

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

**MENDY L. SALZANO, *Applicant***

**vs.**

**ROSS STORES; ARCH INSURANCE COMPANY, administered by SEDGWICK CMS,  
*Defendants***

**Adjudication Number: ADJ10425538  
San Diego District Office**

**OPINION AND ORDER  
DENYING PETITION FOR RECONSIDERATION**

Defendant Ross Stores/Arch Insurance Company, administered by Sedgwick CMS seeks reconsideration of the October 16, 2024 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that defendant unreasonably refused or delayed medical treatment to applicant Mendy L. Salzano's left knee, and awarded penalties under Labor Code,<sup>1</sup> section 5814, in the amount \$750.00 and attorney's fees pursuant to sections 5814.5 and/or 5813 in the amount of \$13,185.00.

Defendant contends that the WCJ erred in awarding penalties and fees because there was a genuine doubt as to the compensability of applicant's left knee due to the lack of substantial medical evidence, defendant did not act in bad faith to warrant an award of attorney's fees against it, and a section 5814.5 award in attorney's fees is improper because there is no award with respect to applicant's left knee.

We received an answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We received a supplemental petition for reconsideration of the October 16, 2024 Findings and Award from defendant contending that the Report raised new issues: (1) whether defendant's original petition for reconsideration is timely; (2) whether defendant appealed the February 8,

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<sup>1</sup> All future statutory references are to the Labor Code unless otherwise indicated.

2022<sup>2</sup> Findings and Award; (3) whether Christopher Pallia, M.D., questioned the validity of applicant's altered gait; (4) whether section 5813 sanctions are appropriate; (5) whether section 5814 penalties are appropriate; and (6) whether an award under section 5814.5 attorney's fees are proper when there has not been an award with respect to applicant's left knee. WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964) states that supplemental petitions, pleadings, or responses shall be considered only when specifically requested or approved by the Appeals Board. We accept and review defendant's supplemental brief.

We have considered the Petition for Reconsideration, the Answer, the supplemental briefing, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, and for the reasons discussed below, we deny reconsideration.

## I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (§ 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
  - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
  - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

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<sup>2</sup> We believe defendant means the April 11, 2022 Findings and Award finding that applicant suffered left knee injury as a compensable consequence of her right knee injury.

Here, according to Events, the case was transmitted to the Appeals Board on November 20, 2024 and 60 days from the date of transmission is Sunday, January 19, 2025. The next business day that is 60 days from the date of transmission is Tuesday, January 21, 2025 (Monday, January 20, 2025 is a holiday). (See Cal. Code Regs., tit. 8, § 10600(b).)<sup>3</sup> This decision is issued by or on Tuesday, January 21, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on November 20, 2024, and the case was transmitted to the Appeals Board on November 20, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 20, 2024.

## II.

First, we address the timeliness of defendant's petition for reconsideration, which was filed on November 11, 2024 and received on November 12, 2024. Section 5903 provides that a petition for reconsideration must be filed within 20 days after service of any final order, decision, or award. Here, 20 days from the October 16, 2024 Findings and Award is November 5, 2024. Add 5 days for service time pursuant to WCAB Rule 10650 (Cal. Code Regs., tit. 8, § 10650), is November 10, 2024, which is a Sunday. Monday, November 12, 2024 is a holiday. Pursuant to WCAB Rule

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<sup>3</sup> WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

10600 (Cal. Code Regs., tit. 8, § 10600), the next business day is Tuesday, November 12, 2024. We agree that applicant's November 11, 2024 petition for reconsideration is timely.

Next, we conclude that the Report does not raise new issues as defendant alleges. The issues of penalty and fees have been litigated twice, on December 18, 2019 and February 28, 2022, with Findings and Awards issued on December 31, 2019 and April 11, 2022. Furthermore, although the Report erroneously states that defendant appealed the February 28, 2022 (the correct date should be April 11, 2022) Findings and Award, the error does not alter the basis of the October 16, 2024 Findings and Award, which is that defendant engaged on prolonged discovery based on non-admissible medical evidence from Dr. Pallia.

Lastly, the July 5, 2018 Award based on applicant's right knee injury includes medical treatment "to cure or relieve from the effects of said injury(ies)." (See Stipulations with Request for Award dated July 5, 2018.) Since applicant's left knee injury was claimed, and later found, to be a compensable consequence of applicant's right knee injury, the July 5, 2018 Award includes medical treatment to applicant's left knee injury. As such, we find the award of fees pursuant to section 5814.5 proper. Even if not proper, the award of fees is proper under section 5813 because of defendant's bad-faith actions or tactics that were frivolous or intended to cause unnecessary delay.

Accordingly, we deny the petition.

For the foregoing reasons,

**IT IS ORDERED** that defendant Ross Stores/Arch Insurance Company/Sedgwick CMS's Petition for Reconsideration of the October 16, 2024 Findings and Award is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



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

**January 21, 2025**

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

**MENDY SALZANO  
LAW OFFICES OF MANUEL RODRIGUEZ  
LLARENA MURDOCK LOPEZ & AZIZAD**

**LSM/oo**

*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  
DATE OF REPORT: November 20, 2024**

**I**

**INTRODUCTION**

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| 1. Applicant's Occupation:             | Retail Associate;  |
| Applicant's Age:                       | 47   |
| Dates of Injury:                       | May 4, 2015  |
| Parts of Body Alleged:                 | Right and Left knees   |
| 2. Identity of Petitioner:             | <b>ROSS STORES; ARCH<br/>INSURANCE ADMINSTERED BY<br/>SEDGWICK CMS</b>   |
| 3. Timeliness:                         | Petition was not timely.   |
| 4. Verification:                       | The Petition was verified.   |
| 5. Date Order Issued:                  | October 16, 2024   |
| 6. <b>Petitioner's Contentions(s):</b> |  |
| A.                                     | That the defendants did not unreasonably delay medical benefits for treatment to the left knee;  |
| B.                                     | That Labor Code §5813 attorney's fees are not owed absent a finding of bad faith;  |
| C.                                     | That the WCAB erred in ruling against defendants on their Petition for Attorneys' fees Pursuant to Labor Code §5813;   |
| D.                                     | That the WCAB exceeded its authority in granting attorneys' fees pursuant to Labor Code §5814 based on delay that occurred after the original Award and before the dispute as to causation for the left knee was determined. |

**II**

**STATEMENT OF FACTS**

This case was originally settled by way of Stipulations with Request for Award on July 5, 2018 for the right knee (Jt. Ex. 12). A timely Petition to Re-open was filed November 1, 2018 alleging left knee injury as a compensable consequence of the right knee injury for which an Award was issued on July 5, 2018 (Jt. Ex. 11- Findings & Award right knee). Dr. Thomas Harris, the treating physician for the applicant found the left knee to be compensable and requested authorization for treatment on November 26, 2018, along with a Request for Authorization for treatment for the left knee. (Applicant's Ex. 1 also marked as Ex. 1 in the 12/19/2019 hearing).

This UR deferred by defendant via letter dated December 12, 2018 on the grounds that the left knee was not an accepted body part (Applicant's Ex. 20). As there was a dispute over compensability over the left knee, the parties utilized a panel Qualified Medical Examiner, Dr. Byron King.

Dr. King authored his first report on June 13, 2019 (Jt. Ex. 1) finding the left knee to be a compensable injury to her right knee stating the applicant "has suffered from antalgic gait for nearly three years, which in my medical opinion, is sufficient to have resulted in a spraining/straining type injury to the left knee as a compensable consequence" (Jt. Ex. 1). In response to this report defendants set up a Labor Code §4050 exam with Dr. Pallia. Dr. Pallia is not a treating physician, a consulting physician or AME/PQME. He authored his first report of November 7, 2019 (Jt. Ex. 6) and a subsequent report on March 15, 2020 (Jt. Ex. 7). The defendants also requested a report from Michael Kimball, a prior treating physician who last saw the applicant in May 2016 and then later deposed Dr. Kimball July 6, 2021.

The compensable injury claim was denied by **SEDGWICK CMS**. The case was originally tried on December 18, 2019 (MOH/SOE 12/18/2019). A Findings and Award issued on December 31, 2019. Defendants filed a Petition for Reconsideration on January 16, 2020 alleging that a violation of due process and lack of substantial medical evidence. An Order vacating submission and setting aside the F&A as well as setting the matter back on the trial calendar was issued on January 28, 2020. The case was then set for trial on February 25, 2020 and taken off calendar for further discovery. The matter came back for trial on April 26, 2021 wherein the defendant requested additional discovery, which then resulted in hearings on June 7, 2021, September 8, 2021, October 5, 2021, October 18, 2021, and November 21, 2021 all of which were granted so defendant could take depositions of doctors and get additional supplemental reports. The case was finally set on February 8, 2022 at which time the stipulations and issues were reframed and additional exhibits were admitted for each party. The case was finally resubmitted on February 8, 2022 over defendant's objection.

Defendant objected to moving forward to trial on February 8, 2022 because they had requested a third supplemental report from Dr. King, requesting that he review Dr. Kimball's August 4, 2021 report (Def. Ex. H). See MOH 2/8/2022 page 6, lines 1-5.

Dr. Byron King, PQME issued reports reviewing various reports and his opinion on the compensability of the left knee has never changed. The defendant has solicited reports one prior

treating physician, Dr. Kimball (Def. Ex. G and H) as well as taking the deposition of Dr. Kimball on July 6, 2021 (Def. Ex. F). The defense also solicited reports from Dr. Christopher Pallia who was neither a PQME nor a treating physician, and therefore not admissible as evidence (Def. Ex. I and Ct. Ex. XX). It was Dr. Pallia who raised the issue of “antalgic gait” which then formed the basis of the denial which issued November 18, 2019 (App. Ex. 4) and from which all the subsequent discovery flowed.

The case resolved via Compromise & Release on June 9, 2023. Applicant’s attorney filed a Petition for Sanctions and attorneys’ fees pursuant to Labor Code Sections 5813, 5814, and 5814.5. The defendant filed an Opposition to this penalty petition and filed a Petition for Costs and Fees of their own. A Findings and Award and Opinion on Decision dated October 16, 2024 issued finding fully in favor of the injured worker and her attorney on their Petition for Costs and Sanctions and against the defendant on their Petition. The Findings and Award was served on the parties on October 16, 2024. The defendants filed their Petition for Reconsideration dated November 11, 2024 on November 12, 2024 (EAMS ID: 54841571) thus making it untimely. As the petition was untimely it should not be considered, however, the following is a discussion of the contentions and facts with a Recommendation for disposition.

### III

#### DISCUSSION

#### CONTENTIONS

##### **A. THAT THE DEFENDANTS DID NOT UNREASONABLY DELAY MEDICAL BENEFITS FOR TREATMENT TO THE LEFT KNEE;**

The basis for the defendant’s denial of claim was based on non-admissible medical evidence from Dr. Chris Pallia who started the stalking horse of “antalgic gait”. This was followed by the defense requesting two supplemental reports from Dr. Kimball who had not seen the applicant since May of 2016) Joint Ex. 9 (8/2/2021) and Joint Ex. 10 (8/24/2021). The defendants then took the deposition of Dr. Kimball on July 6, 2021, Joint Ex. 8 (7/6/2021) as well as obtaining multiple reports from Dr. Byron King (Jt. Ex. 1 through Joint Ex. 4) and Dr. King’s deposition on November 16, 2022 (Defense Ex. D) and on January 26, 2021 (Jt. Ex. 5), as well as multiple reports from the treating physician Dr. Harris (Applicant’s Exhibits 1-5). The discovery was eventually cut off by the trial on February 8, 2022 and F&A establishing injury to the left knee pursuant to



the reports of Drs. Harris (current PTP) and Dr. King (PQME). The decision was appealed and Reconsideration was denied by the WCAB.

The procurement of a non-admissible medical report which formed the basis for denial of the left knee as well as the plethora of discovery which followed when neither the current PTP nor the PQME, Dr. Byron King changed their opinions was the definition of “bad faith, dilatory actions).

This Contention should be denied.

**B. THAT LABOR CODE §5813 ATTORNEY’S FEES ARE NOT OWED ABSENT A FINDING OF BAD FAITH;**

Finding of Fact Number of the Findings and Award dated October 16, 2024, specifically states that “Sedgwick CMS did unreasonably refuse or delay medical treatment to the applicant’s left knee”. Labor Code §5813 applies to bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. Therefore it was not necessary to make a specific finding of “Bad Faith”, rather the finding of that Sedgwick CMS unreasonably refused or delayed medical treatment to the applicant’s left knee is equivalent to a finding of bad faith otherwise the delay or denial would not be “unreasonable”.

This contention should be denied.

**C. THAT THE WCAB ERRED IN RULING AGAINST DEFENDANTS ON THEIR PETITION FOR ATTORNEYS’ FEES PURSUANT TO LABOR CODE §5813;**

It was the actions of the defendant that precipitated the filing of the applicant’s Petition For Penalties under Labor Code §5814, 5814.5 and 5813. The applicant attended each appointment set by the defendants. The applicant attorney has never disputed the right of the defendant to dispute the original find of Dr. Harris regarding the left knee on 11/26/2018 (App. Ex. 1) and 9/18/2019 (App. Ex. 2). The Applicant’s Petition is filed for the rest of the discovery and delays occasioned by the defendant. This was the basis of the denial of the defense Petition. There was no error.

This Contention should be denied.

**D. THAT THE WCAB EXCEEDED ITS AUTHORITY IN GRANTING ATTORNEYS’ FEES PURSUANT TO LABOR CODE §5814 BASED ON DELAY THAT OCCURRED AFTER THE ORIGINAL AWARD AND BEFORE THE DISPUTE AS TO CAUSATION FOR THE LEFT KNEE WAS DETERMINED**

Labor Code §5814.5 allows for attorneys’ fees for enforcement of an Award. In this case, although the Award was re-opened for new and further disability, there was still an Award and

therefore, the issue of the compensability for the opposite knee was a part of the Award for the right knee. Furthermore, as detailed above, the denial of the claim and unending discovery based on inadmissible report by Dr. Pallia is sufficient to show conduct consistent with “bad faith and dilatory actions” under Labor Code §5813, and therefore, the award of attorneys’ fees was based on both Labor Code §5814.5 and Labor Code §5813.

This Contention should be denied.

#### IV

#### **CONCLUSION**

Based on the Facts of the Case, and responses to the defendants contentions outlined above, the defendants’ Petition for Reconsideration is not timely and if it were it is no supported by the facts of law of this case and should be denied

#### V

#### **RECOMMENDATION**

It is recommended that the Petition for Removal be denied.

Respectfully submitted,

**LINDA F. ATCHERLEY**  
Workers’ Compensation Judge