

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

LASZLO PROGLI, *Applicant*

vs.

**SOLAIRE ENERGY SYSTEMS;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ10444411
San Bernardino District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board previously granted reconsideration to further study the factual and legal issues in this case. This is our Decision After Reconsideration.

Lien claimant West Star Physical Therapy (“West Star”), through its representative MJR Management Services, seeks reconsideration of the June 17, 2019 Findings and Orders (F&O) wherein the workers’ compensation administrative law judge (WCJ) found that West Star did not timely file its lien within the deadline; West Star did not meet its burden of proof; defendant was not liable for the treatment provided by West Star; and West Star was liable for attorney’s fees, costs, and sanctions.

West Star contends that it timely filed the lien; that the WCJ did not verify if defendant was part of a valid Medical Provider Network (MPN); and that it was denied the opportunity to provide evidence to address the other issues.

Defendant State Compensation Insurance Fund (SCIF) filed an Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on our review of the record, and for the reasons stated in the WCJ’s report, we will rescind the June 17, 2019 F&O and substitute a new F&O to find that West Star’s lien is barred by the statute of limitations and that West Star is not liable to pay attorney’s fees, costs, or sanctions.

FACTS

Applicant claimed that, while employed by defendant as a laborer, he sustained an industrial injury to his back. He claimed cumulative trauma due to continuous and repetitive driving on uneven ground. Applicant's case was resolved by way of Compromise and Release (C&R), and an order approving (OACR) issued on December 19, 2016. Applicant was awarded \$5,900.00. According to the OACR, there were no liens of record at the time and defendant was responsible to pay, adjust, or litigate any liens.

Applicant received treatment from West Star from August 5 to October 12, 2016. (Ex. 1, Itemized Bill and Lien, pp. 1-2.) He was discharged from physical therapy treatment on November 7, 2016, due to noncompliance; he did not receive any treatment on that day. (Ex. 6, Discharge Report, p. 1.)

On May 3, 2018, West Star filed a Notice and Request for Allowance of Lien (Lien) for a total lien amount of \$3,321.00. On December 21, 2018, West Star filed a Declaration of Readiness (DOR) and requested that the WCJ set a lien conference.

At the lien trial on April 2, 2019, there was no testimony and the WCJ admitted exhibits into evidence from both West Star and SCIF. (4/2/19 Minutes of Hearing/Statement of Evidence (MOH/SOE), pp. 1-5.) The parties admitted the following facts: 1) applicant, while employed during the period January 27, 2016, through May 10, 2016, as a laborer in Anaheim, California, by Solaire Energy Systems, Inc., claims to have sustained injury arising out of and in the course of employment to his back; 2) at the time of the alleged injury, the employer was insured for workers' compensation by SCIF; 3) the employer has furnished no medical treatment and the treating physician is disputed; and 4) the case settled by way of C&R for \$5,900.00 on December 19, 2016. (MOH/SOE, p. 2.)

There were 12 issues for trial including the statute of limitations for the lien (issue 7) and sanctions, fees, and costs against West Star (issue 12). (MOH/SOE, pp. 2-3.) Specifically, issue 7 was "Defendant asserts the statute of limitations as a bar to the lien" and issue 12 was "Sanctions, fees and costs for Lien Claimant having insufficient evidence to sustain its burden of proof. Lien Claimant is offering no medical evidence at all in support of its lien and did not bring the applicant to testify on the AOE/COE issue." (MOH/SOE, pp. 2-3.)

On April 5, 2019, defendant filed a Petition for Costs, requesting that West Star pay \$3,600.00 for costs incurred in preparing for the lien trial. On May 13, 2019, West Star filed an Objection to Defendant's Petition for Costs and Sanctions.

In the June 17, 2019 F&O, the Findings of Fact were as follows: 1) Lien claimant, West Star Physical Therapy, did not timely file their lien within 18 months of last providing treatment to the applicant, so the lien is barred by the Statute of Limitation; 2) Even if the statute of limitations did not bar the lien, lien claimant, West Star Physical Therapy, did not meet their burden of proof in regard to the issues of injury AOE/COE; medical necessity; or medical control prior to denial of injury; 3) Defendant is not liable for the treatment provided by West Star; 4) Lien claimant West Star is liable for defense fees and costs in the amount of \$2,700.00; 5) Lien claimant, West Star, is liable to pay sanctions in the amount of \$1,000.00 to the WCAB, as set forth below; and 6) All other issues are moot. (F&O, p. 1.)

The WCJ ordered the following: West Star take nothing by reason of its lien filed on May 3, 2018, that West Star pay reasonable attorney's fees and costs, in the amount of \$2,700.00 to defendant, and that West Star pay sanctions in the amount of \$1,000.00. (F&O, pp. 1-2.)

DISCUSSION

I. Statute of Limitations for Lien Claim

The initial issue in this case is whether West Star filed its lien claim within the statute of limitations for lien claims. The Appeals Board may determine, and allow as liens against any sum to be paid as compensation, including the reasonable expense incurred by or on behalf of the injured employee for certain medical or medical-legal expenses. (Lab. Code, § 4903(b).)¹ A lien claim for expenses as provided in section 4903(b) shall not be filed more than 18 months after the date the services were provided, if the services were provided on or after July 1, 2013. (Lab Code, § 4903.5(a).)

In West Star's discharge report, it stated that applicant received 10 sessions of treatment from August 5, to October 12, 2016. (Ex. 6, p. 1.) West Star filed its lien for \$3,321.00 on May 3, 2018, which was more than 18 months after the last date of treatment of October 12, 2016. The filing of the one sentence discharge report on November 7, 2016, without applicant being present,

¹ All further statutory references are to the Labor Code unless otherwise noted.

and without any treatment provided, is not a “service” pursuant to section 4903.5. The last date that services were provided was October 12, 2016. (Ex. 6, p. 1.) Therefore, West Star did not file its lien claim within the 18 month statute of limitations and the lien claim is dismissed.

As the lien claim is dismissed due to the statute of limitations, we do not need to address the issues of West Star’s burden of proof in regard to the issues of injury AOE/COE; medical necessity; or medical control prior to denial of injury.

II. Attorney’s Fees, Costs, and Sanctions

Next, we address the issue of attorney’s fees, costs, and sanctions against West Star. Section 5813 authorizes the WCJ to impose sanctions and costs for “bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.” (Lab. Code, § 5813(a).) The order of sanctions can be made “after written application by the party seeking sanctions or upon the appeal board’s own motion.” (Lab. Code, § 5813(b).) In order for the WCJ to impose sanctions and costs, the alleged offending party or attorney must be given notice and an opportunity to be heard. (Cal. Code Regs., tit. 8, former § 10561(a) now § 10421(a); see also Cal. Code Regs., tit. 8, § 10832(a)(3).)

Here, the record reveals that the WCJ imposed sanctions upon lien claimant and ordered lien claimant to pay attorney’s fees and costs without issuing a Notice of Intent. The WCJ listed sanctions, fees, and costs as one of the issues for trial as follows: “Sanctions, fees and costs for Lien Claimant having insufficient evidence to sustain its burden of proof. Lien Claimant is offering no medical evidence at all in support of its lien and did not bring the applicant to testify on the AOE/COE issue.” (MOH/SOE, p. 3.) However, the WCJ ultimately imposed sanctions because the West Star brought forth a frivolous claim “without evidence to support its burden of proof.” (Opinion on Decision (OOD), p. 4; Report, p. 9.) Defendant only filed a Petition for Costs, requesting attorney’s fees for preparing for the lien trial, and did not request sanctions. We therefore conclude that the WCJ imposed sanctions without appropriate notice and an opportunity to be heard and in violation of lien claimant’s right of due process. (Lab. Code, § 5813(b); Cal. Code Regs., tit. 8, §§ 10421(a), 10832(a)(3).)

Having determined that the WCJ imposed sanctions without providing adequate notice and an opportunity to be heard, we nevertheless address the merits of lien claimant’s argument that it proceeded to trial with reasonable justification.

Here, we note that while the WCJ correctly determined that lien claimant failed to timely file its lien claim, we are unpersuaded that lien claimant acted out of bad faith or used tactics that were frivolous or solely intended to cause unnecessary delay. (See Lab. Code, § 5813(a).) Bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay include actions or tactics that result from a willful failure to comply with a statutory or regulatory obligation, that result from a willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board, or that are done for an improper motive or are indisputably without merit. (Cal. Code Regs., tit. 8, § 10421(b).)

The WCJ imposed sanctions against West Star for bringing a frivolous claim without evidence to support its burden of proof. (OOD, p. 4; Report, p. 9.) However, West Star submitted, and the WCJ accepted into evidence, multiple exhibits from West Star. (MOH/SOE, pp. 3-4.) Losing on an issue is not in and of itself sanctionable. (See, e.g. *Hershewe v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 1198, 1206 ["sanctions cannot be awarded based on actions that are colorable and arguably correct, even if it is extremely unlikely that they will win"]; *Singerman v. Nike, Inc.* (2021) 2021 Cal.Wrk.Comp. P.D. LEXIS 81, *12 ["Failing her burden of proof at trial in and of itself is not a ground for sanctions".]) Further, we do not see any indication that West Star acted in bad faith or intended to cause unnecessary delay. Therefore, we rescind the order that West Star pay attorney's fees, costs, and sanctions.

Accordingly, we will rescind the June 17, 2019 F&O and substitute new findings and orders.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the June 17, 2019 Findings and Orders is **RESCINDED** and **SUBSTITUTED** as follows:

FINDINGS OF FACT

1. Lien claimant, West Star Physical Therapy, did not timely file their lien within 18 months of last providing treatment to the applicant, so the lien is barred by the Statute of Limitation.
2. Defendant is not liable for the treatment provided by West Star Physical Therapy.
3. Lien claimant, West Star Physical Therapy, is not liable for defense fees and costs in the amount of \$2,700.00.
4. Lien claimant, West Star Physical Therapy, is not liable to pay sanctions.
5. All other issues are moot.

ORDERS

IT IS ORDERED that lien claimant, West Star Physical Therapy, take nothing by reason of its lien filed herein on May 3, 2018.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 1, 2023

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

**WESTSTAR PHYSICAL THERAPY
MJR MANAGEMENT SERVICES, INC.
STATE COMPENSATION INSURANCE FUND**

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