertently misidentified the regulation that enumerated bad faith actions or tactics and intended to reference California Code of Regulations § 10421.

California Code of Regulations § 10421(b) provides that "[b]ad 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 indisputable without merit."

California Code of regulations § 10421(b) further provides that the list of bad faith actions includes such actions as (1) Failure to appear or appearing late at a conference or trial; (2) Filing a pleading, petition or legal document unless there is some reasonable justification for filing the document; (3) Failure to timely serve documents; (4) Failing to comply with the Workers' Compensation Appeals Board's Rules of Practice and Procedure; (5) Executing a declaration or verification to any petition, pleading or other document filed with the Workers' Compensation Appeals Board that contains false or substantially false statements of fact; (6) Bringing a claim, conducting a defense or asserting a position that is indisputably without merit; (7) Presenting a claim or a defense, or raising an issue or argument, that is not warranted under existing law; (8) Asserting a position that misstates or substantially misstates the law; and (9) Using any language or gesture at or in connection with any hearing or using any language in any pleading or other document that is patently insulting, offensive, insolent, intemperate, foul, vulgar, obscene, abusive or disrespectful; or impugns the integrity of the Workers' Compensation Appeals Board or its commissioners, judges or staff.

However, The Matian Law Group did not include in its citing of the California Code of the language of the regulation that states that violations subject to the provisions of Labor Code section 5813 include, but are not limited to, the listed actions. Furthermore, multiple times, the regulation includes the language that individual actions may result in sanctions if they appear to be part of a pattern of actions.

As such, the list provided in California Code of Regulations § 10421 is not exhaustive, and there are actions that may be found frivolous and/or solely intended to cause unnecessary delay that can rise to the level of bad faith actions or tactics that are sanctionable under Labor Code section 5813.

Based on the above, the cancellation of medical exams, if done in bad faith or as a tactic that is frivolous or solely intended to cause unnecessary delay, is sanctionable under Labor Code section 5813.

B. Dr. Hackman's PQME Re-evaluation

Based on the evidence submitted, the applicant was scheduled to be reevaluated by Dr. Douglas Hackman, the orthopedic qualified medical examiner, on November 3, 2021. [APPLICANT'S 37: Defense attorney letter to applicant, dated 8-27-2021.] On November 12, 2021, the Matian Law Group issued a notice of cancellation that provided no reason for the cancellation of the examination. [APPLICANT'S 35: Defense attorney cancellation notice to the applicant, dated 11-12-2021.]

The evaluation by Dr. Hackman was rescheduled to take place on July 12, 2022. [APPLICANT'S 34: Applicant attorney appointment notice to defense attorney, dated 5-5-2022; DEFENSE DD: Notice of PQME Re-evaluation, dated 5-23-2022.] However, the Matian Law Group issued a notice that this evaluation was rescheduled to September 27, 2022. Again, no reason was provided in the notice for the rescheduling. [APPLICANT'S 33: Defense attorney cancellation notice to applicant, dated 6-14-2022; DEFENSE EE: Notice of Rescheduled of PQME Re-evaluation, dated 6-14-2022.]

As a result of the Matian Law Group's two unexplained cancellations of the Orthopedic Qualified Medical Examinations, it was ten months after the original re-evaluation date of November 30, 2021, that Dr. Hackman completed his evaluation on September 27, 2022, and issued his report. [APPLICANT'S 38: PQME Report, Dr. Douglas Hackman, chiropractor, dated 9-27-2022.]

The Matian Law Group, in its trial brief, asserted that the cancellations of Dr. Hackman's evaluations were warranted under California Code of Regulations section 31.7(a), which provides that once evaluated by a qualified medical examiner, should a new issue arise, the parties are to return to the same evaluator for a follow-up. The Matian Law Group asserted that an issue arose as to the appropriateness of the diagnostic studies recommended by Dr. Saeed Nick in Dr. Nick's October 13, 2021, report.

The implication was that 30 days was insufficient for Dr. Hackman to address the issue of the applicant's neurological claim and what test may be required to decide the issue.

