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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. ADJ103216 (LAO 0867367)

ROSA PALAFOX,

Applicant,

vs.

**PELICAN PRODUCTS, INC.; UNITED
STATES FIRE INSURANCE COMPANY,**

Defendant,

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

Defendant and its attorney, Martin Reiner, seek reconsideration of the June 21, 2010 Findings and Orders of the workers' compensation administrative law judge (WCJ) who found that, "There are no grounds to permit defendant to cross-examine applicant's attorneys regarding matters within the attorney-client privilege." The WCJ further found that Mr. Reiner engaged in sanctionable conduct by "filing a frivolous petition to cross-examine applicant's attorneys [Graiwer & Kaplan] on privileged matters," and by "crossing out the name of attorney Shelia Kashani on the Minutes of Hearing and sending threatening letters to her law firm [Kagel, Tobin & Truce]."¹ Based on these findings, the WCJ ordered Mr. Reiner to pay Graiwer & Kaplan "the sum of \$1,000.00 in sanctions," and to forward sanctions in the amount of \$2,500.00 to the Appeals Board. The WCJ further ordered Mr. Reiner to "refrain from further attempts to depose applicant['s] attorney or his employees absent express leave from this Court."

Defendant contends through the petition signed by Mr. Reiner that it was not frivolous to request to depose applicant's attorneys because the record supports a "crime-fraud" exception to the attorney-client privilege, that it was proper to cross-out Ms. Kashani's name on the Minutes of

¹Bracketed material added to quotations.

1 Hearing because she and her defense law firm have "no standing" in the case and are "interlopers,"
2 and that there is no valid basis for imposing sanctions.

3 We have carefully reviewed the record and considered the allegations of applicant's
4 petition for reconsideration and the WCJ's Report and Recommendation on Petition for
5 Reconsideration (Report) with respect thereto. For the reasons stated by the WCJ in the Report,
6 which is incorporated by this reference, and for the reasons below, we affirm the substance of the
7 WCJ's decision. However, we grant reconsideration in order to clarify the June 21, 2010 Findings
8 and Orders. As our decision after reconsideration we amend the WCJ's order to describe the
9 \$1,000.00 to be paid to Graiwer & Kaplan as payment due for applicant's "attorney's fees and
10 costs" in accordance with Labor Code section 5813, instead of as only a payment of "sanctions."

11 Contrary to Mr. Reiner's assertions in defendant's petition for reconsideration, the
12 evidentiary record does not support a "crime-fraud" exception to the attorney-client privilege in
13 this case, as explained by the WCJ in the Report, and the petition filed by defendant to obtain such
14 discovery was frivolous. It also was improper for Mr. Reiner to unilaterally cross-out Ms.
15 Kashani's name on the official court record of those in attendance at trial, and the WCJ's
16 imposition of sanctions for that and other conduct by Mr. Reiner was appropriate, as explained in
17 the Report. However, the WCJ's June 21, 2010 order refers to the \$1,000.00 payment due Graiwer
18 & Kaplan as "sanctions" when it is more appropriately described under Labor Code section 5813
19 as payment of applicant's "attorney's fees and costs" that were incurred in defending against the
20 discovery motion.²

21 ² Mr. Reiner does not contend in the petition for reconsideration that it was legally incorrect, per se, for the
22 WCJ to order the payment of "sanctions" to applicant's attorneys. Nevertheless, we amend the language used in the
23 June 21, 2010 order to avoid any confusion about the nature and purpose of the payment. A grant of reconsideration
24 provides the Appeals Board with jurisdiction to address an issue that was not specifically raised in the petition for
25 reconsideration. (Lab. Code, § 5908; *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657 [18 Cal.Comp.Cases
26 246].)

27 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 (\$2,500.00) to be transmitted to the General
Fund." (Emphasis added.)

1 This is not the first time this case has been before the Appeals Board. On January 5, 2010,
2 we issued an Opinion and Order Denying Petition for Disqualification and Notice of Intention to
3 Impose Sanctions (NIT), wherein we denied Mr. Reiner's petition to disqualify the WCJ from
4 hearing the motion to compel the deposition testimony of applicant's attorneys, and from hearing
5 applicant's attorneys' motion to quash the deposition subpoenas served by Mr. Reiner. In our
6 January 5, 2010 NIT we concluded that there was not a valid basis for defendant's disqualification
7 petition and further wrote as follows:

8 "Here, Reiner's entire purpose appears to be to impugn the integrity
9 of the WCJ, whom he accuses of shielding ethical violations and
10 corruption and either lying or exhibiting such gross incompetence
11 that he should be terminated from his employment forthwith in order
12 to protect the people of the State of California. Our rule [Cal. Code
13 Regs., tit. 8, § 10561(b)] prohibits exactly such language, and we
will not tolerate it. Therefore, we issue a notice of intention that
unless good cause to the contrary is shown in [sic] within fifteen
days of the date of this Order, Martin Reiner shall be ordered to pay a
sanction of \$2,500.00 to be transmitted to the General Fund."³

14 Mr. Reiner responded to the January 5, 2010 NIT by reiterating his reasons for seeking to
15 disqualify the WCJ, which were earlier found by the Appeals Board to be without merit, by arguing
16 that his criticism of the WCJ was justified, and by challenging the constitutionality of California
17 Code of Regulations, title 8, section 10561. In our February 23, 2010 Opinion and Order Imposing
18 Sanctions we concluded that Mr. Reiner's response to the NIT did not show good cause to rescind
19 the proposed sanction, and the sanction was imposed. Mr. Reiner's petition to the Court of Appeal
20 for review of the Appeals Board's February 23, 2010 sanction order was subsequently denied.

21 Following the issuance of the February 23, 2010 sanction, Mr. Reiner again sought to
22 compel the testimony of applicant's attorneys. Thereafter, a hearing was conducted by the WCJ on
23 May 10, 2010, to consider the issue and to address Mr. Reiner's conduct in crossing out Attorney
24 Kashani's name on the appearance sheet and threatening to sue her and her law firm if she

25 ³ Bracketed material added. California Code of Regulations, title 8, section 10561 describes a bad-faith action
26 or tactic under section 5813 to include, inter alia, "Using any language or gesture at or in connection with any hearing,
27 or using any language in any pleading or other document...where the language or gesture impugns the integrity of the
Workers' Compensation Appeals Board or its Commissioners, judges or staff."

1 appeared as a witness against him at the sanction hearing, as she was ordered to do by the WCJ.
2 Following the hearing, the WCJ issued his June 21, 2010 decision as described above.

3 Turning to defendant's petition, we note that the WCJ's June 21, 2010 decision finally
4 addressed the issue of sanctions against Mr. Reiner. For that reason, our grant of reconsideration is
5 appropriate notwithstanding that the WCJ's ruling on defendant's motion to compel discovery is
6 properly characterized as an interim order that is not subject to reconsideration, and only subject to
7 challenge by way of a petition for removal. (Lab. Code, §5900; *Safeway Stores, Inc. v. Workers'*
8 *Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410]; *Maranian v*
9 *Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [63 Cal.Comp.Cases 650].)

10 With regard to the ordered sanctions, we agree that their imposition is appropriate for the
11 reasons set forth by the WCJ in the Report. However, we note that Labor Code section 5813
12 specifically authorizes an award of "reasonable expenses, including attorney's fees and costs,
13 incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely
14 intended to cause unnecessary delay" as a form of "additional sanctions" that may be imposed in
15 addition to ordering the payment of a sanction to the Appeals Board for transmittal to the General
16 Fund. Thus, it was not improper for the WCJ to refer to the awarded payment to Graiwer &
17 Kaplan as a form of additional "sanctions" under Labor Code section 5813, but in our view it is
18 more appropriate to describe the payment as an award of applicant's "attorney's fees and costs"
19 incurred as a result of Mr. Reiner's bad-faith actions and tactics, as found by the WCJ in his June
20 21, 2010 decision and as addressed by him in his Report.

21 The June 21, 2010 decision of the WCJ is affirmed except that the reference in the decision
22 to an award of "sanctions" to Graiwer & Kaplan is clarified to refer to it as an award of "attorney's
23 fees and costs" pursuant to Labor Code section 5813.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's petition for reconsideration of the June 21, 2010
3 Findings and Orders of the workers' compensation administrative law judge is **GRANTED**.

4 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Appeals
5 Board that the June 21, 2010 Findings and Orders of the workers' compensation administrative law
6 judge is **AFFIRMED**, except that paragraph a. of the Orders is amended and **RESCINDED** and
7 the following is **SUBSTITUTED** in its place:

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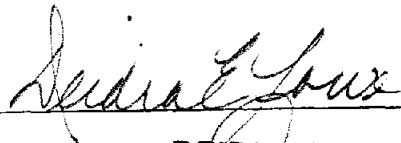
1 **ORDERS**

2 *****

3 a) Attorney Reiner is to pay Graiwer & Kaplan Los Angeles the sum of \$1,000.00 for
4 applicant's attorney's fees and costs incurred as a result of defendant's bad-faith actions
5 and tactics.

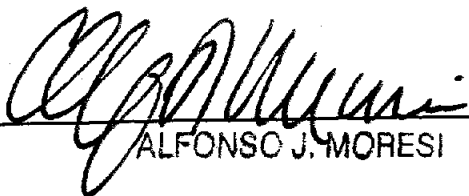
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7 **WORKERS' COMPENSATION APPEALS BOARD**

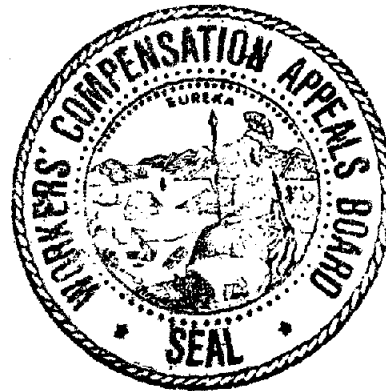
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11 DEIDRA E. LOWE

12 **I CONCUR,**

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15 ALFONSO J. MORESI

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18 RONNIE G. CAPLANE



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

23 **SEP 07 2010**

24 **SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT
25 THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:**

26 **Rosa Palafox
27 Graiwer & Kaplan
Martin Reiner (2)**

JFS/jp

PALAFIX, Rosa

