

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

**DEBORAH ORTIZ, *Applicant***

**vs.**

**KAISER PERMANENTE HOSPITAL/SOUTHERN CALIFORNIA PERMANENTE  
MEDICAL GROUP, permissibly self-insured, administered by SEDGWICK CLAIMS  
MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ2609190 (VNO 0516982)**

**Van Nuys District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted Lien Claimant David Silver's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

David Silver, M.D., (lien claimant) seeks reconsideration of the Third Amended Finding of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 17, 2023, wherein the WCJ found in pertinent part that lien claimant failed to meet his burden of proof that applicant sustained an injury arising out of and occurring in the course of employment (AOE/COE).

Lien claimant contends that the issue of injury AOE/COE was not raised at trial, so the issue was waived or, for various reasons, it is subject to equitable estoppel.

We received the Fourth Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will affirm the F&O.<sup>1</sup>

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<sup>1</sup> We previously issued three Opinions and Orders in this matter. Commissioner Lowe was a member of the panel; she has since retired, and another panel member has been assigned in her place.

## **BACKGROUND**

Deborah Ortiz, applicant herein, claimed injury to her upper extremities, wrist, nervous system/brain, and other body systems, while employed by defendant as a department administrator, during the period from May 9, 2002, through May 9, 2003. Applicant also claimed injury to various body parts in five previous claims. By correspondence dated November 4, 2004, defendant denied the injury claim in this matter, case number ADJ2609190. (Def. Exh. E, Notice of Denial.) Applicant received medical treatment from lien claimant commencing on February 19, 2004, and continuing to November 9, 2011. The injury claim (in addition to the five other injury claims) was settled by Compromise and Release; a WCJ issued the Joint Order Approving Compromise and Release on April 5, 2018.

Lien claimant and defendant proceeded to a lien trial on March 19, 2019. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 3/19/2019.) The WCJ issued a Findings of Fact and Order on May 8, 2019, and lien claimant filed a Petition for Reconsideration. By our July 19, 2019 Opinion and Order Granting Petition For Reconsideration and Decision After Reconsideration (Opinion and Order) we granted reconsideration, rescinded the Findings of Fact and Order, and returned the matter to the WCJ for further proceedings and a new decision. The WCJ issued an Amended Findings of Fact and Order on August 1, 2019, and lien claimant filed a Petition for Reconsideration. On October 24, 2019, we granted reconsideration, rescinded the Amended Findings of Fact and Order, and returned the matter to the WCJ for further proceedings and a new decision. On March 10, 2020, the Notice of Intention to Submit Case for Decision, was served by mail on all parties, including lien claimant and his representative. Including the statutory five-day extension for service by mail, the parties had fifteen days to file a response. The last day for a party to file a timely response was Wednesday, March 25, 2020. The F&O was issued/served on Monday, March 23, 2020, thirteen days after the Notice of Intent was served. Lien claimant was not allotted the required amount of time to file a response. Thus, he was denied the due process to which he was entitled. We granted reconsideration, rescinded the March 23, 2020, Findings and Order and returned the matter to the WCJ for further proceedings.

On December 15, 2022, the WCJ issued a Notice of Intention to Submit Case for Decision which stated:

Notice Is Hereby given that this case will be submitted for decision ten (10) days after service hereof, based upon the present record as set forth in the Minutes of Hearing and Summary of Evidence dated March 19, 2019, unless good cause to the contrary be shown in writing and filed within said time.

Our review of the Electronic Adjudication Management System (EAMS) ADJ file indicates that neither party objected to the matter being submitted for decision based on the trial record as set forth in the March 19, 2019, MOH/SOE. The F&O was issued/served by mail on January 17, 2023.

### DISCUSSION

Pursuant to Labor Code section 5705, “The burden of proof rests upon the party or lien claimant holding the affirmative of the issue.” (Lab. Code, § 5705.) “All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence.” (Lab. Code §3202.5) "A lien claimant ... has the burden of proving by a preponderance of the evidence that the claim is industrial...." (*Hand Rehabilitation Center v. Workers' Comp. Appeals Bd. (Obernier)* (1995) 34 Cal.App.4th 1204, 1212-1213 [60 Cal.Comp.Cases 289, 291-292].)

Lien claimant argues that:

The issue of whether the Applicant suffered an injury AOE/COE was not an issue specifically raised by the parties at the time of the Pretrial Conference Statement, nor was it raised at the time of trial, so defendant waived the issue. (Petition, pp. 5 - 6.)

A lien claimant treating physician’s burden of proof includes the burden of showing that he or she provided medical treatment “reasonably required to cure or relieve” the injured worker from the effects of an industrial injury. (Lab. Code, § 4600(a); *Zenith Insurance Company v. Workers' Comp. Appeals Bd. (Capi)* (2006) 138 Cal.App.4th 373 [71 Cal.Comp.Cases 374]; *Williams v. Industrial Acc. Com.* (1966) 64 Cal.2d 618 [31 Cal.Comp.Cases 186]; *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd.* (1994) 26 Cal.App.4th 789 [59

Cal.Comp.Cases 461].) Absent stipulations regarding the alleged injury and the injured body parts, a lien claimant must prove that applicant sustained an injury AOE/COE.

It is also important to note that in our July 19, 2019, Opinion and Order, we explained:

However, a lien claimant treating physician's burden of proof includes the burden of showing that he or she provided medical treatment "reasonably required to cure or relieve" the injured worker from the effects of an industrial injury. Thus, lien claimant is correct that the WCJ needs to make a finding regarding the threshold issue of injury AOE/COE before making a ruling as to the lien claim. Again, as noted, the trial record contains no evidence of injury AOE/COE, and that issue is an additional aspect of lien claimant's burden of proof.

(Opinion and Order, July 19, 2019, p. 5, citations omitted.)

Clearly, lien claimant's current argument that the issue of injury AOE/COE was not raised at trial is inconsistent with its earlier position as stated in his May 18, 2019, Petition for Reconsideration. More importantly, there is no statutory or case law that supports his contention that the issue of injury AOE/COE was waived.

Lien claimant also argues that defendant's Exhibit H is evidence that defendant accepted applicant's injury claim. Our review of the record shows that lien claimant initially objected to defendant's Exhibit H being admitted into evidence "based on relevance" (MOH/SOE, March 19, 2019, p. 8) and defendant's Exhibit H was admitted for "ID ONLY." There is no Finding or Order admitting the exhibit into evidence. Therefore, it is not evidence in support of lien claimant's argument. We also note that if the exhibit had been admitted into evidence:

Our review of the record shows that Defendant's Exhibit H refers to the March 9, 2003, specific injury in case number ADJ5678477, not the cumulative injury claim (case number ADJ2609190) at issue herein. As such, it is not evidence that defendant accepted applicant's injury claim.

(Opinion and Order, July 19, 2019, p. 5.)

Further, the Compromise and Release states:

Additionally, there exists a good-faith issue that an injury may not have occurred arising out of and in the course and scope of employment to Bilateral Hands, Bilateral Wrists, and Psych. ... This settlement is intended as full payment in compromise of any and all claims that have been or could be presented, and does not constitute an admission of liability to Bilateral Hands, Bilateral Wrists, and Psych. ... There is no substantial medical evidence finding injury to Bilateral Hands, Bilateral Wrists, and Psych. ... The parties agree that a take-nothing award could issue should this matter proceed in further litigation to Bilateral Hands, Bilateral Wrists, and Psych. ... There are significant defenses to the claim of injury to Bilateral Hands, Bilateral Wrists, and Psych and there is no admission of liability. (Def. Exh. A., Order Approving Compromise and Release/Compromise and Release, Paragraph 9 Continued C, [EAMS p. 17].)

Again, having reviewed the entire record, it appears that lien claimant's arguments are not based on the actual facts of this case, nor are they supported by statutory or case law.

Accordingly, for the reasons discussed herein, in addition to those explained by the WCJ in his Report, we affirm the F&O.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 17, 2023, Third Amended Finding of Fact and Order is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

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

I CONCUR,

**/s/ JOSÉ H. RAZO, COMMISSIONER**

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



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

**April 14, 2023**

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

**DAVID SILVER, M.D.  
LEGAL SERVICE BUREAU  
SEDGWICK KAISER  
RESOLUTION PARTNERS**

**TLH/mc**

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *mc*

**FOURTH REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**

**INTRODUCTION**

Lien claimant, Dr. David Silver, M.D., filed a timely, verified Petition for Reconsideration, dated February 04, 2023, with respect to the Amended Opinion on Decision and Amended Findings of Fact and Order, dated January 13, 2023. This matter came on for trial on March 19, 2019, with exhibits taken into evidence; no testimony was elicited by either party. The only issue is the lien of Dr. David Silver, M.D., for medical treatment with a balance of \$13,228.32 for services provided from 2/19/2004 through 11/9/2011. Lien claimant alleges statutory interest under Labor Code Section 4603 .2 (b ); 15% statutory increase under Labor Code Section 4603 .2 (b ); allowance of fees above the Official Medical Fee Schedule; costs and sanctions against defendant. These are all pursuant to two petitions dated 7/10/2018 and 6/22/2018. 2. Defense alleges: reasonableness and necessity; charges in excess of Official Medical Fee Schedule.

**PROCEDURAL HISTORY**

This case was previously the subject of a petition for reconsideration, elated May 18, 2019, which the Board granted on July 17, 2019. An Amended Findings of Fact and Order issued on August 1, 2019. Petitioner again sought reconsideration on August 26, 2019, and the Board granted reconsideration and issued its decision on October 24, 2019, rescinding the WCJ' s Amended Findings of Fact and Order. In this decision, the Board found that "there is a due process issue that must be addressed [and] [o]ur review of the EAMS ADJ file indicates the parties were not given notice that the matter was going to be re-submitted for decision after we rescinded the May 8, 2019, Findings of Fact and Order. *"The Board concluded, "Although it is in the discretion of the WCJ to determine if the record, as it now stands, is adequate to make a final decision, it is appropriate that the parties be given the opportunity to state their respective positions regarding how to proceed. "* (Emphasis added)

## **FACTUAL BACKGROUND**

Deborah Ortiz, born 9/13/1956, while employed during the period of 5/9/2002 through 5/9/2003, as a department administrator, at La Palma, California, by Southern California Permanente Medical Group, claims to have sustained injury arising out of and in the course of employment to her brain, wrist, upper extremities, nervous system, and other body systems . At the time of injury, the employer was permissibly self-insured.

The case in chief was resolved by a Joint Order Approving Compromise & Release in the amount of \$800,000 on 4/5/2018 approved by the Honorable Clint Feddersen. The parties stipulate that defendant has paid \$2,611.68 and that applicant has paid \$967.00 on account for Dr. Silver's bill. Pursuant to the October 24, 2019, opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration which states:

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ to issue a Notice of Intention to re-submit the matter for decision, giving the parties adequate time to respond, and to conduct further proceedings as appropriate. (EAMS Doc ID 71434645)

Subsequently, a conference was held on December 16, 2019, whereas the lien claimant indicated he would not appear for personal reasons, however, later did appear and told by the undersigned that the matter would be submitted. Petitioner sent the letter advising the undersigned that he would be unable to attend the hearing, dated December 13, 2019, which did not reach the undersigned in a timely manner. No additional evidence was offered, introduced nor taken into evidence. (Minutes of Hearing EAMS Doc ID 71848318) The undersigned believed that record, as it now stands, is adequate to make a final decision.

On March 9, 2020, a Notice of Intention to Submit Case for Decision was issued. 72431353. No objection to said notice was filed by either-party. Two weeks later, 011 March 23, 2020, [anAm] an Amended opinion on Decision and Findings of Fact was issued which was identical to the previous one since no new information/evidence was introduced to change the outcome.

Subsequently, lien claimant filed another Petition for Reconsideration, dated April 15, 2020 (EAMS Doc ID 32161970. Numerous issues were raised similar to those raised in the past as



well as alleged procedural issues. A Report and Recommendation on Petition for Reconsideration was issued on April 24, 2020 (EAMS Doc ID 3216970)

Several of lien claimant's arguments are premised on his assertion that he is entitled to fees in excess of the OMFS because of the "extraordinary circumstances" related to the "unusual nature" of the services he provided. These arguments appear to be based on the provisions of Administrative Director (AD) Rule 9792 as amended in 1999. However, AD Rule 9790, states in part that: Sections 9790.1 - 9792.1 and Appendices A-C, contained in this Article, are not applicable for physician services rendered and inpatient hospital facility services for discharges after January 1, 2004, unless otherwise specified in this Subchapter (Cal. Code Regs., tit. 8, § 9790.)

Labor Code section 5307.1(b) which allowed payment in excess of the OMFS for medical treatment related to extraordinary circumstances was deleted in 2004. Concurrently, Labor Code 5307.1(e)(1) was amended to provide that:

Prior to the adoption by the administrative director of a medical fee schedule pursuant to this section, for any treatment, facility use, product, or service not covered by a Medicare payment system, including acupuncture services, the maximum reasonable fee paid shall not exceed the fee specified in the official medical fee schedule in effect on December 31, 2003, except as otherwise provided in this subdivision (Lab. Code, § 5307.1.)

As noted above, the services at issue herein were provided by lien claimant during the period from February 19, 2004, through November 9, 2011. Thus, the "extraordinary circumstances" provisions previously contained in Labor Code section 5307.1(b) and AD Rule 9792 are not applicable for those dates of service.

Lien claimant also argues that based upon the Supreme Court opinion in Kaiser Foundation Hospitals v. Workmen's Comp. Appeals Bd. (Keifer) (1974) 13 Cal.3d 20 [39 Cal.Comp.Cases 857], he met his burden of proof, "by demonstrating that the lien claim arose by reason of services rendered to the applicant in connection with an injury or event for which the employee received compensation." (Petition, JJ. 4.)

At this point the Board quotes [form]from *Tito Torres v AJC Sandblasting and Zurich North America* {Torres} (2012) 77 Cal.Comp.Cases 1113 (Appeals Board en bane) and notes the following in regards to lien claimant's reliance on Kiefer:

It is important to note that our decision in Torres addressed the amendments to the Labor Code which the legislature implemented in 1993. We explained in Torres (as quoted above), that the amendments specifically define a lien claimant's evidentiary burden of proof. Clearly, the legislature intended to do away with "the Kiefer presumption" stated in the 1974 Supreme Court decision. There is no legal basis for lien claimant's contention, and as noted, our decision in Torres is consistent with a number of previous appellate court decisions.

It is important to note that our decision in Torres addressed the amendments to the Labor Code which the legislature implemented in 1993. We explained in Torres (as quoted above), that the amendments specifically define a lien claimant's evidentiary burden of proof. Clearly, the legislature intended to do away with "the Kiefer presumption" stated in the 1974 Supreme Court decision. There is no legal basis for lien claimant's contention, and as noted, our decision in Torres is consistent with a number of previous appellate court decisions.

In determining whether to admit evidence, we are governed by the principles of Labor Code section 5708, which states that the Appeals Board "shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division." (Lab. Code, § 5708.) The right to present evidence implicates the right to due process. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 175 [36 Cal.Comp.Cases 93, 102]; *Pence v. Industrial Acci. Com.* (1965) 63 Cal.2d 48, 51 [30 Cal.Comp.Cases 207, 209].) Lien claimant cites no legal authority that requires the WCJ to exclude defendant's exhibits from evidence. Also, lien claimant submitted no evidence that supports its contention that the bill review documents are false and misleading. Lien claimant is reminded that arguments are not evidence.

A Third Amended Findings of Fact and Order, Amended Opinion on Decision issued on January 13, 2023, including a finding on AOE/COE. The trial record contains no evidence of

injury AOE/COE, and that issue is an additional aspect of lien claimant's burden of proof. (Lab. Code, § § 3202.5 and 5705.)

A lien claimant treating physician's burden of proof includes the burden of showing that he or she provided medical treatment "reasonably required to cure or relieve" the injured worker from the effects of an industrial injury. (Lab. Code, § 4600(a); *Williams v. Industrial Acc. Com.* (1966) 64 Cal.2d 618 [31 Cal.Comp.Cases 186]; *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd.* (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461 ]; cf. *Workers' Comp. Appeals Bd. v. Small Claims Court (iShans)* (1973) 35 Cal.App.3d 643 [38 Cal.Comp.Cases 748].) Lien claimant has failed to meet this burden.

### **RECOMMENDATION**

The undersigned WCJ respectfully recommends that applicant's Petition for Reconsideration, dated February 04, 2023, be denied.

DATED: February 16, 2023

Respectfully submitted,

**ROBERT SOMMER**

Workers' Compensation Administrative Law Judge