WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ASAEL FUENTES, *Applicant*

vs.

ROAD DOG DRIVERS; TOWER INSURANCE COMPANY, in liquidation and administered by CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, *Defendants*

Adjudication Number: ADJ8760735
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case.[1] We now issue our Opinion and Decision After Reconsideration.

Lien claimant seeks reconsideration of the June 16, 2021 Findings and Order re Lien of Preferred Scan issued by the workers' compensation administrative law judge (WCJ) wherein the WCJ ordered that lien claimant take nothing further on its lien and that interest and penalties are denied.

We did not receive an answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration recommending that we deny the petition.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed in the Report and the Opinion on Decision, both of which we adopt and incorporate, and for the reasons discussed below, we will affirm the June 16, 2021 Findings and Order re Lien of Preferred Scan.

Lien claimant raises a request for judicial notice and adverse inference for the first time in the Petition for Reconsideration. An issue that is not raised at the first opportunity at which it may properly be raised is waived. (Lab. Code, § 5502(e)(3), see also *Gould v. Workers' Comp. Appeals*

[1] Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist was appointed in her place.

Bd. (1992) 4 Cal.App.4th 1059 [57 Cal.Comp.Cases 157], *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260 [54 Cal.Comp.Cases 145].)

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the June 16, 2021 Findings and Order re Lien of Preferred Scan is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 19, 2024

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

ASAEL FUENTES
PREFERRED SCAN
CIGA LITIGATION

PAG/abs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Lien Claimant, PREFERRED SCAN, by and through its attorneys of record, has filed a timely Petition for Reconsideration challenging the Findings and Order of 16 June 2021. In it, PREFERRED SCAN argues that the undersigned failed to follow their Market Rate Analysis (Exhibit 5,) failed to establish 01 January 2017 as the date of liquidation, failed to assess penalties and interest (presumably from 01 January 2017) and failed to award costs and assess sanctions against the California Insurance Guarantee Association (CIGA.)

To date, no Answer to the Petition from CIGA has been received.

It is recommended that reconsideration be denied.

II FACTS

Applicant, while employed by ROAD DOG DRIVERS, insured by TOWER SELECT INSURANCE COMPANY (TOWER SELECT,) sustained injury arising out of and in the course of employment on 27 November 2012. The applicant's case-in-chief resolved by way of Compromise and Release approved on 19 January 2016 and based on the AME reports of Dr. Fleming dated 15 and 29 July 2014.

Lien claimant PREFERRED SCAN provided subpoena services for applicant's attorney who requested documents in order forms dated February 2012 and March 2013. (See Exhibit 1.) The subpoenas went out on 28 February 2013; 01 March 2013, 04 March 2013 and 02 April 2013. (See Exhibit 2.) As a result, PREFERRED SCAN sent bills to TOWER SELECT at a P.O. Box in Concord, California on 08 July 2013, 25 April 2013, 15 March 2013, 26 March 2013, 25 March 2013, 12 March 2013, 11 April 2013, 25 April 2013 and 30 December 2014. (See Exhibit 3.)

The record also contains a "Fee breakdown" (Exhibit 4,) a "Market Rate Analysis," (Exhibit 5) and a calculation of penalties and interest. The fee breakdown appears to be a definition page while the "Market Rate Analysis" appears to be a list of settlement totals, organized by party and listing the percentage recovered from the amount billed. However, there is no breakdown of the items billed that might permit direct comparison with the bill at issue in this case.

Missing from this record is any data on when CIGA took over the case (presumably the date of liquidation) or when CIGA became aware that PREFERRED SCAN was still asserting its bill or when (or if) CIGA issued a proper Explanation of Review. Neither side provided enough information for the judge to discern these dates, either by way of documentary evidence or request for judicial notice.

At the lien conference, the parties prepared Stipulations and Issues. In the Stipulations and Issues CIGA's attorney very clearly noted that one of the key issues is the extent to which CIGA is insulated from liability for penalties and interest for delays caused by the insolvent insurance carrier. The CIGA attorney cited Insurance Code section 1063.1(c) (8) to support this point. The parties then set the case for trial which included a minutes of hearing that ordered both sides to upload their exhibits into EAMS. Importantly, the representatives for PREFERRED SCAN and CIGA were the same two individuals as appeared at trial.

When the undersigned called the calendar at 8:30 on the day of trial, PREFERRED SCAN was present but CIGA was not. I ordered the representative for PREFERRED SCAN to call CIGA and get someone to return to the phone hearing at a certain time.

When the attorney for CIGA did appear, he at first claimed that there was no notice of the order to upload the exhibits, until it was pointed out that he was the attorney at the lien conference. He then asked for leave to upload the exhibits on the day of trial. I told him that he could attempt to do so but that it was unlikely that the documents e-filed on the day of trial would make it to the file in time for trial. Ultimately, he did not attempt to e-file these documents, although at a later date, the undersigned found out from the PJ's secretary that he had attempted to email some documents to the court via the Oxnard general email address. As these were not properly filed exhibits, the undersigned did not consider them.

Also at trial, the undersigned asked the representative for PREFERRED SCAN whether she had researched Insurance Code section 1063.1. She admitted that she had not.

The undersigned issued a decision against lien claimant based on its failure to sustain the Burden of Proof under Labor Code section 3202.5 on 16 June 2021. The undersigned decided not to award costs or assess sanctions against either side. This Petition for Reconsideration followed.

III DISCUSSION

PREFERRED SCAN argues that the undersigned failed to follow their Market Rate Analysis (Exhibit 5,) failed to establish 01 January 2017 as the date of liquidation, failed to assess penalties and interest (presumably from 01 January 2017) and failed to award costs and assess sanctions against the California Insurance Guarantee Association (CIGA.) Each of these points will be addressed.

First of all, the undersigned did consider the Market Rate Analysis provided by the lien claimant. However, the Market Rate Analysis was unhelpful in determining the market rate for the services provided. Looking at Exhibit 5, one sees a detailed tabulation of the percentage recovery for various liens filed by PREFERRED SCAN in other cases. The percentage appears to be computed as a function of the amount claimed divided by the amount recovered for the whole bill in each claim.

This analysis provides for the percentage recovery but not the market rate. The market rate must establish the rate for each comparable item billed. Without some explanation of what was recovered for the items billed, it would be impossible to compare these other bills in these other

cases with the bills in this case. Copies of the other bills were not provided so the undersigned could not even estimate what was paid and what was not and why for each of the cases listed in Exhibit 5. There being insufficient evidence of the true market rate, the undersigned found that lien claimant had failed to establish it.

PREFERRED SCAN then argues that the date of liquidation should be deemed 01 January 2021. This is based on an entry in the Stipulations and Issues that the liquidation date was in "2017." However, a court cannot simply choose the first day of the year to assign as a liquidation date. Be that as it may, no liquidation date has been established by either party in this case.

In its Petition PREFERRED SCAN belatedly asks the Appeals Board to take judicial notice of the liquidation date in the second of two internet links that they provide in their Petition. They argue that the undersigned should have taken judicial notice under Evidence Code section 452 (d) which provides for judicial notice of orders of courts of record of this State or other states. However, PREFERRED SCAN neglects to mention Evidence Code section 453 which requires the party invoking judicial notice to give each adverse party notice of the request and "to furnish the Court with sufficient information to enable it to take judicial notice of the matter." This could have simply been done by providing the undersigned with a copy of the liquidation order by uploading it into EAMS. They did not. In fact, up until the end of trial, PREFERRED SCAN appeared to be arguing that they were entitled to all the interest and penalties for the entire period of delay, not only CIGA's delay (if any) but that of its insolvent carrier TOWER SELECT. They did not appear to understand Insurance Code section 1063.1 and CIGA's role until the filing of the Petition for Reconsideration. By failing to provide the Court this information, they have failed to sustain the burden of proof under Labor Code section 3202.

Lastly, PREFERRED SCAN argues that they are entitled to costs and that sanctions should be assessed due to CIGA's failure to have any exhibits on the day of trial to support CIGA's position. They cite the Tito Torres vs. AJC Sandblasting (en banc, 2012) 77 CCC 1113 to support sanctions and costs against their opponent. However, citation of Tito Torres comes with it a measure of irony. In Tito Torres, the lien claimant in that case was sanctioned for submitting a case for decision knowing full well that they had no factual support for their position. Here, both sides arguably violated the Tito Torres doctrine: Defendant failed to upload exhibits so that they had no factual basis for most of their defenses and lien claimant chose to ignore Insurance Code section 1063.1 and failed to provide the liquidation date. No, if anything, the Tito Torres case could be used to establish that the lien claimant herein failed to address the law on the subject despite having been provided citations to that law at the lien conference in the stipulations and issues.

However, the undersigned denied sanctions and costs to both sides. The undersigned did so, not in an act of being magnanimous, but in recognizing that sanctioning both sides would do little to instill a sense of objectivity in these two people. It may also help teach them the importance of being both organized and to prepare for trial. By pointing out the facts and giving a stern warning, the undersigned allows the parties to learn from these mistakes. However, if they do not learn, then sanctions may be appropriate in future cases when it becomes evident that this behavior is part of a pattern or practice. Mistakes happen. But a pattern or practice of mistakes would be sanctionable.

IV RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

ROGER A. TOLMAN, JR.
Workers' Compensation Judge

July 22, 2021

OPINION ON DECISION

Admissibility of Evidence:

On the day of trial, it appeared that the trial in this case came as a surprise to the defense attorney. Despite the fact he appeared at the lien conference in this case, he was late for trial and seemed unaware that the case was set for hearing that morning. As a trial judge, the undersigned knows that these things happen.

However, it is also evident that none of the pre-trial preparation and filing of exhibits occurred between the date of the lien conference and the date of the lien trial. CIGA's attorney did not follow up by filing the evidentiary documents on the day of trial nor in the days after up to the date of this decision. He did attempt to email one exhibit to the Court at the general email address for the Oxnard Board. However, he did not follow this up with a filing with the Court by e-filing in EAMS or even by filing with the Court by U.S. Mail. Thus, the undersigned may not consider that piece of evidence.

Thus, the undersigned only has Joint Exhibit X which only refers to the document in question. However, the undersigned cannot speculate as to the actual content of the document referenced in Joint Exhibit X because it is not admitted into evidence.

In sum, the undersigned cannot consider the document referred to in Joint Exhibit X because no one offered it into evidence. The undersigned may only consider those documents admitted at trial.

Limited Liability of CIGA:

Based on the clear wording of Insurance Code § 1063.1(c)(8) CIGA is not responsible for interest and penalties that accrue against a liquidated carrier. CIGA is not an insurance carrier, nor are they a re-insurance carrier. They are the payor of last resort and are only responsible for what is provided in Insurance Code § 1063.1. They exist to pay benefits to insureds and beneficiaries who are left in the lurch when an insurance company has gone out of business. That said, CIGA is responsible for its own actions and must pay penalties and interest attributable to their own delay.

It would seem that lien claimant PREFERRED SCAN never understood that legal limitation. Furthermore, the Minutes of Hearing and the Pretrial Conference Statement provided ample citations to authority to allow PREFERRED SCAN to research this issue. They did not. As a result, PREFERRED SCAN offered Exhibit 6 into evidence which attempts to set forth the computations for penalties and interest but these calculations assume that CIGA is responsible for delays that predate their administration of the claim.

Furthermore, neither side has provided the date of liquidation, that is to say, the date CIGA began administration of this claim to the judge in the form of probative evidence. Nor has either side provided the Court with evidence as to when PREFERRED SCAN made clear to CIGA that a dispute remained.

Thus, if penalties and interest were due, it would not be possible to say what that amount might be as the key dates were left out of the evidentiary record in this case.

The question then becomes whether to employ the burden of proof rules of Labor Code § 3202.5 or to develop the record under McDuffie vs. MTA (en banc, 2002) 67 CCC 138.

Here, it would appear to be a clear case where the burden of proof should apply. Lien claimant failed to conduct the proper research into the legal underpinnings of their case. Since their own failure to provide the appropriate evidence caused this problem, they should not now benefit from development of the record. The fact that CIGA also failed to introduce evidence does not excuse this. Therefore, absent a showing of good cause, the undersigned is disinclined to expand the McDuffie doctrine outside its medical – legal context for a case such as this.

It is found that insufficient evidence exists to establish penalties and interest against CIGA. One may argue that development of the record is appropriate. However, this may be a moot point in light of the Market Rate Analysis discussed below. If the Market rate analysis fails to justify an increased fee and the defunct carrier paid what it thought was reasonable then any delay in payment would have been the fault of the defunct carrier and not CIGA. As discussed above, CIGA is not responsible for the penalties assessed against the defunct carrier.

Market Rate Analysis:

Lien claimant, PREFERRED SCAN, submits a market rate analysis to support its claim for a higher fee. This, in and of itself, is proper as the copying services in question date from 2012 and 2013 so that the fee schedule in 8 CCR Rules 9980 et seq. do not apply. However, the Market Rate Analysis was not persuasive.

Looking at the document, it only relates the totals for each invoice for the cases identified in the analysis, it does not identify the individual items in each invoice so as to allow the judge to compare the invoices in the Market Rate Analysis with the invoices in this case. Only the totals of each invoice and the settlement amount are given along with the percentage amount recovered on each invoice. Without this ability to compare the items on the invoice, the judge can't see whether the invoices were similar to this one or what was charged for each item. Thus, the judge could not determine what the market rate was for the services rendered.

Sanctions & Costs:

Both parties seek costs and sanctions against the other.

The defense seeks costs and sanctions due to the fact that they would have no liability for the interest and penalties accrued by the prior carrier under Insurance Code section 1063.1. However, this does not excuse delay that may have been caused by CIGA itself and lien claimant's lack of understanding of this distinction may have contributed to its failure to prove any delay by CIGA. If lien claimant had understood the law on the subject, they may have been able to show such a delay or, if no such delay existed, they may have been able to withdraw their claim. In any event, this record is deficient on that point. What is clear is that to sanction PREFERRED SCAN for this

may have a chilling effect on litigation of complex issues. On the other hand, sanctioning them for failure to prepare would encourage PREFERRED SCAN to research the arguments of their opponents before offering their exhibits into evidence.

Similarly, PREFERRED SCAN seeks sanctions against CIGA. Here the judge saw reasons for costs and sanctions in open court both on the telephonic conference line and in the Lifesize video conference line. Defense counsel arrived late and only appeared after the undersigned ordered the representative for PREFERRED SCAN to call CIGA and get them to appear. Also, CIGA had failed to upload its exhibits into EAMS FileNet so that there were no exhibits to support their position. There were other problems involving misplaced blame but these two points are enough.

In sum, there is support for sanctions against both sides in this case. In light of that fact, the undersigned is disinclined to order either sanctions or costs against either party in this case and to leave them where I find them. However, both sides are warned that preparation is required before trying a case before a judge in a court, even an administrative law court. Failure to do so in the future may subject either side, or their representatives, to sanctions and costs.

ROGER A. TOLMAN, JR.
Workers' Compensation Judge

June 16, 2021