WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DONNA YEE-SANCHEZ, ***Applicant,*** **vs.** **PERMANENTE MEDICAL GROUP, and ATHENS ADMINISTRATORS (Adjusting Agent),** ***Defendant(s).***	**Case No. OAK 271713** **OPINION AND ORDER DISMISSING PETITION FOR REMOVAL**
NATALIE PIATT, ***Applicant,*** **vs.** **EUREKA UNION SCHOOL DISTRICT; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION on behalf of CALIFORNIA COMPENSATION INSURANCE COMPANY, in liquidation,** ***Defendant(s).***	**Case No. SAC 304854** **OPINION AND DECISION AFTER RECONSIDERATION**

I.

Introduction

A.

These two cases present some common issues regarding: (a) what the parties and the Workers' Compensation Appeals Board ("WCAB") can and cannot do before an application for adjudication of claim ("application") has been filed; and (b) what the parties and the WCAB can do to remedy pre-application abuses once an application is ultimately filed. Because of these

common issues, we have consolidated the two cases for purposes of issuing a joint opinion. (See Lab. Code, §133; *cf*., Cal. Code Regs., tit. 8, §§10590-10592.)

We conclude:

(1) Except for injuries sustained from January 1, 1990 to December 31, 1993, the WCAB has no jurisdiction over any aspect of a workers' compensation claim until an application for adjudication of claim (and not just a claim form) has been filed. (See Lab. Code, § 5500.) Therefore, prior to the filing of an application, the WCAB cannot conduct any hearings or issue any orders, and a party cannot invoke the WCAB's judicial process to conduct compelled discovery (e.g., noticing a deposition, subpoenaing a witness to a deposition, or subpoenaing medical records and other documents).

(2) Nevertheless, prior to the filing of an application (but after the filing of a claim form), the parties may engage in *non-compelled* pre-application investigation. Thus, for example, a defendant may request that an injured employee attend an examination by a qualified medical evaluator ("QME"), request that the injured employee execute a release of medical records, request that the injured employee provide various documents, or interview the injured employee or other potential witnesses. Similarly, an injured employee may request information from a defendant, or interview potential witnesses. If, however, a party or non-party fails to comply with any such request(s), the injured employee or defendant cannot seek to compel compliance unless an application has been filed.

(3) After an application has been filed, there are remedies potentially available to address pre-application abuses. These remedies might include: (a) monetary sanctions under Labor Code section 5813[1] against an injured employee or a

[1] All further undesignated statutory references are to the Labor Code.

defendant for unlawful pre-application discovery efforts (e.g., noticing a deposition, subpoenaing a witness to a deposition, or subpoenaing medical records and other documents); (b) evidentiary sanctions against an injured employee or a defendant for unlawful pre-application discovery efforts; (c) monetary sanctions under section 5813 against a defendant for breaching a statutory duty to file an application, pursuant to section 4061(m)[2] and section 4063; (d) section 4650(d) and/or section 5814 penalties against a defendant for delays in paying benefits occasioned by a failure to comply with a statutory duty to file an application; and (e) liability by the defendant for section 4064(c)[3] attorney's fees the injured employee may incur in connection with the application, if the defendant was the party that ultimately filed the application.

(4) A defendant is not required to file an application under section 4061(m) and section 4063 if it is paying permanent disability indemnity in accordance with the report(s) of either the treating physician, the panel QME, or the agreed medical examiner ("AME").

B.

In *Yee-Sanchez v. Permanente Medical Group* (Case No. OAK 271713), defendant, Permanente Medical Group ("PMG"), filed a petition pursuant to section 5310 and Board Rule 10843 (Cal. Code Regs., tit. 8, §10843), requesting that the Appeals Board remove this matter to itself and rescind the May 10, 2002 order issued by the presiding workers' compensation administrative law judge ("PWCJ").

In that order, the PWCJ had directed PMG to file an application with the WCAB pursuant to the provisions of section 4061(l) [now, section 4061(m)] and section 4063, because PMG had

---

[2] Formerly, section 4061(l).

[3] Formerly section 4064(b).

not paid permanent disability indemnity in accordance with the report of John K. Hightower, D.C., the QME selected by the unrepresented injured employee, Donna Yee-Sanchez ("Yee-Sanchez"), from a three-member panel.[4]

In its petition for removal, PMG asserts, in substance: (1) it was not required to file an application, because it had paid permanent disability indemnity in accordance with the opinion of the treating physician, John Duong, D.C.; and (2) even if it were assumed that it had not paid permanent disability indemnity in accordance with Dr. Duong, it cannot be ordered to file an application.

In *Piatt v. Eureka Union School District* (Case No. SAC 304854), defendant, the California Insurance Guarantee Association ("CIGA"), filed a petition seeking reconsideration of the Findings and Order issued by the workers' compensation administrative law judge ("WCJ") on August 29, 2002. In that decision, the WCJ found that CIGA had engaged in bad faith actions or tactics that were frivolous or solely intended to cause unnecessary delay, and she imposed section 5813 sanctions of $500.00 against it. In her opinion, the WCJ stated that sanctions of $500.00 were imposed because CIGA had engaged in several "bad faith" or "frivolous" actions, including: (1) taking the depositions of the unrepresented injured employee, Natalie Piatt ("Piatt"), and of the panel QME, William C. McKean, D.C., before the filing of an application, which was necessary to invoke the WCAB's jurisdiction; (2) taking the deposition of the panel QME without first obtaining a WCAB order; (3) requesting a new panel QME without attempting to utilize the original panel QME to resolve the dispute; (4) unilaterally directing Piatt to be re-evaluated by the panel QME, without first filing an application and obtaining an order from the WCAB; and (5) attempting to have Piatt re-evaluated by the panel QME (or by a new QME) after trial, when discovery had closed.

In its petition for reconsideration, CIGA contends, in substance: (1) due process entitles a defendant to take the deposition of an injured employee following the filing of a claim form, and

---

[4] See Lab. Code, §4061(d).

"[i]t is commonplace after a [claim form] is filed that depositions take place;" (2) there is no requirement that an application must be filed in order to have an unrepresented employee re-evaluated by a panel QME; (3) section 4062 allows a defendant to object to a treating physician's determination regarding the extent and scope of medical treatment at any time during the life span of the injured employee's workers' compensation case, including when discovery has been closed after a mandatory settlement conference ("MSC"), because an objection under section 4062 is not an attempt to conduct discovery; and (4) there is no requirement that a defendant obtain a WCAB order before deposing a panel QME.

II.

Background

We shall turn initially to a pertinent history of each case.

A.

***Yee-Sanchez v. Permanente Medical Group* (Case No. OAK 271713)**

Yee-Sanchez, who has never been represented by counsel, sustained an admitted industrial injury to her neck and right upper extremity on January 11, 1999 while employed by PMG. Although there is no claim form in the WCAB's file, it appears she filed a claim form with PMG shortly after her injury.

Dr. Duong was Yee-Sanchez's primary treating physician and, on October 19, 2000, he issued a "final comprehensive report" that found her to be medically permanent and stationary with various factors of disability.

PMG objected to Dr. Duong's assessment of Yee-Sanchez's permanent disability and requested that she select a panel QME. (See Lab. Code, §4061(d).) She selected Dr. Hightower from a QME panel and, on December 4, 2000, Dr. Hightower issued a report finding her to be medically permanent and stationary with various factors of permanent disability.

On December 14, 2000, the Disability Evaluation Unit ("DEU") issued a summary rating determination opining that the factors of permanent disability in Dr. Hightower's report rated at

66%. (See Lab. Code, §4061(j)[5].)

On January 5, 2001, PMG requested that the Administrative Director reconsider the DEU's summary rating determination (see Lab. Code, §4061(l)[6]), but this request was ultimately denied.

Thereafter, PMG noticed depositions for Yee-Sanchez, Dr. Duong, and Dr. Hightower. It also issued two deposition subpoenas to Dr. Hightower.

In multiple letters to PMG, Yee-Sanchez objected to the taking of any depositions. However, PMG responded by a letter stating that, if she failed to appear for her deposition, it would file a petition to compel with the WCAB.

Following this letter from PMG, Yee-Sanchez sent a letter to the PWCJ, objecting to all depositions and noting that PMG had not yet filed an application. Nevertheless, PMG went forward with Dr. Hightower's deposition (although, apparently, it never took the depositions of Yee-Sanchez or Dr. Duong).

In response to Yee-Sanchez's letter to him, the PWCJ set a pre-trial conference, even though no application had yet been filed.

Prior to the conference, PMG requested that the DEU issue a consultative rating of Dr. Duong's October 19, 2000 report. (See Lab. Code, §4061(j).) The DEU's consultative rating opined that the factors of permanent disability in Dr. Duong's October 19, 2000 report rated at 31%.

Thereafter, the conference before the PWCJ took place. At the conference, the PWCJ noted that no application had been filed, but he indicated that a WCAB case number had been administratively assigned in order for proceedings to occur. The WCJ also noted that PMG's act of deposing Dr. Hightower, the panel QME, might have been legally invalid because PMG had not filed an application contesting the QME's opinion. However, the PWCJ took no action at

---

[5] Formerly, section 4061(i).

[6] Formerly, section 4061(k).

that time, but instead suggested that the parties attempt to reach an informal resolution.

Efforts by Yee-Sanchez and PMG failed to informally resolve her claim, so she wrote to PMG, again requesting that it file an application. PMG did not do so. Instead, it asked the DEU to issue a consultative rating of the transcript of Dr. Hightower's February 21, 2001 deposition.

On December 27, 2001, PMG wrote the PWCJ, advising that it was continuing to make permanent disability advances based on the DEU's 31% consultative rating of Dr. Duong's October 19, 2000 report, but that these advances would soon cease.

On January 9, 2002, Yee-Sanchez filed a declaration of readiness and a letter to the PWCJ regarding the issues of her permanent disability, PMG's discovery efforts, and PMG's failure to file an application. The letter also raised the issue of sanctions against PMG under section 5813.

Subsequently, the DEU issued a consultative rating opining that the transcript of Dr. Hightower's February 21, 2001 deposition rated at 32%.

Yee-Sanchez then sent another letter to the PWCJ, again objecting to PMG's discovery efforts in light of its failure to file an application and again raising the issue of sanctions under section 5813.

On May 10, 2002, the PWCJ issued the order at issue here, directing PMG to file an application pursuant to section 4061(l) and 4063.

On May 24, 2002, PMG filed its petition for removal. Yee-Sanchez answered the petition, again raising PMG's failure to file an application for adjudication of claim, as well as raising various other objections.

On January 17, 2003, PMG filed a request to withdraw its petition for removal.

B.

***Piatt v. Eureka Union School District* (Case No. SAC 304854)**

Piatt, who has never been represented by counsel, sustained an admitted industrial injury to her cervical spine and both wrists on June 23, 1997, while employed by Eureka Union School District ("EUSD"). EUSD was insured by the now-insolvent carrier, California Compensation

Insurance Company ("Cal Comp"), whose "covered claims" are the liability of CIGA. (Hereafter, Cal Comp and CIGA will be collectively referred to as "CIGA.") Although there is no claim form in the WCAB's file, it appears that Piatt filed a claim form with EUSD shortly after her injury.

Piatt's primary treating physician was Ronald J. Simms, D.C., and, on April 8, 1998, he issued a report finding her to be medically permanent and stationary with various factors of disability.

Thereafter, Piatt saw Dr. McKean, whom she selected from a QME panel (apparently, at CIGA's request). On April 14, 1999, Dr. McKean issued a report declaring her to be medically permanent and stationary with various factors of disability.

On August 20, 1999, Dr. McKean issued a supplemental report on the issue of permanent disability. The DEU later issued a summary rating determination that the factors of disability set forth in that report rated at 60%. (See, Lab. Code, §4061(j).)

Thereafter, CIGA noticed the depositions of both Piatt and Dr. McKean. Apparently, Dr. McKean's deposition did not then go forward, but CIGA did depose Piatt.

In early 2001, CIGA sent two letters to Piatt asserting that Dr. McKean's 1999 reports were "stale." Therefore, she saw Dr. McKean again, and he issued another report on May 9, 2001 addressing the issue of permanent disability. The DEU also issued a new summary rating determination which, taking into consideration all three of Dr. McKean's reports, again concluded that they rated at 60%.

CIGA then took the deposition of Dr. McKean. Following this deposition, CIGA made a request to the Administrative Director to require Piatt to select a new panel QME.

On August 29, 2001, Piatt filed an application for adjudication of claim and a declaration of readiness (DOR). The DOR specifically objected to CIGA's request for a new QME.

At the ensuing MSC, the parties raised not only the issue of whether a new QME should be appointed, but also other issues – including permanent disability and further medical treatment. (See Cal. Code Regs., tit. 8, §10492.)

On November 30, 2001, the first day of trial took place.

On December 12, 2001, CIGA sent a letter to Dr. Simms, objecting to his weekly treatment of Piatt and stating that it was requesting either that she return to Dr. McKean on the issue of treatment or that she select a new panel QME.

On January 7, 2002, the trial was completed.

Subsequently, the WCJ issued a decision finding that Piatt's permanent disability is 60%, that she is in need of further medical treatment, and that no new QME is necessary. In her opinion, the WCJ (on her own motion) stated that a further MSC would be set on the issue of section 5813 sanctions against CIGA based on: (1) its taking of depositions before an application had been filed; (2) its instruction to Piatt that she be re-evaluated by Dr. McKean, without a WCAB order; and (3) its notification to Dr. Simms, after the commencement of trial, that it would be requesting Piatt to either return to Dr. McKean or select a new QME.

An MSC and trial took place on the sanctions issues and, on August 29, 2002, the WCJ issued the order imposing sanctions of $500.00 against CIGA.

CIGA then filed its petition for reconsideration, and we granted reconsideration to further study the facts and law relevant to the petition.

Piatt has not filed an answer.

///

///

///

///

///

///

///

///

///

///

III.

Discussion

A.

The WCAB Has No Jurisdiction Before An Application Has Been Filed And, Prior To The Filing Of An Application, The WCAB Cannot Conduct Any Hearings Or Issue Any Orders, Nor Can The Parties Invoke The WCAB's Judicial Process To Conduct Compelled Discovery.

Section 5500 provides, in relevant part:

> "…[E]xcept where a claim form has been filed for an injury occurring on or after January 1, 1990, and before January 1, 1994, *the filing of application for adjudication and not the filing of a claim form shall establish the jurisdiction of the appeals board and shall commence proceedings before the appeals board for the collection of benefits*." (Lab. Code, §5500 [emphasis added].)

Thus, except for injuries sustained from January 1, 1990 to December 31, 1993, it is beyond dispute that the WCAB has no jurisdiction over any aspect of a workers' compensation claim until an application, and not merely a claim form, has been filed. (*Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284, 1288, fn. 3 [66 Cal.Comp.Cases 584, 586, fn. 3]; *Aubry v. Workers' Comp. Appeals Bd*. (*Amores*) (1997) 56 Cal.App.4th 1032, 1036, fn. 2 [62 Cal.Comp.Cases 870, 873, fn. 2]; *Cal. General Tire v. Workers' Comp. Appeals Bd*. (*Talbott*) (2002) 67 Cal.Comp.Cases 1336, 1339 (writ den.); *Banks v. Workers' Comp. Appeals Bd*. (1999) 64 Cal.Comp.Cases 1457, 1458 (writ den.).)[7]

Therefore, if no application has been filed, the WCAB lacks jurisdiction to set or hold any hearings, or to issue any orders, including an order directing a party to file an application. If a PWCJ or WCJ somehow becomes aware of problems relating to an unrepresented employee's workers' compensation claim prior to the filing of an application, the only recourse available is

[7] Although sections 5300 and 5301 establish the *scope* of the WCAB's jurisdiction, they do not (in the face of the specific language of section 5500) give the WCAB jurisdiction over any claim for workers' compensation benefits, or any right or liability relating thereto, where no application has been filed.

to refer the employee (or both parties) to an Information and Assistance Officer. (See Lab. Code, §5450 et seq.) The Information and Assistance Officer may then advise the employee of his or her rights, including the need to file an application. Such a referral to the Information and Assistance Officer may result in a limited tolling of the statute of limitations, under the appropriate circumstances. (See Lab. Code, §5454.)

Because the WCAB has no jurisdiction absent the filing of an application, a party cannot invoke the WCAB's judicial process to notice and take a deposition (or to issue a subpoena) unless an application has been filed.[8] It is only the jurisdiction and authority of the WCAB that permits depositions, subpoenas or other forms of compelled discovery to be undertaken in workers' compensation matters. (*Wyche v. Blood Bank of America* (1993) 58 Cal.Comp.Cases 42, 43, fn. 2 (Appeals Board en banc); *Moran v. Bradford Building, Inc.* (1992) 57 Cal.Comp.Cases 273, 283 (Appeals Board en banc); see also, Lab. Code, §§133, 5300, 5301, 5710(a); Cal. Code Regs., tit. 8, §§10348, 10530, 10532, 10536.)

B.

After An Application Has Been Filed, There Are Remedies Potentially Available To Address Pre-Application Abuses, Including Monetary And/Or Evidentiary Sanctions, Section 4650(d) And/Or Section 5814 Penalties, And Section 4064(c) Attorney's Fees.

Of course, once either party files an application, remedies are available to the parties or to a PWCJ or WCJ for addressing significant problems (or outright abuses) that might have occurred prior to the application's filing.

First, if it is the defendant that ultimately files the application, and if the employee is

---

[8] We reiterate that section 5500 does not apply to injuries sustained during the period of January 1, 1990 through December 31, 1993, i.e., "window period" injuries. Former Board Rule 10406 (Cal. Code Regs., tit. 8, §10406 [deleted effective January 1, 2003]) did provide for pre-application discovery for "window period" injuries. This, however, was because the claim form (*not* the application) was the jurisdictional document for those injuries. (See former Lab. Code, §5401(c); see also, *Gangwish v. Workers' Comp. Appeals Bd*., *supra*, 89 Cal.App.4th at p. 1288, fn. 3 [66 Cal.Comp.Cases at p. 586, fn. 3]; *Aubry v. Workers' Comp. Appeals Bd*. (*Amores*), *supra*, 56 Cal.App.4th at p. 1036 & fn. 2 [62 Cal.Comp.Cases at p. 873 & fn. 2]; *Wyche v. Blood Bank of America*, *supra*, 58 Cal.Comp.Cases at p. 43, fn. 2; *Moran v. Bradford Building, Inc., supra,* 57 Cal.Comp.Cases at p. 283; *Castillo v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 751 (writ den.).)

unrepresented, then the defendant may be liable for any attorney's fees incurred by the employee in connection with the application. (Lab. Code, §4064(c); see *Ford v. Lawrence Berkeley Laboratory* (1997) 62 Cal.Comp.Cases 153, 158-159 (Appeals Board en banc).)

Second, if a defendant breached its statutory duty to file an application (see discussion, *infra*), or if either party attempted to compel discovery in the absence of WCAB jurisdiction, it might be appropriate to impose a monetary sanction. (Lab. Code, §5813; Cal. Code Regs., tit. 8, §10561.) And, if a party and/or its counsel engaged in multiple and separate bad faith or frivolous actions, multiple sanctions might be appropriate. (See *Clabaugh v. Fremont Ins. Co.* (2001) 29 Cal. Workers' Comp. Rptr. 153, 3 WCAB Rptr. 10,192 (Board panel) and *Clabaugh v. Fremont Ins. Co.* (2002) 4 WCAB Rptr. 10,077 (Board panel), writ and rev. den. sub nom. *Hershewe v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 1198, 4 WCAB Rptr. 10,259 [Appeals Board imposed $6,000.00 in sanctions jointly and severally against defendant, defendant's attorney, and defendant's attorney's law firm, plus $24,000.00 in attorney's fees against defendant, for multiple acts of sanctionable conduct].)

Third, if a defendant has breached its statutory duty to file an application (see discussion, *infra*), or if it attempted to compel discovery in the absence of WCAB jurisdiction, the defendant may be subject to section 4650(d) and/or section 5814 penalties for any delays in paying benefits occasioned by its failure to file an application and/or its abuse of the discovery process. (*Ford v. Lawrence Berkeley Laboratory*, *supra,* 62 Cal.Comp.Cases at pp. 157, 159, *cf., Peterson v. Employment Development Dept. (*1995) 60 Cal.Comp.Cases 1206, 1210 (Appeals Board en banc), writ den. sub nom. *Peterson v. Workers' Comp. Appeals Bd.* (1995) 61 Cal.Comp.Cases 1081.)[9] Both *Ford* and *Peterson* have given clear warnings to the workers' compensation community that such penalties may be warranted if a defendant breaches its statutory duty to file an application.

Fourth, if a party attempted to utilize the WCAB's judicial process to conduct discovery

[9] The defendant may also be subject to audit penalties. (Cal. Code Regs., tit. 8, §10111.1.)

before an application was filed, then that party may be subject to evidentiary sanctions once an application has been filed, possibly including but not necessarily limited to: (1) excluding the improperly discovered material from evidence; and/or (2) precluding some (or all) related post-application discovery efforts. (Lab. Code, §133; Cal. Code Regs., tit. 8, §§10348, 10353; *cf*., Code Civ. Proc., §2023(b)(3).)

C.

Before The Filing Of An Application (But After The Filing Of A Claim Form), A Party Can Engage In Non-Compelled Pre-Application Investigation, But A Party Cannot Seek To Compel Compliance With Its Investigation Efforts Until An Application Has Been Filed.

We emphasize, however, it is only compelled discovery purporting to invoke the WCAB's jurisdiction and authority by utilizing the WCAB's judicial process that is proscribed prior to the filing of an application. (This would include, but not necessarily be limited to, noticing a deposition, subpoenaing a witness to a deposition, or subpoenaing medical records and other documents.) Non-compelled pre-application *investigation* efforts that do not invoke the WCAB's judicial process are generally permissible and, indeed, are often necessary in order to permit a defendant to determine liability after a claim form is filed. (See, Lab. Code, §5402.)

Accordingly, after the filing of a claim form, but before the filing of an application, a defendant may request that the injured employee attend a QME examination (see, Lab. Code, §§4060(c) & (d), 4061(c) & (d), 4061(a) & (b))[10] and it might notify the employee that, if he or she fails to attend, it may seek a WCAB order compelling attendance. (See, Lab. Code, §4053.) If, however, the injured employee fails to voluntarily attend and the defendant then elects to petition the WCAB to compel the employee's attendance, the defendant must first file an application, if one has not been filed already. (Lab. Code, §5500.)

---

[10] Also, either party may informally write to an agreed medical examiner ("AME") or a QME, with copies to the other party, although there are limitations on correspondence with an AME or with a panel QME selected by an unrepresented employee. (Lab. Code, §4062.2.)

A party may even informally request that the injured employee be re-evaluated by an AME or a QME, at least if new issues arise. (See, Lab. Code, §§4061(h) [formerly, 4061(g)], 4062(c), 4067.)

Similarly, a defendant may (among other things) request that the injured employee execute a release for medical records, request that the injured employee provide various documents (such as wage information), or interview the injured employee (or other potential witnesses). Correspondingly, an injured employee may request information from a defendant, or interview potential witnesses. Yet, if a party or non-party fails to voluntarily comply with an injured employee or a defendant's request, and the employee or defendant then elects to request an order from the WCAB, an application must first be filed, if none was filed previously. (Lab. Code, §5500.)

D.

A Defendant Is Not Required To File An Application Under Sections 4061(m) And 4063 If It Is Paying Permanent Disability Indemnity In Accordance With The Report(s) Of Either The Treating Physician, The Panel QME, Or AME.

In assessing whether a defendant has breached a *statutory duty* to file an application, we observe that section 4061(m) provides, in relevant part: "If a comprehensive medical evaluation from the treating physician or an agreed medical evaluator or a qualified medical evaluator selected from a three-member panel resolves any issue so as to require an employer to provide compensation, the employer shall commence the payment of compensation or promptly commence proceedings before the appeals board to resolve the dispute." (Lab. Code, §4061(m).)[11] Similarly, section 4063 provides: "If a formal medical evaluation from an agreed medical evaluator or a qualified medical evaluator selected from a three member panel resolves any issue so as to require an employer to provide compensation, the employer shall commence the payment of compensation or file an application for adjudication of claim." (Lab. Code, §4063.)

Thus, where either the treating physician, the AME, or the panel QME issues an opinion

[11] Of course, the panel QME process only applies where the injured employee is unrepresented (Lab. Code, §4061(d)) and where injury to at least one body part is accepted as compensable by the defendant. Lab. Code, §4060(a).)

that would require the payment of permanent disability indemnity, the defendant must *either* (1) promptly commence payment of permanent disability indemnity in accordance with at least one of those physician's opinions *or* (2) promptly file an application with the WCAB to resolve the permanent disability dispute. (Lab. Code, §§4061(m), 4063; see *Ford v. Lawrence Berkeley Laboratory*, *supra*, 62 Cal.Comp.Cases at p. 157.) If a defendant fails to pay permanent disability indemnity in accordance with at least one of these reporting physician's opinions, but fails to file an application, it has breached its statutory duty. (*Id*.)

We recognize that, in *Ford*, there were permanent disability opinions both from the treating physician and a panel QME, yet, the Appeals Board indicated that the defendant was obliged to either pay permanent disability indemnity *in accordance with the panel QME* (not the treater) or file an application. (*Ford v. Lawrence Berkeley Laboratory*, *supra*, 62 Cal.Comp.Cases at p. 157.) *Ford*, however, involved the pre-1993 version of section 4061(k) [now, section 4061(m)], which referred only to the opinions of the panel QME or the AME; that is, the section did not contain any reference to the opinion of the treating physician.[12] Accordingly, any suggestion in *Ford* that a defendant cannot rely on the treating physician's report, but must pay permanent disability indemnity based on the panel QME's report, is no longer applicable or germane.

We also recognize that section 4061(m) essentially provides that the defendant must pay based on either the treating physician, the AME, or the panel QME's reports, unless it files an application. Section 4063, however, essentially provides that the defendant must pay based on either the AME or the panel QME's reports, unless it files an application. That is, section 4063 does *not* refer to the opinion of the treating physician.

When construing a statute, however, the fundamental purpose is to determine and effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd*. (1993) 5 Cal.4th 382,

---

[12] Former section 4061(k) provided, in relevant part: "If a formal medical evaluation from an agreed medical evaluator or a qualified medical evaluator selected from a three-member panel resolves any issue so as to require an employer to provide compensation, the employer shall commence the payment of compensation or file an application for adjudication of claim."

387 [58 Cal.Comp.Cases 286, 289]; *Nickelsberg v. Workers' Comp. Appeals Bd*. (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476, 480]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652, 657].) The words of the statute must be construed keeping in mind the statutory purpose, and statutes relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd*. (*Steele*) (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1, 8-9]; *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 268; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387; *Moyer v. Workmen's Comp. Appeals Bd.*, *supra*, 10 Cal.3d at pp. 230-231 [38 Cal.Comp.Cases at p. 657].) Thus, a statutory provision must be considered in light of the entire statutory scheme of which it is part. (*DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at p. 388 [58 Cal.Comp.Cases at pp. 289-290]; *Gee v. Workers' Compensation Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1427 [67 Cal.Comp.Cases 236, 242]; *American Psychometric Consultants, Inc. v. Workers' Comp. Appeals Bd.* (*Hurtado*) (1995) 36 Cal.App.4th 1626, 1639 [60 Cal.Comp.Cases 559, 568].) A statute will not be read literally if that would be contrary to the apparent legislative intent. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd*. (*Steele*), *supra*, 19 Cal.4th at p. 1192 [64 Cal.Comp.Cases at p. 7]; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; *General Accident Ins. Co. v. Workers' Comp. Appeals Bd*. (*Loterstein*) (1996) 47 Cal.App.4th 1141, 1146 [61 Cal.Comp.Cases 648, 651].)

In accordance with these principles of statutory construction, we will read sections 4061(m) and 4063 in harmony to provide that a defendant must file an application, unless it is paying permanent disability indemnity based on the AME, the panel QME, *or the treating physician*. Such a construction not only reconciles the differences in the statutory language of section 4061(m) and 4063 (with the former expressly allowing a defendant to pay in accordance with treating physician, but the latter not expressly allowing this), it also makes both sections consistent with the presumption of correctness afforded to the treating physician's opinion by section 4062.9, as it read at all times relevant here. In light of this express statutory presumption

(and in light of the express reference to the treating physician in section 4061(m)), we cannot read section 4063 in isolation, and we cannot conclude it was the Legislature's intention to require a defendant to file application where it is paying permanent disability indemnity in accordance with the treating physician's report(s).[13]

We reiterate, therefore, that a defendant breaches its statutory duty to file application only if it fails to pay permanent disability benefits based on any one of the following physicians: the treating physician, the panel QME, *or* the AME.

IV.

Disposition

A.

Yee-Sanchez v. Permanente Medical Group **(Case No. OAK 271713)**

In *Yee-Sanchez*, we will dismiss the petition for removal based on the following alternative reasons.

As mentioned above, PMG filed a request to withdraw its petition for removal. Although PMG did not specify the reason, it appears the request may have been made because, according to the allegations of a recent letter from Yee-Sanchez, PMG has already filed an application. Assuming that PMG has in fact filed an application, this would render the WCJ's May 10, 2002 order directing it to file one moot. Therefore, this is one basis upon which to dismiss PMG's petition for removal.

There is, however, some question of whether an application has actually been filed. No application is found in the WCAB's file and the WCAB's on-line database does not reflect the

---

[13] Our discussion above relates only to the issue of how section 4061(m) and 4063, when read together, affect the duty of a defendant to pay permanent disability indemnity or file an application for injuries sustained between January 1, 1993 and December 31, 2003.

We do not now reach the question of how the 2002 amendments to section 4062.9 (which, for injuries on or after January 1, 2003, makes the presumption of correctness applicable only to treating physicians who were "predesignated prior to the date of injury") might affect our analysis of the relationship between sections 4061(m) and 4063.

We also do not now reach the question of how section 4063, by itself, may affect the duty of a defendant to pay benefits or file an application where the compensation in question might not be covered by section 4061(m) (e.g., temporary disability indemnity).

filing of an application. Of course, an application may have been filed, but then associated with another injured employee's file due to clerical error. If an application was not actually filed, however, then we must alternatively dismiss PMG's petition for removal for lack of jurisdiction. (Lab. Code, §5500.)

Although we are dismissing PMG's petition for removal, we will make the following observations.

As we have already observed, the WCAB lacks jurisdiction to issue *any* orders before an application is filed. (Lab. Code, §5500.) Therefore, the PWCJ here was without authority to order PMG to file an application, and his order was void ab initio. In the absence of an application, the PWCJ was limited to referring Yee-Sanchez to the Information and Assistance Office, so it could inform her of the need to file an application. (See Lab. Code, §5450 et seq.)

Further, consistent with our discussion above, it appears (without actually deciding the issue) that PMG did *not* breach its statutory duty to file application. (Lab. Code, §§4061(m), 4063.) That is, although PMG was not paying permanent disability indemnity in accordance with the DEU's 66% summary rating of the December 4, 2000 report of the panel QME, Dr. Hightower, PMG was apparently paying permanent disability indemnity in accordance with the DEU's 31% consultative rating of the October 19, 2000 report of the treating physician, Dr. Duong.[14] Therefore, because a defendant need not file an application if it is paying based on *either* the treating physician, the panel QME, *or* the AME (where an AME can be and is utilized), it is likely there was no breach of sections 4061(m) and 4063 here.

On the other hand, it appears (without actually deciding the question) that PMG far overstepped the bounds of proper and non-compelled investigation and ventured far into the realm of unquestionably unlawful pre-application discovery. That is, notwithstanding the absence of an application giving the WCAB jurisdiction over any aspect of the matter (see, Lab. Code, §5500), it appears that PMG repeatedly purported to invoke the WCAB's jurisdiction by

[14] Of course, this consultative rating would not be admissible in evidence in proceedings before the WCAB. (Cal. Code Regs., tit. 8, § 10166(b).)

noticing the depositions of applicant, Dr. Duong, and Dr. Hightower, and also by twice subpoenaing Dr. Hightower to appear for his deposition. Of course, as emphasized above, it is only the jurisdiction and authority of the WCAB that permits depositions to be noticed and taken (and subpoenas to be issued) in workers' compensation matters.

Accordingly, once an application is filed (if one has not been filed already), the PWCJ (or any other WCJ ultimately assigned to the case) should consider exercising the post-application remedies discussed above, including but not limited to monetary and evidentiary sanctions, for PMG's apparent pre-application abuses of discovery.

B.

***Piatt v. Eureka Union School District* (Case No. SAC 304854)**

In *Piatt*, we will affirm the WCJ's imposition of $500.00 in sanctions.

Section 5813 permits the WCAB to impose sanctions of up to $2,500.00 where a party and/or its counsel engage in "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Lab. Code, §5813.) Board Rule 10561 (Cal. Code Regs., tit. 8, §10561) makes it clear that "[a] bad faith action or tactic is one which results from a willful failure to comply with a statutory or regulatory obligation or from a willful intent to disrupt or delay the proceedings of the [WCAB]" and that "[a] frivolous bad faith action or tactic is one that is done for an improper motive or is indisputably without merit," but that sanctions should not be imposed where the party and/or its counsel "acted with reasonable justification or [where] other circumstances make imposition of the sanction unjust."

Here, CIGA took the depositions of both Piatt and Dr. McKean prior to the filing of an application. As discussed extensively above, these actions were indisputably without merit and were utterly without justification because CIGA was purporting to utilize the WCAB's judicial process at a time when the WCAB lacked jurisdiction. (Lab. Code, §5500.) The $500.00 in sanctions is warranted on this basis alone. Indeed, CIGA's conduct in this regard was so egregious, we believe that the imposition of sanctions well in excess of $500.00 might well have been appropriate.

Because we conclude that the imposition of $500.00 in sanctions was fully justified solely on the ground of CIGA's entirely unlawful acts of taking two depositions before any application was filed, we need not and will not reach CIGA's remaining contentions.

For the foregoing reasons,

IT IS ORDERED that the petition for removal filed by Permanente Medical Group in *Yee-Sanchez v. Permanente Medical Group* (Case No. OAK 271713), be, and it hereby is, **DISMISSED**.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Appeals Board in *Piatt v. Eureka Union School District* (Case No. SAC 304854), that the Findings and Order issued by the workers' compensation administrative law judge on August 29, 2002 be, and it hereby is, **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ William K. O'Brien

I CONCUR,

/s/ James C. Cuneo

/s/ Janice J. Murray

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 29, 2003

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

NPS/ncv