WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EUNICE PARK, *Applicant*

vs.

COAST FEDERAL BANK; SEDGWICK care of CIGA for CALIFORNIA COMPENSATION INSURANCE 9 COMPANY in liquidation, *Defendants*

Adjudication Numbers: ADJ1797208 (VNO 0368743); ADJ2845584 (VNO 0368744)
Van Nuys District Office

OPINION AND ORDERS DENYING PETITIONS FOR RECONSIDERATION; DENYING PETITION FOR DISQUALIFICATION; AND DISMISSING PETITION FOR REMOVAL

Lien claimants David Silver, M.D., and David Bresler, Ph.D., jointly filed a Petition for Removal and Request for Immediate Stay (Petition for Removal) on June 7, 2021 regarding the workers' compensation administrative law judge (WCJ)'s May 27, 2021 order submitting these matters for decision. Dr. Bresler subsequently filed a Petition for Reconsideration on July 7, 2021 and Dr. Silver filed a Petition for Reconsideration and a Petition for Disqualification on July 8, 2021. We have considered the allegations of the Petition for Removal, the Petitions for Reconsideration, the Petition for Disqualification, and the contents of the WCJ's reports with respect thereto. Based on our review of the record, and because the WCJ issued a decision on June 17, 2021, rendering lien claimants' Petition for Removal moot, we will dismiss the Petition for Removal. For the reasons stated in the WCJ's July 20, 2021 report, which we adopt and incorporate, and for the reasons discussed below, we will deny both Petitions for Reconsideration and the Petition for Disqualification.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) Due

process requires that a party be provided with reasonable notice of the proceedings and an opportunity to be heard. (*Katzin v. Workers' Comp. Appeal, Bd*. (1992) 5 Cal.App.4th 703, 711–712 [57 Cal.Comp.Cases 230].) As stated by the WCJ in the report, lien claimants were given three continuances over the span of one year and four months for the sole purpose of properly filing their exhibits and failed to do so. Based on these circumstances, we are persuaded that more than reasonable notice and an opportunity to be heard was afforded to them and we agree with the WCJ that there is no violation of due process.

Turning to the Petition for Disqualification, we note that Labor Code section 5311 provides that a party may seek to disqualify a WCJ upon any one or more of the grounds specified in Code of Civil Procedure section 641. (Lab. Code, § 5311; see also Code Civ. Proc., § 641.) Among the grounds for disqualification under section 641 are that the WCJ has "formed or expressed an unqualified opinion or belief as to the merits of the action" (Code Civ. Proc., § 641(f)) or that the WCJ has demonstrated "[t]he existence of a state of mind … evincing enmity against or bias toward either party" (Code Civ. Proc., § 641(g)).

Under WCAB Rule 10960, proceedings to disqualify a WCJ "shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under penalty of perjury stating in detail facts establishing one or more of the grounds for disqualification … ." (Cal. Code Regs., tit. 8, former § 10452, now § 10960 (eff. Jan. 1, 2020), italics added.) It has long been recognized that "[t]he allegations in a statement charging bias and prejudice of a judge must set forth specifically the facts on which the charge is predicated," that "[a] statement containing nothing but conclusions and setting forth no facts constituting a ground for disqualification may be ignored," and that "[w]here no facts are set forth in the statement there is no issue of fact to be determined." (*Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 399, italics added.)

Furthermore, even if detailed and verified allegations of fact have been made, it is settled law that a WCJ is not subject to disqualification under section 641(f) if, prior to rendering a decision, the WCJ expresses an opinion regarding a legal or factual issue but the petitioner fails to show that this opinion is a fixed one that could not be changed upon the production of evidence and the presentation of arguments at or after further hearing. (*Taylor v. Industrial Acc. Com. (Thomas)* (1940) 38 Cal.App.2d 75, 79-80 [5 Cal.Comp.Cases 61].) Additionally, even if the WCJ expresses an unqualified opinion on the merits, the WCJ is not subject to disqualification under section 641(f) if that opinion is "based upon the evidence then before [the WCJ] and upon

the [WCJ's] conception of the law as applied to such evidence." (Id.; cf. *Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312 ["It is [a judge's] duty to consider and pass upon the evidence produced before him, and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing party."].)

