

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

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FILED

Case No. ADJ9533148

ANTHONY TAYLOR (deceased),

Applicant,

vs.

MERCED COUNTY SHERIFF'S
DEPARTMENT,

Defendants.

**FINDINGS OF FACT, AWARD, ORDER,
AND OPINION ON DECISION**

GOLDBERG & IBARRA
By Russell Sahlin
Attorneys for Applicant;

MICHAEL SULLIVAN & ASSOCIATES
By Pilar Mitchell
Attorneys for Defendants

Application having been filed herein; all parties having appeared for the trial in the above-entitled matter; and all evidence having been heard on the record and submitted, the Honorable Angelique Scott, Workers' Compensation Administrative Law Judge, now decides as follows:

STIPULATED FACTS

1. Anthony Taylor, Decedent, born December 27, 1961, and while employed as a correctional sergeant, Occupational Group Number 490, in Merced, for the period commencing October 4, 1982, through July 30, 2011, by Merced County Sheriff's Department, permissibly self-insured (psi), whose workers' compensation benefits are administered by third-party administrator Pegasus Risk Management, claims to have sustained an injury arising out of

**STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board**

and occurring in the course of employment causing pancreatic cancer from industrial exposure.

2. The employer has furnished no medical treatment.
3. No attorney fees have been paid and no attorney fee arrangements have been made.

FINDINGS OF FACT

1. The stipulations of the parties are accepted as fact.
2. On August 22, 2012, decedent Anthony Taylor expired from septicemia, biliary track obstruction and pancreatic carcinoma.
3. On February 7, 2018, the DWC Medical Unit issued Panel Number 7164971 in the specialty of Internal Medicine (MMM) in response to the Applicant's attorney request for a panel to select a qualified medical evaluator to evaluate decedent's widow allegation that decedent developed pancreatic cancer as a result of exposure to toxic carcinogens during decedent's employment with Merced County Sheriff's Department.
4. Internist Roger Noriega, MD was included in Panel Number 7164971. An appointment was scheduled with Dr. Noriega for April 26, 2018.
5. On February 27, 2018, Defendant wrote Applicants indicating arrangements had been made for records to be examined Dr. Noriega on April 26, 2018.
6. On April 6, 2018, Defendant wrote Dr. Noriega, objecting to the panel specialty initially selected by Applicant, requesting he cancel the appointment pending determination from the Medical Unit as to the appropriate specialty, and further indicating Defendant would not issue payment for fees associated with his medical-legal services his services if it is found that internal medicine is not the appropriate specialty.

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

7. On April 17, 2018, Defendant filed a Replacement Panel Request with the DWC Medical Unit, with no evidence to support its contention.
8. On July 12, 2018, Applicant's Attorney wrote the DWC Medical Unit objecting to Defendant's Replacement Panel Request,
9. On July 17, 2018, the DWC Medical Unit issued a determination denying Defendant's request to change the specialty.
10. On August 2, 2018, Applicant's Attorney rescheduled an appointment for evaluation with Dr. Noriega, scheduled for September 6, 2018.
11. On August 13, 2018, Defendant unilaterally cancelled the evaluation with Dr. Noriega.
12. On August 29, 2018, Applicant's Attorney filed a verified Petition for Penalties, Sanctions, Costs and Attorney Fees for Undue Delay, Cancellation of PQME Evaluation.
13. The DWC Medical Unit complied with California Code of Regulations Sections 31.5(a) (10) and 31.1.
14. The appropriate medical/legal specialty is internal medicine.
15. Defendant's act of warning Dr. Noriega they would not pay any fees associated with the evaluation if it is found that the internal medicine is not the appropriate specialty coupled with its request that he then cancel the properly obtained and scheduled medical legal evaluation, are found to be in bad faith, unsupported by law, causing unnecessary delay
16. Defendant's unilaterally cancelling the rescheduled appointment with Dr. Noriega is found to be in bad faith and unsupported by law, causing further unnecessary delay in the expeditious adjudication of Applicants claim.
17. Applicant Attorney's Petition for Penalties dated August 29, 2018, is sustained.

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**STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board**

AWARD

AWARD IS MADE in favor of ANTHONY TAYLOR (DECEASED) against MERCED COUNTY SHERIFF'S DEPARTMENT, psi, administered by PEGASUS RISK MANAGEMENT, of:

- a. An evaluation with Internist, Panel QME Robert Noriega, MD.
- b. Reasonable attorney fees of \$4,275.00 as set forth in Finding of Fact number 17.

ORDER

IT IS SO ORDERED THAT:

1. The evaluation with Internist, Panel QME Robert Noriega, M.D. proceed, uninterrupted.
2. Defendants issue payment to Applicant's attorney the sum of \$4,275.00 in fees for services performed and time rendered.

OPINION ON DECISION

While the parties prepared a Pre-Trial Conference Statement at the time of Mandatory Settlement Conference, an Amended Pre-Trial Conference Statement was prepared by the parties when the matter proceeded to trial on December 27, 2018, to adjudicate the principal issues of (1) whether the DWC Medical Unit complied with Title 8, of California Code of Regulations, Sections 31.5(a) (10) and 31.1, in addressing medical/legal specialty, (2) the appropriate medical/legal specialty and (3) Applicant Attorney's Petition for Penalties. Medical reports and documents were received into evidence. The matter was submitted based on the evidentiary record, absent any witness testimony. The parties were afforded opportunity to submit Pre-Trial Briefs in support of their respective decisions. Both parties filed said briefs.

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STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Factual Background

On August 22, 2012, decedent Anthony Taylor expired. The Certificate of Death identified the cause of death as septicemia, biliary track obstruction and pancreatic carcinoma.

On July 10, 2014, Defendant Merced County Sheriff's Department's adjusting agent, Innovative Claims, filed an Application of Adjudication of Claim of Death Benefits on behalf of Dolores Taylor, the widow, and dependent, of decedent Anthony Taylor. On January 29, 2016, Mrs. Taylor obtained legal representation of Goldberg & Ibarra (hereinafter Applicant's Attorney). And, on May 3, 2017, Applicant's Attorney amended the Application to identify additional dependents of decedent.

On February 6, 2018, Applicant's attorney requested the DWC Medical Unit issue a panel of qualified medical evaluators in the specialty of internal medicine. On February 7, 2018, the DWC Medical Unit issued Panel Number 7164971 said specialty. Internist Roger Noriega, MD was included as an internist on the panel list. An appointment was scheduled with Dr. Noriega for April 26, 2018. On February 27, 2018, Defendant wrote Applicant indicating arrangements had been made for records to be examined Dr. Noriega on April 26, 2018.

Thereafter, on April 6, 2018, prior to filing a Replacement Panel Request with the DWC Medical Unit, Defendant wrote Dr. Noriega, objecting to the panel specialty initially selected by Applicant. Defendant informed Dr. Noriega they would not pay any fees associated with the evaluation if it is found that the internal medicine is not the appropriate specialty and requested he cancel the appointment.

Subsequently, on April 17, 2018, Defendant filed a Replacement Panel Request with the DWC Medical Unit explaining:

"Defendants contend internal medicine is the inappropriate QME panel specialty. A replacement QME in toxicology (MTT) is requested. This is an extremely complex death claim. The [decedent's] widow is alleging the

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

deceased injured worker developed pancreatic cancer as a result of exposure to toxic carcinogens during the [decedent's] employment. The highly complex nature of the alleged exposure and the alleged carcinogens is outside the expertise of an internal medicine physician."

On July 12, 2018, Applicant's Attorney wrote the DWC Medical Unit objecting to Defendant's Replacement Panel Request, contending internal medicine is the most relevant specialty to address. In support of its contention, Applicant explained that internal medicine is appropriate a specialty evidenced by the fact that cancer is listed as a sub specialty in the Medical Unit's own description for internal medicine on the DWC Medical Unit's webpage. Enclosed with Applicant's letter was a copy of the DWC Medical Unit's page describing the specialty of internal medicine.

On July 17, 2018, the DWC Medical Unit issued a determination denying Defendant's request and further explaining that a California medical license allows a physician to practice medicine in any area they believe they are adequately trained and competent to practice and indicating it is the responsibility of the QME physician to decline any evaluation they are not adequately trained and competent to perform.

On August 2, 2018, Applicant's Attorney rescheduled an appointment for evaluation with Dr. Noriega set for September 6, 2018, which Defendant unilaterally cancelled on August 13, 2018.

On August 29, 2018, Applicant's Attorney filed a verified Petition for Penalties, Sanctions, Costs and Attorney Fees for Undue Delay, Cancellation of PQME Evaluation.

DWC Medical Unit's Regulatory Compliance

Title 8, California Code of Regulations (CCR) § 31.1, subdivision (b) provides in pertinent part that disputes regarding the appropriateness of the qualified medical evaluator panel specialty shall be resolved pursuant to CCR 31.5(a)(10). CCR 31.5(a) (10) instructs that a replacement of an entire panel of qualified medical evaluators may be issued at the discretion of the Medical Director of the DWC

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Medical Unit, if the Medical Director determines upon written request, and after a review of all appropriate records, that the specialty chosen by the party holding the legal right to designate a specialty is medically or otherwise inappropriate for the disputed medical issues. CCR § 31.1(b) further provides in pertinent part that either party may appeal the Medical Director's decision as to the appropriateness of the specialty to a Workers' Compensation Administrative Law Judge.

Here, Applicant's attorney requested the DWC Medical Unit issue a panel in the specialty of internal medicine to assess the allegation that decedent developed pancreatic cancer as a result of exposure to toxic carcinogens during decedent's employment with Merced County Sheriff's Department. Months after the issuance of panel in the specialty of internal medicine Defendant objected to the specialty and in turn requested the DWC Medical Unit issue a replacement panel in medical toxicology contending the highly complex nature of the alleged exposure and the alleged carcinogens is outside the expertise of an internal medicine physician. Defendant's request failed to proffer any evidence to demonstrate why a case alleging exposure to carcinogens is outside the expertise of an internal medicine physician.

Conversely, in response to Defendant's Replacement Panel Request, Applicant's attorney submitted an objection letter to the DWC Medical Unit arguing that internal medicine is an appropriate specialty, but additionally proffering evidence to support that contention; a printout from the DWC Medical Unit's webpage explaining internal medicine, which provides in pertinent part:

“Internal medicine physicians, or internists, specialize in adult health care. ...Internists have a broad knowledge base and possess the skills of many internal medicine specialists. They care for any adult sickness, including those involving:
[¶¶]
• Cancer (oncology)....
[¶¶]”

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

The Medical Director was afforded discretionary authority to replace a panel specialty. If upon receipt of a party's written request for a replacement panel and after review of all appropriate records, the Medical Director elects to exercise its *discretionary* authority to replace a panel specialty, the Medical Director must issue a determination demonstrating that the found that the specialty chosen by the party holding the legal right to designate a specialty is medically or otherwise inappropriate for the disputed medical issue or issues. Here, upon review of the evidence submitted, the Medical Director elected not to exercise its *discretionary* authority to replace the panel specialty chosen by the Applicant. Neither CCR 31.5(a)(10), nor 31.1 imposes a duty on the Medical Director to issue a determination as to the appropriateness of the that the specialty chosen by the party holding the legal right to designate a specialty, if discretionary authority is not exercised.

Therefore, it is found that there is insufficient evidence to support a finding that the DWC Medical Unit failed to comply with its regulatory duties imposed by CCR 31.5(a) (10) or 31.1, when deciding not to replace the initially selected specialty and deny Defendant's unsupported request.

Appropriate Medical /Legal Specialty

Labor Code §§ 3202.5 and 5705 mandate that the moving party must prove all elements necessary to establish the validity of their claim or defense by a preponderance of the evidence. Unless that is provided, the burden of proof will not shift to the opposing party. Applicant, as the first requesting party, exercised the right to choose the specialty of the panel. Therefore, Defendant has the burden to establish the validity of its requested relief of a replacement panel, by a preponderance of the evidence.

Here, Applicant requested an internal medicine panel. While Defendant requested a replacement panel, Defendant failed to present sufficient evidence to the DWC Medical Unit in support of this contention to compel a replacement panel specialty. Furthermore, at the parties prepared a Pre-Trial Conference Statement with identification of exhibits. In addition to decedent's Death Certificate,

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Defendant introduced an operative report issued by Jennifer McEvoy, MD dated September 30, 2011, , an operative report issued by David Burton, MD dated October 23, 2011, and a medical report issued by Sivakumar Munnangi, MD dated Novmeber 2, 2011. While the Death Certificate identified the official cause of death, neither of the proffered medical reports were probative as to why internal medicine is an inappropriate specialty for Applicant's case, or even demonstrate why the alleged exposure and carcinogens is outside the expertise of an internal medicine physician. Nor did the evidence introduced by Defendant demonstrate how the DWC Medical Unit erred in denying Defendant's request for a replacement panel.

Applicant's attorney introduced its objection letter submitted to the DWC Medical Unit along with the a copy of the printout from the DWC Medical Unit's own webpage describing internal medicine specialty, which specifically identifies cancer (oncology) as a condition in which internists are knowledgeable and skilled, as evidence.

Therefore, Applicant's evidence submitted to the DWC Medical Unit and introduced at trial support a finding that internal medicine is an appropriate specialty to assess Applicant's claim wherein decedent expired from multiple causes, including cancer, and wherein Applicant has alleged decedent sustained an injury arising out of and occurring in the course of employment causing pancreatic cancer from industrial exposure. Defendant failed to proffer sufficient evidence to demonstrate that the DWC Medical Unit's determination, denying the request, was issued in error.

Applicant's Penalty Petition

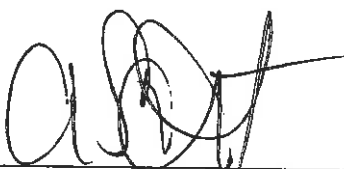
On April 6, 2018, without legal authority, Defendant instructed Dr. Noriega to cancel the statutory compliant medical-legal appointment for evaluation of Applicant's case, pending determination from the Medical Unit as to the appropriate specialty, combined with what is tantamount to a threat of

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

non-payment for properly rendered medical-legal services. Defendant thereafter filed an unsubstantiated request for replacement panel, unsupported by law or evidence.

Upon receipt of the Medical Director's determination denying Defendant's request for a replacement panel, Applicant's Attorney rescheduled an appointment for evaluation with Dr. Noriega, which Defendant then unilaterally cancelled on August 13, 2018, under the false pretenses that its actions was "In accordance with the California Labor Code.....". Applicant's Attorney filed a Petition for Penalties, Sanctions, Costs and Attorney Fees for Undue Delay, Cancellation of PQME Evaluation.

Defendant's act of warning Dr. Noriega they would not pay any fees associated with the evaluation if it is found that the internal medicine is not the appropriate specialty coupled with its request that he then cancel the properly obtained and scheduled medical legal evaluation, are found to be in bad faith, unsupported by law, causing unnecessary delay. Additionally, Defendant's subsequent conduct of unilaterally cancelling the rescheduled appointment after the DWC Medical Unit rendered a determination on the issue of panel specialty is also found to be in bad faith, unsupported by law, and causing further unnecessary delay of expeditious resolution of Applicant's claim.



ANGELIQUE SCOTT
Workers' Compensation Judge

Served by mail on parties
as shown on Official Address Record.
By: *D. Allison* 02/07/2019

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

02-07-2019

OFFICIAL ADDRESS RECORD

FINDINGS OF FACT, AWARD, ORDER, AND OPINION ON DECISION served by mail on parties
as listed on the OAR (excluding employers) by *D. Allison*.

Case Number: ADJ9533148

COUNTY OF MERCED SHERIFFS DEPARTMENT DOLORES TAYLOR	Self Insured Employer, 2222 M STREET 9 MERCED CA 95340 Dependent, 7905 MORNING GALLOP CT LAS VEGAS NV 89131
DOLORES TAYLOR	Guardian Ad Litem, 7905 MORNING GALLOP CT LAS VEGAS NV 89131
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KASSANDRA KELLOGG	Dependent, 7905 MORNING GALLOP CRT LAS VEGAS NV 89131
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