

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

BRIGIDA SANTANA, *Applicant*

vs.

**BARON HR WEST/GRAPHIC INK
CORP./TRION SOLUTIONS;
STATE COMPENSATION INSURANCE FUND;
UNITED WISCONSIN INSURANCE COMPANY
administered by NEXT LEVEL ADMINISTRATORS, *Defendants***

**Adjudication Numbers: ADJ11626536, ADJ11626537
Santa Ana 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. Pursuant to our authority, we accept defendant's supplemental pleading. (Cal. Code Regs., tit. 8, § 10964.) 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.

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/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 2, 2024

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

**PSYCHOLOGICAL ASSESSMENT
PROFESSIONAL TRANSLATION SERVICES
DJG LAW GROUP**

PAG/abs

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

**REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

Background:

Psychological Assessment Services sought payment for treatment and medical-legal services provided to Applicant, Brigida Santana, by Dr. Nelson Flores, but was rebuffed by Defendant, United Wisconsin Insurance Company. Unable to resolve their dispute, the parties sought trial after which it was determined, *inter alia*, that Applicant did sustain a work-related psychiatric injury, that the services performed by Dr. Flores were reasonable and necessary, and that payment was warranted. Disagreeing with the award in favor of Psychological Assessment Services, Defendant timely filed a verified petition for reconsideration that should be denied because the issue raised in the petition was not raised at trial.

Facts:

Applicant alleged injury of a psychiatric nature due to mistreatment, ongoing harassment, perceived sexual assault and threats by her supervisor.¹ The employer did not admit liability for this claim. In November 2019, Applicant commenced treatment on a self-procured basis with Dr. Nelson Flores at Psychological Assessment Services [Ex 11; Ex 5]. He diagnosed a major depressive disorder, anxiety disorder, and insomnia [Ex 5, P3]. He referred Applicant for pain management, and commenced group psychotherapy [Ex 5, P3]. His evaluations and treatment underlie the lien from Psychological Assessment.

As Applicant's elected treating physician [Ex 11] Dr. Flores also prepared a Comprehensive Medical-Legal Evaluation Report dated 11/20/19 [Ex 4]. In it, he noted the circumstances giving rise to Applicant's claim [Ex 4, P3-6], including unwanted touching by her supervisor, threats of severe bodily harm, and the obtaining of a restraining order by Applicant for protection [Ex 4, P6]. He opined that the events at work were a predominant cause of her psychiatric condition and treatment was required [Ex 4, P10]. Treatment ensued until June 2021 [Ex 2, P2-8; Ex 10] after which a final medical-legal report was issued indicating his opinion that 80% of the cause of Applicant's condition and disability was the result of work stress and harassment, as well as threats of physical harm and death from her supervisor [Ex 3, P27]. He also discussed periods of temporary disability, impairment, apportionment and need for further treatment [Ex 3, P28-30].

Psychological Assessment filed its lien for treatment expense of \$30,065.80 in October 2021 [EAMS Doc ID 38613608]. Subsequent to settlement of Applicant's case in July 2022² a number of Lien Conferences were held without success in resolving Psychological Assessment' lien. The issue of Psychiatric Assessment's lien for treatment and medical-legal expense³ proceeded to trial on 9/12/23.

¹ See Application for Adjudication in case number ADJ11626536 [EAMS Doc ID 68462578].

² See Order Approving Compromise 7 Release 7/15/22 [EAMS Doc ID7571697]

³ There were other disputed liens, not pertinent to the current discussion.

At trial Defendant asserted that “*Injury arising out of and in the course of employment*” was at issue [MOH P3, L1] and therefore it questioned liability for self-procured treatment from Psychiatric Assessment [MOH P3, L4]. Additionally, Defendant raised a statute of limitations defense as well as applicability of Labor Code sections 3208.1 and 3208.3 [MOH P3, L9-10]. It also asserted that the necessity and reasonableness of the doctor’s services was at issue [MOH P3, L11].

After trial a decision issued that Applicant did sustain a psychiatric injury [See Opinion, Part 2, P12-13], that the treatment she received from Dr. Flores was reasonable and necessary [Opinion Part 6, P17-18] and that the medical-legal services were appropriate [Opinion, section 8, P19-21].

Accordingly, the following pertinent Findings of Fact under ADJ11626536 were made:

Brigida Santana, born 10/7/1977, sustained Psychiatric Injury while employed from 9/21/2017 through 9/23/2018 by Trion Solutions/Baron HR. [Finding #1]

Applicant received necessary and reasonable treatment by Dr. Nelson Flores of Psychological Assessment Services to cure or relieve from the effects of her injury. [Finding #7]

Dr. Nelson Flores of Psychological Assessment Services performed actual and necessary medical-legal reporting on behalf of Applicant for the purpose of proving her injury claim.[Finding #8]

Lien Claimant, Psychological Assessment Services, is entitled to payment for treatment services pursuant to the Official Medical Fee Schedule. [Finding #10]

Lien Claimant, Psychological Assessment Services, is entitled to payment for medical-legal services pursuant to the ML Fee Schedule. [Finding #11]

An award issued in favor of Psychological Assessment Services for payment pursuant to the appropriate fee schedules as well as for penalty and interest with respect to the unpaid med-legal costs.

In its petition for reconsideration, Defendant does not challenge any of the findings with respect to injury, or the necessity for treatment, or the med-legal services, or the penalty. The challenge is only about entitlement to payment because of alleged non-compliance with Labor Code sections 4903.05 and 4903.8. The reasons asserted are that the declaration required (and filed) under Labor Code section 4903.8(d) was fraudulent because it referred to billing attached to the lien where the billing total did not match the lien amount and that consequently due to that discrepancy the lien was filed improperly and is invalid so it should not have been addressed in the first place.

Discussion:

Defendant’s petition⁴ relies entirely and solely on its interpretation of the applicability of Labor Code sections 4903.05 and 4903.8 and its assertion that Lien Claimant was non-compliant with those sections.

However, these contentions as asserted in Defendant’s petition for reconsideration were not raised as issues to be addressed during the trial. In furtherance of judicial economy, an issue not raised at trial is considered waived. *Ingram Micro v WCAB* (Ordonez), 64 CCC 100 (1998).

Moreover, failure to raise an issue at trial forecloses the right to raise that issue on Reconsideration. *City of Anaheim v. Workers' Comp. Appeals Bd. (Evans)* (2005) 70 CCC 237, 238; *Los Angeles Unified School District v. Workers' Comp. Appeals Bd. (Henry)* (2001) 66 CCC 1220; *Davis v. Interim Healthcare*, 65 CCC 1039 (2000), *Cottrell v WCAB*, 63 CCC 760, 761 (1998), *California Compensation Ins Co v WCAB* (Gale), 62 CCC 961 (1997). This principle of not raising new issues on appeal is not unique to workers’ compensation matters [See for example *Lucich v City of Oakland*, 58 CCC 618 (1993)].

At no time did Labor Code sections 4903.05 and 4903.8 or the argument now asserted about them pop up as a source of dispute at the inception of, framing issues for, or during the trial proceedings.

While there was disagreement over paying for the medical services—for various reasons as set out under “issues” in the minutes of Hearing—Defendant’s representative never articulated its assertion of Lien Claimant’s non-compliance with sections 4903.05 and 4903.8 during the framing of issues for trial. Hence, Lien Claimant would not have any reason to address that issue; nor would the Court. To allow un-litigated issues to be raised and addressed for the first time on appeal deprives the opposing party of due process [See *Diaz v Pacific Coast Framers*, 2023 Cal. Wrk. Comp. P.D. LEXIS 211].

Accordingly, failure to raise an issue at trial requires denial of a petition for reconsideration that rests solely on that issue.

Recommendation:

Respectfully, Defendant’s petition for reconsideration should be denied.

DATE: 11/14/2023

Marco Famiglietti
WORKERS’ COMPENSATION JUDGE

⁴ The petition does not address any parties, issues, or findings in case ADJ1626537.