Also, it is "well settled … that the expressions of opinion uttered by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice" under section 641(g) (*Kreling, supra*, 25 Cal.2d at pp. 310-311; accord: *Mackie, supra*, 154 Cal.App.2d at p. 400) and that "[e]rroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias or prejudice, especially when they are subject to review" (*McEwen v. Occidental Life Ins. Co*. (1916) 172 Cal. 6, 11; accord: *Mackie, supra*, 154 Cal.App.2d at p. 400.) Similarly, "when the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies" the judge under section 641(g). (*Kreling, supra*, 25 Cal.2d at p. 312; see also *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219 ["When making a ruling, a judge interprets the evidence, weighs credibility, and makes findings. In doing so, the judge necessarily makes and expresses determinations in favor of and against parties. How could it be otherwise? We will not hold that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias."].)

Under no circumstances may a party's unilateral and subjective perception of bias afford a basis for disqualification. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1034; *Robbins v. Sharp Healthcare* (2006) 71 Cal.Comp.Cases 1291, 1310-1311 (Significant Panel Decision).)

Finally, WCAB Rule 10960 provides that when the WCJ and "the grounds for disqualification" are known, a petition for disqualification "shall be filed not more than 10 days after service of notice of hearing or after grounds for disqualification are known."

Here, as discussed in the WCJ's report, the petition for disqualification does not set forth facts, declared under penalty of perjury, that are sufficient to establish disqualification pursuant to Labor Code section 5311, WCAB Rule 10960, and Code of Civil Procedure section 641(f) and/or (g). Moreover, the Petition for Disqualification was not filed within 10 days after the alleged

grounds for disqualification were known from the service of the May 27, 2021 Minutes of Hearing or the June 17, 2021 Findings and Order. Accordingly, the petition will be denied.

For the foregoing reasons,

IT IS ORDERED that the Petitions for Reconsideration and the Petition for Disqualification are **DENIED**.

IT IS FURTHER ORDERED that the Petition for Removal is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 3, 2021

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

LEGAL SERVICE BUREAU
CIPOLLA, CALABA, WOLLMAN & BHATTI
DAVID BRESLER
DAVID SILVER MD (2)

PAG/*pc*

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

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
FACTS

The lien trial commenced with the undersigned on January 15, 2020. During the lien trial on that date, Dan Escamilla represented both lien claimants David Silver, MD and David Bresler, PhD L.Ac. At trial, Mr. Escamilla attempted to offer into evidence a very large stack of exhibits consisting of several hundred pages that were not EAMS compliant. For example, there were no separator sheets between the exhibits.

Accordingly, the matter was continued to April 15, 2020, in order for the parties to prepare and provide the undersigned with exhibits that are EAMS compliant. (MOH, 1/15/2020, page 1, "Disposition").

The lien trial was rescheduled several times thereafter by the court, as the court was not hearing lien trials at the time due to the COVID 19 pandemic.

Eventually, the parties appeared for lien trial on October 15, 2020. At that time, the lien claimants had still not filed their exhibits. The lien representative indicated that they were EAMS filers. The lien claimants were ordered to file and serve their exhibits no later than 20 days before the next trial date on January 7, 2021. (See MOH 10/15/2020)

The lien claimants failed to appear at the lien trial on January 7, 2021, and the matter was continued. (See MOH 1/7/2021).

The parties appeared at the continued lien trial on March 18, 2021. At that time, the lien claimants' representative was advised that their exhibits were not properly filed in EAMS, as hundreds of pages of various documents were filed as two entries. Dr. Silvers' exhibits total 452 pages (EAMS Doc ID number 34167087, filed 10/15/2020), and Dr. Bresler's exhibits total 115 pages (EAMS Doc ID number 34167088, filed 10/15/2020).

The undersigned instructed the lien claimants to file each document as a separate exhibit. The undersigned confirmed with the lien representative that there are many brief PR-2 type of reports such as progress notes that are no more than 2-3 pages long. The undersigned advised that the lien representative that it would be permissible for them to file the brief PR-2 type of reports such as progress notes, in batches of up to five reports if they wished to do so, given the large number of the very brief reports being offered into evidence. However, the undersigned reiterated that all other medical reports and liens must be filed separately. The lien trial was continued and the lien claimants were ordered to

properly file their exhibits at least twenty days before the next trial date on May 27, 2021.

At the lien trial on May 27, 2021, the lien claimants had still not properly filed their exhibits. The lien trial proceeded on that date. At trial, the undersigned excluded the two large batches of exhibits that had previously been filed by the lien claimants on October 15, 2020, as the undersigned had previously given the lien claimants additional time to properly file their exhibits separately. (MOH, 5/27/2021 lines 1-4)

Thereafter, the lien claimants offered exhibits into evidence that were previously filed separately, and offered two of the exhibits that had been previously filed separately by the defendant. These exhibits were admitted into evidence. The trial was completed, and the matter was submitted.

Subsequently, the lien claimants filed a timely verified Petition for Removal and Request for Immediate Stay, dated June 4, 2021. The lien claimants asserted that it is the duty of the Board to develop the record and not exclude their medical records offered into evidence, that their due process rights have been violated, that their filing of the exhibits as a packet was appropriate, and that it was an abuse of discretion for the WCJ to deny their request for additional time to properly file their exhibits. The Petitioner also requested a stay pending the Board's decision on their Petition, so the WCJ would not be bound by the 90 day period to issue the decision.

The defendant filed an Answer to the Petition for Removal, dated June 14, 2021.

Subsequently, the undersigned issued Findings and Order dated June 17, 2021, ordering that the lien claimants take nothing further regarding their liens.

Thereafter, lien claimant Dr. Silver filed a timely separate verified Petition for Reconsideration and Petition for Disqualification of WCJ on Remand on July 8, 2021 asserting that: the evidence does not justify the Findings of Fact, that the Findings of Fact do not support the Order, and that by the Order, made and filed by the workers compensation judge, the appeals Board acted without or in excess of its powers.

Lien claimant Dr. Bresler filed a timely separate verified application for Reconsideration on July 8, 2021 asserting that: the evidence does not justify the Findings of Fact, that the Findings of Fact do not support the Order, and that by the Order, made and filed by the workers compensation judge, the appeals Board acted without or in excess of its powers.

At the time of the dictation of this Report, there was no response filed by the defendant.

II.
DISCUSSION

STATUTE OF LIMITATIONS/FILING FEES/LIEN ACTIVATION

As per Labor Code §4903.5, a lien claim shall not be filed after three years from the date the services were provided, nor more than 18 months after the date services were provided, if the services were provided on or after July 1, 2013. The undersigned disagrees with the Petitioner's assertion that the statute only applies for dates of services after July 1, 2013. As per the clear language of the statute, a lien claim shall not be filed after 3 years from the date services were provided, for services provided prior to July 1, 2013. The Petitioners failed to cite authority to the contrary.

As per Labor Code §4903.06 (a) (1), lien claimants were required to pay an activation fee before January 1, 2014.

David Bresler Ph.D, L.Ac

In the matter at hand, the last date the service were provided by lien claimant David Bresler Ph.D, L.Ac was May 28, 2002. David Bresler Ph.D, L.Ac offered into evidence their lien dated April 20, 2004, although the undersigned saw no evidence in EAMS that this lien was filed. (Lien Claimant David Bresler Ph.D L.Ac Exhibit 1).

As per EAMS, Dr. Bresler filed a lien regarding ADJ1797208 on January 19, 2005. However, the second lien was not admitted into evidence at trial. Notwithstanding, there is no substantial evidence that a lien activation fee was ever paid thereafter. Accordingly, these liens were previously dismissed by operation of law, with prejudice.

Petitioner Dr. Bresler appears to have improperly "cut and paste" alleged information to support their assertion that the $100 lien activation fee was paid regarding their August 7, 2015 lien. It is noted that the even the Petitioner's cut and paste information states that the lien is inactive. The alleged evidence offered by the Petitioner lacks foundation. EAMS indicates that the lien activation fee was not paid by Dr. Bresler. Accordingly, these liens were previously dismissed by operation of law, with prejudice.

According to EAMS, Dr. Bresler thereafter filed a lien regarding ADJ1797208 on October 2, 2018, including the required lien filing fee. This lien was not offered into evidence at the time of trial. In any event, this lien was filed more than three years from the last date that the services were provided. Therefore, Dr. Bresler's October 2, 2018 lien is barred by Labor Code §4903.5.

Dr. Silver/Disqualification

The last date of service provided by Dr. Silver was October 25, 2011.

As per EAMS, Dr. Silver filed a lien on November 1, 2002 regarding ADJ2845584, and a lien on March 21, 2005 regarding ADJ1797208. These liens were not admitted into evidence at trial. Notwithstanding, there is no substantial evidence that a lien activation fee was ever paid thereafter. Accordingly, these liens were previously dismissed by operation of law, with prejudice.

Petitioner Dr. Silver appears to have improperly "cut and paste" alleged information to support their assertion that the $100 lien activation fee was paid regarding their August 7, 2015 lien. It is noted that even the Petitioner's cut and paste information states the lien is inactive.

EAMS indicates that the lien activation fee was not paid by Dr. Silver. Accordingly, these liens were previously dismissed by operation of law, with prejudice.

Petitioner Dr. Silver argues that a determination of the issue of whether Dr. Silver paid a filing fee was not raised by the defendant, and that the court's determination was in violation of the right to due process, and it creates an appearance of bias justifying disqualification of the WCJ.

The undersigned has no bias against the Petitioners. Regardless of whether the specific issue was raised by the defendant in the pre-trial conference statement, if a lien activation fee was not previously timely paid, the lien was previously dismissed by operation of law with prejudice, and this court lacks jurisdiction over the previously dismissed lien at this time. The undersigned disagrees with the Petitioners' assertion that this finding creates an appearance of bias justifying disqualification of the undersigned, particularly in light of the fact that the undersigned found that Dr. Silver's most recent lien filed on February 1, 2013 is not barred by Labor Code §4903.5. Notwithstanding, the Findings and Order was based upon several factors. Accordingly, even if the activation fees had been timely filed regarding all of the liens, the WCJ would have reached the same conclusion.

Nevertheless, Dr. Silver filed a lien c/o Legal Service Bureau Santa Ana on February 1, 2013, including the required filing fee. (Lien Claimant David Silver MD Exhibit 1). The undersigned found as indicated in the Findings and Order, that this lien was filed within three years of the last date the services were provided. Accordingly, Dr. Silver's lien filed on February 1, 2013 is not barred by Labor Code §4903.5.

BURDEN OF PROOF/ DUTY TO DEVELOP THE RECORD

It is well-established that lien claimants must prove by a preponderance of the evidence all elements necessary to establish the validity of their lien, before

the burden of proof shifts to the defendants. (See *Torres v. AJC Sandblasting (2012) 77 CCC 1113, en banc*). The Petitioners failed their respective burdens of proof.

EXCLUSION OF THE PETITIONERS' MEDICAL REPORTS/DUE PROCESS

The parties are required to properly file their exhibits. The Petitioner's failure to properly file their exhibits commenced approximately one year and four months ago on the first day of lien trial, when the Petitioners failed to offer exhibits that were EAMS compliant. During the first trial date, the Petitioners attempted to offer into evidence a very large stack of several hundred pages documents without any separator sheets. The undersigned granted a continuance in order to allow the parties additional time to properly file their exhibits.

The lien trial was continued by the Board several times thereafter, as trials were not being held due to COVID 19.

At the time of the next lien trial post Covid 19 on October 15, 2020, the Petitioners had not filed any of their exhibits. As indicated in the MOH, the lien claimants were ordered to file and serve their exhibits no later than 20 days before the next trial date.

At the next trial on March 18, 2021, the Petitioners had still had not properly filed their exhibits. The undersigned once again continued the trial in order to allow the lien claimants to properly file their exhibits.

At the next trial date May 27, 2021 over two months later, the Petitioners had still not properly filed their exhibits. Therefore, the undersigned excluded their exhibits from evidence at trial.

The Petitioners were given 3 continuances for the sole purpose of properly filing their liens. The Petitioners had ample time to properly file their exhibits over a period of approximately one year and 4 months. The Petitioners' due process rights were not violated by the exclusion of their improperly filed 567 pages of exhibits.

Further, it is noted that the Petitioners cite older versions of the Policy and Procedure Manual that were subsequently revised, and therefore are not relevant to the issues at hand. The Petitioners failed to cite authority for their assertion that the exclusion of their exhibits may be deemed a "sanction". In the opinion of the undersigned, the cases cited by the petitioners are not pertinent to the issues at hand.

PRESUMPTION REGARDING AME REPORTS

It is noted that the Petitioners rely upon CCR §10622, which was repealed on January 1, 2020, and is therefore not relevant to the issues at hand.

The Petitioners did not list AME reports as exhibits in the pretrial conference statement. The Petitioners did not present sufficient evidence at trial that they had previously requested service of the AME medical reports, nor that the defendant had "willfully suppressed" the AME reports. Further, the lien claimants made no showing at trial that any AME reports were relevant to the particular issues at hand.

The Petitioners failed to cite any authority that alleged failure to serve the AME reports would make their liens fully compensable.

Assuming for the sake of argument that any such presumption could be made, the Petitioners did not specify what adverse presumptions could be made from the AME reports that would establish the reasonableness of the Petitioners' charges, or support an allowance of Dr. Silver's fees above the OMFS, or defeat the statute of limitations/failure to pay activation fee, or otherwise justify a finding in favor of the Petitioners regarding the particular issues at hand. The Petitioners would still have the burden to prove the reasonableness of their charges, and allowance of Dr. Silver's fees above OMFS, and all elements necessary to establish the validity of their liens.

DEFENDANT'S MOTION TO QUASH

During the trial on May 27, 2021, the Petitioners requested that the undersigned issue a ruling on the defendant's Motions to Quash witnesses Terry Harrison and Wayne Wilson. The Petitioners did not request a ruling regarding Keith Hamilton at that time, nor did Petitioners attempt to call Keith Hamilton as a witness at trial. Accordingly, no ruling was given at trial regarding Keith Hamilton. (MOH, May 27, 2021, page 4, lines 1 through 3). As the Petitioners are raising this issue for the first time in their Petition for Reconsideration, the Petitioners have waived any issues regarding Keith Hamilton.

During the trial, the parties had a discussion with regard to Wayne Wilson, and both parties were in agreement that Mr. Wilson no longer works for CIGA. Thereafter, the Petitioners indicated that they withdrew their notice to appear for Wayne Wilson. (MOH, May 27 21, page 4, lines 4 through 6.) Accordingly, the Petitioners have waived any issues regarding Mr. Wilson.

Regarding Terri Harrison, the Petitioners failed to show good cause at trial or in their Petitions or Reconsideration to order the appearance of the director for all CIGA claims throughout California to appear for this lien trial.

In the opinion of the undersigned, the Petitioners did not sustain their burden of proof to establish all elements of their liens, and therefore it was appropriate to issue a take nothing for their liens.

III.
RECOMMENDATION

Therefore, it is respectfully recommended that the Petitions for Reconsideration be denied.

DATE: July 20, 2021
Robin A. Brown
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE