

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

AM KANG, *Applicant*

vs.

**RADIATOR USA;
ILLINOIS MIDWEST INSURANCE AGENCY on behalf of STAR
INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ7750590
Oxnard District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, we will deny reconsideration.

Further, the Appeals Board has broad equitable powers with respect to matters within its jurisdiction. (*Truck Ins. Exchange v. Workers' Comp. Appeals Bd.* (2016) 2 Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685]; *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [59 Cal.Comp.Cases 96], citing *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (1978) 83 Cal.App.3d 413, 418 [43 Cal.Comp.Cases 785].) Thus, equitable doctrines are applicable in workers' compensation litigation. (*Truck Ins. Exchange v. Workers' Comp. Appeals Bd., supra*, 2 Cal.App.5th at p. 401, citing *State Farm General Ins. Co. v. Workers' Comp. Appeals Bd.* (2013) 218 Cal.App.4th 258, 268 [78 Cal.Comp.Cases 758].)

The Appeals Board can consider the equitable remedies regarding fees due to those who provide services in workers' compensation cases. (See *Eduardo Alberdin v. State Compensation Ins. Fund* (2009) 2009 Cal.Wrk.Comp. P.D. LEXIS 477, *18 [returning case to WCJ to weigh public policy considerations underlying fictitious name requirement against equitable

consequences of ordering forfeiture of fees for services to enrichment of defendants who received benefit of services].)

In this matter, defendant previously sought a writ of review after the Workers' Compensation Appeals Board denied reconsideration of the decision of the WCJ finding industrial causation of a psychiatric injury and sleep disorder. The Court of Appeal annulled the WCJ's earlier decision and remanded the matter for further development of the record, necessitating the costs incurred by the lien claimant at issue here. (*Radiator United States v. Workers' Comp. Appeals Bd.* (2015) 80 Cal. Comp. Cases 79, 80.) Therefore, in addition to the reasons stated in the Report, we observe that the payment to lien claimant is also permissible pursuant to our equitable powers.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 8, 2024

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

**CALIFORNIA IMAGING
CERTIFIED INTERPRETERS
SABOURI LAW GROUP**

JMR/ara

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

Defendant, STAR INSURANCE COMPANY c/o ILLINOIS MIDWEST, by and through their attorneys of record, has filed a timely Petition for Reconsideration challenging the Findings and Order of 17 October 2023. In it, Petitioner argues that the undersigned erred in finding in favor of one of the lien claimants in the case: SAN DIEGO IMAGING, INC dba CALIFORNIA IMAGING SOLUTIONS. Defendant does not challenge the denial of the lien of CERTIFIED INTERPRETERS OF CALIFORNIA. Specifically, they state that the undersigned failed to address defendant's argument that discovery was closed when lien claimant performed its medical – legal services.

To date, no answer to the Petition has been received. However, lien claimant filed a very detailed trial brief on or about 11 May 2020 that should be of interest to the Appeals Board. Defendant also filed a trial brief in 2020.

It is recommended that reconsideration be denied.

**II
FACTS**

APPLICANT, AM KANG, aged 66 on the date of injury, while employed as a driver at Los Angeles, California by RADIATOR USA, sustained injury arising out of and in the course of employment on 24 December 2010 to his back and psyche and claims to have sustained injury arising out of and in the course of employment to his right lower extremity, neck, and sleep.

This case has a long history. The application was filed on 11 April 2011 and an Amended Application filed on 05 June 2012. On 13 June 2012 Defendant filed an Answer to the Amended Application contesting injury with a comment that states that the injury to the psyche is denied. Also at issue are liability for self-procured medical treatment, future medical treatment, medical-legal costs periods of disability, SJDB and permanent disability. At this point a contested claim began.

Defendant is correct to say that discovery originally closed by operation of law at the close of discovery on 15 July 2013 and that the case went to trial in front of Judge Horelly, then of the Los Angeles Board on 26 September 2013. It is also true that Judge Horelly issued a decision on 26 December 2013 as noted in Defendant's Petition for Reconsideration. Additionally, lien claimant's services consisted the subpoenas of records which occurred on or about 27 November 2013 and 03 December 2013 which would be between the date of the MSC and the date Judge Horelly issued her decision.

At this point in the timeline, Defendant filed a petition for Reconsideration dated 14 January 2014 arguing that insufficient evidence existed to support a finding of a psychological or sleep injury. The Appeals Board denied reconsideration in an opinion dated 17 March 2014. Defendant then filed a Petition for Writ of Review which does not appear in the Board file. However, on 22 July 2014, the Second District Court of Appeal issued a Writ of Review ordering the filing of the record and setting the matter for Oral Argument to be heard on 24 November 2014.

At this point, Dr. Nogales, one of the lien claimants, filed a Declaration of Readiness to Proceed (DOR) which resulted in the setting of a lien conference.

On 12 December 2014, defendant filed a letter-petition requesting that the lien conference of 27 January 2015 be taken off-calendar due to the fact that the case-in-chief was still pending. The matter was then actually taken off-calendar on 27 January 2015.