However, the Undersigned Judge noted that Dr. Hackman had deferred the determination as to the applicant's neurological claims to a neurologist, advising the parties that the applicant should undergo an evaluation with a neurologist to determine etiology (the cause) and any necessary treatment. [APPLICANT'S 39: PQME Report, Dr. Douglas Hackman, chiropractor, dated 2-23-2021, Page 41 (identified in document as page 35 of 41).] Dr. Hackman again deferred the determination of the applicant's neurological claims to a neuropsychologist and recommended that a QME psychologist see the applicant. [APPLICANT'S 38: PQME Report, Dr. Douglas Hackman, chiropractor, dated 9-27-2022, Page 33 (identified in document as page 32 of 33).]

The Undersigned Judge found the rationale to cancel the orthopedic evaluations of Dr. Hackman pending the completion of neurological testing when Dr. Hackman had already advised the parties that a neurologist should determine the issue was unreasonable.

The Matian Law Group further asserts that discovery was pending regarding the applicant's other claims, and as they had not been resolved, the applicant's claim status would have remained the same.

The Undersigned Judge believes that this rationale is inadequate and contrary to the intentions of the workers' compensation system.

The Undersigned Judge notes that in Dr. Hackman's September 27, 2022, report, he found that the applicant's orthopedic injuries were permanent and stationary and provided the applicant with a whole person impairment of approximately 50% prior to adjustments.

According to the evidence, the defendant paid temporary disability indemnity from May 10, 2021 to September 5, 2021. [DEFENSE N: TPD Payment of Benefits, 6-24-2019 through 7-15-2019.] Also, according to the records submitted, the defendant had paid \$8,990.00 in permanent disability. [DEFENSE 0: Notice of TTD Benefits Termination, dated 12-15-2020.]

The applicant had scheduled the orthopedic re-evaluation with Dr. Hackman for November 12, 2021. [APPLICANT'S 37: Defense attorney letter to applicant, dated 8-27-2021.] The undersigned Judge acknowledges that it is speculation to assume the applicant would have been permanent and stationary on November 12, 2021. However, given the applicant's continued complaints

and the lack of treatment being received by the applicant, it would not have been unreasonable in 2021 to anticipate that the applicant's industrial disability would exceed \$8,990.00 and/or 10%.

In canceling the orthopedic evaluations, defense counsel was able to forestall the analysis of the applicant's disability status for ten (10) months and, in doing so, delayed the applicant's receipt of permanent disability indemnity.

As such, the undersigned Judge was not in error in finding that the Matian Law Group's cancellations of Dr. Hackman's evaluations were unreasonable.

C. Dr. Levine's AME Evaluations

On November 3, 2021, the applicant filed a Declaration of Readiness to Proceed to an Expedited hearing raising the issues of authorization for a pain consultation and an additional panel in neurology per the reporting of Dr. Hackman. [EAMS Doc ID: 38892713; DECLARATION OF READINESS TO PROCEED TO EXPEDITED HEARING, Dated 11/3/2021.]

On November 22, 2021, the parties appeared before the undersigned Judge and presented a stipulation that the "[p]arties agree to use Dr. Mark Levine as an Agreed PQME. Authorization for Dr. Andrew Messiha for pain management consultation." [EAMS Doc ID: 74910306: MOH-NGUYEN Dated 11/22/2021.]

The neuropsychiatry issue was resolved by the agreement to use Dr. Mark Levine as an Agreed PQME. This agreement had been reached as an alternative to obtaining a panel in neurology.

The parties sent a letter to Dr. Mark Levine advising him that the parties had agreed to have him act as the Agreed PQME in Neuropsychology. [DEFENSE U: Agreed PQME joint agreement, dated 1-13-2022 (APPLICANT'S EXHIBIT 7).] An appointment for Dr. Levine was set for April 2, 2022. [APPLICANT'S EXHIBIT 8: Applicant attorney's letter to Dr. Levine regarding the appointment of the evaluation, dated 1/10/2022.]

On March 15, 2022, defense counsel served on the applicant the defendant's proposed advocacy letter. [DEFENSE V: Defendant's proposed advocacy letter to Dr. Mark Levine, dated 3-15-2022. (JOINT EXHIBIT Y).]

In addition, the defendant's attorney's office sent a communication to the applicant's attorney's office advising the applicant's attorney that the advocacy letter, after being amended by the applicant's attorney, was acceptable. [DEFENSE AA: Defense attorney E-mail chain to applicant attorney, dated 3-15-2022 (APPLICANT'S EXHIBIT 6).]

The applicant's attorney forwarded the applicant's advocacy letter to Dr. Levine on March 29, 2022, as amended on March 11, 2022. [DEFENSE BB & DEFENSE NN: Applicant attorney advocacy letter to Dr. Mark Levine, dated 3-29-2022.]

On March 22, 2022, the applicant objected to some of the language included in the proposed advocacy letter as inaccurate and requested that defense counsel remove the language. [DEFENSE W: Applicant attorney letter to defendant, dated 3-22-2022. (APPLICANT'S EXHIBIT 5).]

The Matian Law Group responded on March 31, 2022, taking issue with the applicant's request to remove the inaccuracies, and stating that defense counsel did not believe that Dr. Levine was a neuropsychologist but rather a clinical psychologist. The Matian Law Group asserted that the agreement to use Dr. Levine was not binding. The defense attorney advised the applicant's attorney that they would be canceling the April 4, 2022, evaluation. [JOINT EXHIBIT X: Defense attorney's letter to Applicant's attorney, dated 3/31/2022. (DEFENSE CC).]

On April 1, 2022, the applicant filed a Declaration of Readiness to Proceed to an Expedited hearing requesting enforcement of the stipulation to use Dr. Levine as an Agreed Medical Examiner. [EAMS Doc ID: 40803118; DECLARATION OF READINESS TO PROCEED TO EXPEDITED HEARING Dated 4/1/2022.]

On April 21, 2022, the parties returned to the Court to try the issue of whether the defendant could withdraw from the agreement to utilize Dr. Levine as an Agreed PQME.

The matter was submitted to the Court, and a Finding and Order was issued on July 21, 2022, finding that 1) Dr. Mark Levine was an Agreed Medical Examiner 2) the defendant could not unilaterally withdraw from the agreement to utilize Dr. Levine as the Agreed Medical Examiner and 3) that there was inaccurate information contained in the proposed advocacy letter that needed to

be removed. [EAMS Doc ID: 75739900; F&O AND OPINION ON DECISION-NGUYEN, B. Dated 7/21/2022.]

As to the parties' actions concerning the use of Dr. Levine as an Agreed Medical Examiner, after the Court's July 21, 2022, Finding and Order, the parties advised Dr. Levine of the Court's determination. They requested that Dr. Levine schedule the applicant for an evaluation. [APPLICANT'S 31: Joint letter to AME Dr. Mark Levine, dated 8-23-2022; & DEFENSE GG: AME joint agreement to Dr. Mark Levine, dated 8-23-2022.] The applicant was scheduled to be evaluated by Dr. Levine on February 7, 2023. [APPLICANT'S 27: Applicant attorney appointment notice to defense attorney, dated 9-8-2022, & APPLICANT'S 28: AME Dr. Mark Levine E-mail to applicant attorney and defense attorney, dated 9-2-2022.]

The parties appear to have been unable to reach an agreement regarding a joint communication to Dr. Levine and, as such, elected to send separate advocacy letters.

On January 3, 2023, the Matian Law Group wrote to the applicant's attorney insisting that the applicant undergo diagnostic studies, including an MRI of the Brain, Thyroid Function Test, VIT B12 Level, Psychiatric for depression and anxiety as a cause of pseudo-dementia, Possible CBT sessions, and Meclizine 25 mg based on the report of Dr. Nick. [DEFENSE HH: Defendant's request for testing, dated 1-3-2023; APPLICANT'S 41: PTP Progress Report PR-2, Dr. Saeed Nick, dated 10-13-2021.]

On January 5, 2023, the applicant's attorney advised defense counsel that they had objected to the opinions of Dr. Saeed Nick and his opinions and recommendations but that the applicant would undergo diagnostic testing if requested by Dr. Levine. [DEFENSE II: Applicant's objection to testing, dated 1-5-2023.]

On January 26, 2023, [APPLICANT'S 25: Applicant attorney resubmission of advocacy letter to the AME Dr. Mark Levine, dated 1-26-2023; DEFENSE D: Applicant's advocacy letter to AME Dr. Mark Levine, dated 1-26-2023] the applicant served on defense counsel and Dr. Levine the March 2022 letter and records previously stated were acceptable by defense counsel on March 15, 2022. [DEFENSE AA: Defense attorney E-mail chain to applicant attorney, dated 3-15-2022 (APPLICANT'S EXHIBIT 6).]

On February 1, 2023, via email, defense counsel provided the applicant with its' Proposed Advocacy Letter to Dr. Mark Levine for the appointment scheduled on February 7, asking that the applicant send her objections and tell defense counsel if she was willing to agree to a 20-day waiver as the appointment is coming up soon. [APPLICANT'S 23: Defense attorney E-mail to applicant attorney, dated 2-1-2023.]

On February 6, 2023, at 4:44 p.m. and 4:58 p.m., defense counsel sent multiple emails. Defense counsel asserted that they had not received a response to their proposed advocacy letter stating that Dr. Levine would not see the applicant without a cover letter, necessitating the continuance of the evaluation. [APPLICANT'S 19: Defense attorney E-mail to applicant attorney, time stamped 4:44 p.m., dated 2-6-2023.] The second email advised the applicant's attorney that the following day's evaluation with Dr. Levine was canceled. [APPLICANT'S 18: Defense attorney E-mail to applicant attorney, time stamped 4:58 p.m., dated 2-6-2023.]

On February 6, 2023, at 5:00 p.m., the applicant's attorney responded to the defense counsel's emails stating that they should not cancel the appointment and that doing so would result in the applicant taking action and requesting sanctions. [APPLICANT'S 21: Applicant attorney E-mail to defense attorney, time stamped 5:00 p.m., dated 2-6-2023.]

Defense counsel issued a notice of cancellation of the February 7, 2023, AME evaluation on February 6, 2023, at 4:58 p.m. [APPLICANT'S 20: Defense attorney cancellation notice to applicant, dated 2-6-2023.]

On February 6, 2023, at 5:22 p.m., the applicant advised defense counsel that Dr. Levine had previously been served with a cover letter and records on January 26, 2023, and requested that defense counsel rescind the cancellation of the evaluation. [APPLICANT'S 22: Applicant attorney E-mail to defense attorney, time stamped 5:22 p.m., dated 2-6-2023.] The cancellation of the evaluation was not rescinded.

On March 13, 2023, the applicant's attorney issued notice of the rescheduling of the evaluation with Dr. Levine for May 3, 2023. [DEFENSE JJ: Notice of AME evaluation, dated 3-13-2023; & APPLICANT'S 14: Applicant attorney letter to defense attorney, dated 3-13-2023.]

Dr. Levine finished his evaluation of the applicant on June 21, 2023. [APPLICANT'S 43: AME Report, Dr. Mark Levine, dated 11-24-2023.]

In his evaluation, Dr. Levine utilized a number of diagnostic tests, including the Wechsler Adult Intelligence Scale (WAIS-IV), Matrix Reasoning, WAIS-IV Digit Span subtest, Wechsler Memory Scale IV Logical Memory subtest, CVLT II, and MCMI 111. Dr. Levine did not recommend or request that the applicant undergo an MRI of the Brain, Thyroid Function Test, VIT B12 Level, Psychiatric for depression and anxiety as a cause of pseudo-dementia, Possible CBT sessions, or Meclizine 25 mg. [APPLICANT'S 43: AME Report, Dr. Mark Levine, dated 11-24-2023.]

The initial cancellation of the evaluation was premised on the defense counsel's misplaced assertion that it had a right to withdraw from the agreement to utilize Dr. Levine and that Dr. Levine was not qualified to assess the applicant's neuropsychological claim.

The second cancellation of the evaluation of Dr. Levine's evaluation was initially premised on the defense counsel's assertion that the diagnostic testing, the undergoing of which was disputed by the applicant, was necessary to be completed prior to Dr. Levine's examination.

Defense counsel has recently asserted that their cancellation of the evaluation was based on their belief that Dr. Levine would have canceled the appointment under the circumstances.

In support of their belief, The Matian Law Group cites the California Code of Regulations Title 8 Sections 34(f) and (h), which provide that failure to receive relevant medical records prior to a scheduled appointment shall not constitute good cause under this section for the evaluator to cancel the appointment unless the evaluator is a psychiatrist or psychologist performing an evaluation regarding a disputed injury to the psyche who states in the evaluation report that receipt of relevant medical records prior to the evaluation was necessary to conduct a full and fair evaluation [EAMS Doc ID: 51518700, Defendant's Petition for Reconsideration 04-19-2024 Nguyen, Bichnga.]

The Matian Law Group's reliance on Sections 34(f) and (h) to support its cancellation of the AME evaluation is misplaced, as the regulation states that the lack of failure to receive relevant medical records is not a valid reason to cancel an appointment except for a psychological exam if the examiner has advised the

parties in the evaluation report that receipt of relevant medical records prior to the evaluation was necessary to conduct a full and fair evaluation of an applicant.

At the time of the cancellation by the defense counsel, the evaluation was not a psychological exam, nor had Dr. Levine advised the parties in an evaluation report that receipt of relevant medical records prior to the evaluation was necessary to conduct a full and fair evaluation.

As such, on the evening prior to the examination, there was no reasonable expectation that Dr. Levine would have canceled the appointment.

D. The cancellation of Dr. Hackman's PQME appointment was not raised in a timely manner

The Matian Law Group asserts that the cancellations of Dr. Hackman's PQME appointments should not have been considered, as their cancellations were not raised in a timely manner.

One of the issues submitted to the Court was Penalties and Sanctions against Matian Law Group for alleged bad-faith discovery abuses.

The Declaration of Readiness to Proceed (DOR) filed on February 9, 2023, by the applicant, stated that the applicant "seeks penalties and sanctions against da Negar Matian, Matian Law Group, and Gallagher Bassett for repeated bad faith cancellations of AME and PQME appointments as well as other bad faith conduct." [EAMS Doc ID: 76415219, DECLARATION OF READINESS TO PROCEED, 2/9/2023.]

The DOR specifically identified, as an alleged bad faith action, the cancellations of PQME appointments. As such, defense counsel had been placed on notice that these actions were actions for which the applicant was seeking sanctions.

As Dr. Hackman was the PQME, the defendant's cancellations of his appointments were submitted to the Undersigned Judge for consideration. As such, the inclusion of the cancellations of Dr. Hackman's evaluations in the Undersigned Judge's determination on the issue of sanctions was appropriate.

E. The Court's consideration of bad faith is based on issues that were never raised by either party and based on a misunderstanding of the record

The Matian Law Group asserts that the Undersigned Judge's consideration of the defendant's advocacy letters was inappropriate and denied the defendant due process.

As discussed above, the Declaration of Readiness to Proceed (DOR) filed on February 9, 2023, stated that the applicant sought penalties and sanctions for repeated bad faith cancellations of AME and PQME appointments "as well as other bad faith conduct." [EAMS Doc ID: 76415219, DECLARATION OF READINESS TO PROCEED, 2/9/2023.]

The defendant's advocacy letters qualify as potential acts that qualify as other conduct placed as an issue before the undersigned Judge. Furthermore, one of the stated issues submitted to the undersigned Judge was the defendant's alleged discovery abuses. As advocacy letters are part of the discovery process, they fall within the actions that are to be considered when determining if a party perpetrated discovery abuses.

Finally, the advocacy letters were referenced by The Matian Law Group as part of the justification for the cancellation of the appointments scheduled with Dr. Levine. As such, the advocacy letters are part of the evaluation cancellations.

Based on the above, the undersigned Judge was not in error in taking into consideration the advocacy letters when determining if defense counsel was acting in bad faith.

As to the advocacy letters of the defendant, the undersigned Judge found that the defendant's original advocacy letter was in part inappropriate as it contained language with inaccuracies that needed to be removed.

In the subsequent proposed advocacy letter, defense counsel again appears to have included inaccurate and misleading statements, specifically the statement that Dr. Nick requested that the applicant should undergo testing, which the applicant refuses to undergo in order to provide a determination on causation, impairment, and apportionment.

The statement in question was provided without context and was misleading. The applicant was clear that she objected to the recommendations of Dr. Nick but would submit to any testing found necessary by Dr. Levine.

The undersigned Judge did state that the Matian Law Group's advocacy letters and the misleading statements found to be contained therein were in and of themselves may not be sanctionable actions.

However, with the lateness of the service of the advocacy letter and its use as a pretext to cancel the evaluation, the undersigned Judge determined that they were a part of the pattern of actions that were done in bad faith and with the intent to cause unreasonable delay.

As to the applicant's assertion of an alleged violation of due process, defense counsel had been provided notice in the Declaration of Readiness to Proceed that the applicant was asserting that defense counsel had acted in bad faith with the cancellation of the QME and AME evaluations as well as other actions.

These allegations were discussed and refined in the pretrial conference statement, which was completed on July 13, 2023, five months prior to the matter proceeding on the records and being submitted to the Undersigned Judge for a determination that its actions concerning discovery were being alleged to be bad faith action.

Defense counsel amended its exhibit list subsequent to the completion of the pretrial statement but before the commencement of trial, adding a significant number of documents, all of which the undersigned Judge took into evidence over the applicant's objections.

As such, defense counsel had notice and was given the opportunity to be heard on the allegation that their actions in conducting discovery were bad faith actions or tactics.

The defense counsel was not denied their due process rights.

F. The WCJ dismissed any wrongdoing on behalf of the Applicant's Attorney

The Matian Law Group asserts that the undersigned Judge ignored the applicant's attorney's actions, alleging that applicant's attorney provided false statements to the defendant about the applicant's willingness to undergo

diagnostic testing, which defense counsel asserts triggered most of the delays in this case.

The applicant did testify at trial that she did not recall stating that she would not undergo the blood tests or brain MRI. [MINUTES OF HEARING and SUMMARY OF EVIDENCE Dated December 21, 2023, Page 10, Lines 16 to 18.] Based on this, the Matian Law Group asserts that by not making the applicant available to undergo the testing, the applicant's attorney blocked discovery. Even if the applicant's attorney's action of disputing the recommendations of Dr. Nick were unreasonable, this does not justify the defendant's cancellations of the QME and AME evaluations. On the contrary, the proceeding of the evaluations would have expedited the resolution of the issues.

In addition, the defendant must perform a reasonable investigation and attempt to obtain the information needed to determine and timely provide each benefit, if any, which may be due to an applicant. [8 CCR 10109(b).]

Furthermore, a defendant may not restrict its investigation to preparing objections or defenses to a claim. A defendant must fully and fairly gather the pertinent information, whether that information requires or excuses benefit payment, and an applicant's burden of proof before the Appeal Board does not excuse the defendant's duty to investigate the claim. [8 CCR 10109(b)(1)&(2).]

The Matian Law Group's repeated cancellations of the medical examinations interfered with the defendant's regulatory obligation to investigate the applicant's claim. They were not justifiable even if the applicant's attorney was not reasonable in his objection to his client's undergoing the recommended diagnostic testing.

As the actions of the applicant, even if unreasonable, do not absolve the defendant from its obligation to act in good faith, the Undersigned Judge did not exceed his authority.

IV. **CONCLUSION**

Defense counsel is accurate in that the issue of delays cannot be viewed in the isolation of one act.

The Undersigned Judge, in making his determinations, looked to the entirety of the submitted record to determine if the actions the applicant was asserting were bad faith actions and/or tactics that were frivolous and/or done to cause unnecessary delay.

The Undersigned Judge considered that the actions, in isolation, may in and of themselves not have been sanctionable. However, it was when the Undersigned Judge looked at the actions of defense counsel as a whole that a pattern of actions appeared that were found to have been done in bad faith, frivolous, and/or done to cause unnecessary delay.

Furthermore, in considering the actions of defense counsel, the Undersigned Judge kept in mind that there could be a chilling effect when imposing sanctions for litigation tactics. However, when those tactics cross the line from active defense and turn into dilatory tactics, a Court must act.

The Undersigned Judge found that the Matian Law Group, in its actions, overstepped the line where active defense turns into dilatory tactics. Such actions are sanctionable.

As such, the Undersigned Judge's findings that the Matian Law Group had acted in and utilized bad faith tactics in its discovery practices that were frivolous and solely intended to cause unnecessary delay was not in error.

V.
RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the applicant's petition for reconsideration be denied.

Date: May 7, 2024

Oliver Cathey
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE