

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS
FROM: JOE TRUCE
DATE: June 18, 2003
RE: POSSIBLE SANCTIONS FOR ATTEMPTING TO TAKE DEPOSITIONS OF UNREPRESENTED INJURED WORKERS

Our clients are increasingly confronted with a situation in which they wish to depose an applicant or issue Subpoena Duces Tecums for medical records but are legally barred from doing so as the applicant has not filed an Application for Adjudication of Claim thereby giving the WCAB jurisdiction.

In this type of situation it has been common practice to send out a notice of deposition or conduct "discovery" even though an Application for Adjudication of Claim has not been filed.

In these type of cases our clients have been reluctant to file Applications, as we then may be liable for attorneys fees if the injured worker subsequently retains an attorney.

However, the WCAB has recently issued a **significant panel decision** in the case of Donna Yee-Sanchez v. Permanente Medical Group¹ in which the Board has warned that a defendant attempting to **conduct discovery** before an Application has been filed may be liable for sanctions pursuant to Labor Code §5813. In its Decision After Reconsideration the Board ruled in relevant part as follows:

1. The WCAB has no jurisdiction over any aspect of a workers' compensation claim until an Application for Adjudication has been filed. **This basically means that neither the applicant nor the defendant can have a hearing before the Board, conduct discovery, or make motions to the Board until an Application has been filed.**²

¹A summary of the Donna Yee-Sanchez case from the Appeals Board Reporter is enclosed with this memo.

²The Board's decision applies to injuries before January 1, 1990 and subsequent to December 31, 1993, as during the so-called window period (1/1/90-12/31/93) the Claim Form gave the Board jurisdiction.

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2. However, if the defendant files the Application and the employee is unrepresented, then the defendant may be liable for attorneys fees incurred by the employee in connection with the Application.
3. If the defendant has reached it's statutory duty to file an Application or if either party attempted to compel discovery before the Application was filed, **"it might be appropriate to impose monetary sanctions"** pursuant to Labor Code §5813.³
4. The Board specifically indicated that if a defendant attempted to compel discovery before the filing of an Application, the defense may be subject to sanctions including monetary sanctions pursuant to Labor Code §5813 and evidentiary sanctions which would exclude "the improperly discovered material from evidence" and precludes "some or all related post-Application discovery efforts."

The Board decision certainly limits the defendant's options in the case of an unrepresented applicant.

WJT:dab

Attach - Appeals Board Reporter/Decision Donna Yee-Sanchez

³In referring to the defendant's statutory duty to file an Application, the Board would appear to be referring to the unlitigated track in Labor Code §4061 which compels the defendant, upon receipt of a summary rating, to either pay out the rating or file an Application. If a defendant does neither, then this would appear to be what the Board refers to as a "breach" of the defendant's statutory duty to file an Application.