Then, on 18 February 2015, the Court of Appeal issued a decision that annulled the decision of the Appeals Board and remanded for further development of the record on the issue of psyche and sleep. In the Court of Appeal decision, the Court notes that, "Dr. Nogales explicitly noted that she did not receive "medical or employment records for review." The Court of Appeal also noted that Dr. Nogales deferred the issues of apportionment until she could "review the previous medical, psychiatric and employment records." The Court of Appeal then ordered the Board to develop the record.

On 03 April 2015, defendant filed a trial brief arguing that discovery should not reopen and that the trial judge should instead appoint a regular physician under the Tyler case. See Tyler vs. WCAB (1997) 56 Cal.App. 4th 389; 62 CCC 924. Judge Horelly addressed the trial brief in an Order dated 10 November 2015, ordering the development of the record by providing all medial and nonmedical records relevant to the issue of causation to Dr. Nogales. She indicated that she would not countermand the Court of Appeal, in this regard and that development of the record would follow the McDuffie case. See McDuffie vs. LACMTA (en banc, 2002) 67 CCC 138.

After development of the record, several conferences were held before the case was tried again, this time in front of Judge Watkins as Judge Horelly had transferred from the Los Angeles Board to the Stockton Board. This trial occurred on 18 July 2016 and resulted in a decision dated 08 September 2016 which found that Dr. Nogales' reports were not substantial evidence and inviting counsel to agree to an AME. On 18 November 2016 Judge Watkins issued an order appointing John Stahlberg, MD as a regular physician in the case to act as a court-appointed medical evaluator. The order further provided that the parties provide the entire medical file and agreed-upon non-medical documents.

Dr. Stahlberg issued a report on 18 April 2017 but noted that the parties failed to provide him with the medical documentation required in Judge Watkins' order.

The defendant then filed two DOR's in a row. Applicant objected to each one. After the first one on 22 March 2018 the conference judge took the matter off-calendar for further discovery. After the second DOR and Objection, the parties settled the case and an Order Approving Compromise

and Release issued on 21 February 2019 at which time discovery had remained open since the Court of Appeal ordered development of the record.

The lien claimant at issue here and one other lien claimant then took the matter to lien trial. The undersigned issued a Findings and Order against the other lien claimant but in favor of this lien claimant, CALIFORNIA IMAGING. This lien claimant argued that the Explanations of Review issued by defendant in this case, Exhibits M, N, O, P & Q were deficient and did not object based on any factual issue at issue in this case.

The undersigned found in favor of CALIFORNIA IMAGING and defendant filed its Petition for Reconsideration.

III **DISCUSSION**

Defendant correctly noted that the undersigned failed to address the issue of the closure of discovery and that the lien claimant appears to have provided subpoena services during a time when discovery was closed. While the general rule is that subpoena services are prohibited after the closure of discovery, defendant's position in this lien trial is at odds with its position before the Court of Appeal and violates the spirits of the Remittitur Order issued by the Court of Appeal. This is because while the subpoena services were provided between the date of the MSC and the date of the first decision by Judge Horelly, discovery thereafter was reopened by the Court of Appeal at the behest of the defendant in challenging Judge Horelly's decision. The Court of Appeal issued a broad and firm order that Dr. Nogales was to be provided with all medical and non-medical exhibits. It follows that in order to comply with that order, the parties were required to provide many of the same records to Dr. Nogales.

Later, when Dr. Nogales' report was found to be insubstantial, two further orders issued by judges to compel the parties to provide the records to Dr. Stahlberg.

No party should be able to get something for free to the disadvantage of the service provider absent compelling circumstances. Here, in order to comply with the Remittitur Order obtained by defendant, the parties were obligated to provide these records to Dr. Nogales and later to Dr. Stahlberg. The fact that they proved useful later in the case excuses the fact that they were obtained during the comparatively brief period of time when discovery was closed.

Stated another way, if the subpoenas were not issued before the decision, the Remittitur Order would have impliedly required the parties to issue the subpoenas for records after the Remittitur Order re-opening discovery. Since the subpoenas proved to be an inevitability, the service provider should be paid.

Additionally, even if one concedes that these subpoenas were served when discovery were closed, no one ever challenged them on that basis until three years after the Order Approving C&R issued. There were Explanations of Review (EOR) issued but they were issued beyond the 60-day due date for EOR's and stating reasons having nothing to do with either the closure of discovery. See Exhibits M, N, O, P & Q.

Two of the items in the EOR's consisted of form objections having to do with medical and medical-legal reports with no explanation as to why these were included in an EOR to a copy service. One objection stated that the subpoenas were not served directly on Illinois Midwest yet the letterhead on which the objection appeared was on its letterhead with no explanation as to how they got the subpoenas. Another objection states that "the records copied are not relevant to the issues in the case." However, there was no explanation as to how these documents were not relevant. To the contrary, the subpoenas themselves provide the explanation and their utility later proved vital to the parties.

In sum, either because the records later proved useful and were ordered to be provided to Dr. Nogales by the Court of Appeal, or because the defendant's EOR's were deficient, the services provided by CALIFORNIA IMAGING should be paid.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

ROGER A. TOLMAN, JR.
Workers' Compensation Judge