WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAVIER GUZMAN, ***Applicant***

vs.

SUPREME GLASS COMPANY; TRUCK INSURANCE EXCHANGE COMPANY, ***Defendants***

Adjudication Numbers: ADJ640631; ADJ1395515
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated in the WCJ's report and opinion, which are both adopted and incorporated herein, 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/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 21, 2021

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

JAVIER GUZMAN
LAW OFFICES FOR THE INJURED WORKER
MCDONNEL WEAVER

PAG/bea

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

Applicant's most recent counsel of record seeks reconsideration of my March 1, 2021, Findings and Joint Order relating to the division of attorney fees pursuant to a lien asserted by one of applicant's former representatives. Petitioner contends that, in issuing the order, I acted without or in excess of the Appeals Board's powers, that the evidence does not justify my findings of fact, that the order is unsupported by those findings, and that the decision "is based on an erroneous interpretation of the law and facts." The petition is timely. It is verified by Hearing Representative Leonardo Flores, who is identified as "attorney of record" within the verification. I am not aware ofany answer having been filed to date.

FACTS

1. Procedural background.

These consolidated cases relate to two industrial injuries sustained by applicant in 2004.

Lien claimant McDonnell & Weaver initially undertook representation, instituted proceedings, and remained counsel of record until it was dismissed by the injured worker in July 2006. That dismissal coincided with the issuance of a joint award based on stipulations negotiated on applicant's behalf not by lien claimant, but by a firm that had begun holding itself out as Mr. Guzman's counsel in April or May 2005, apparently without formally entering into the matter. As part of the settlement terms, the attorney fees awarded at the time were divided, with lien claimant receiving about one-third and applicant's new counsel (not petitioner) getting the rest. Neither case was reopened.

Following lien claimant's dismissal, applicant was represented by a succession of three lawfirms, ending with petitioner Law Offices for the Injured Worker, Inc. (hereinafter "LOIW"), which filed its substitution of attorneys in April 2019. The two interim firms were not parties to this trial and are not lien claimants

in the cases (as noted in footnote 1 of the March 1, 2021, Opinion on Decision[1], the above-mentioned Mr. Flores appears to have been the individual principally responsible for handling applicant's cases at all three firms that represented applicant after lien claimant's exit, in that he made all appearances, authored correspondence, and executed documentson Mr. Guzman's behalf). Four months after LOIW became counsel of record, WCAB Case No. ADJ640631 was settled by means of a Compromise and Release (C&R).[2] Additional fees were awarded and petitioner was ordered to hold them in trust pending resolution of McDonnell & Weaver's lien.

2. Evidence at trial and decision.

The documentary record consists of 11 exhibits, 10 of which were offered by lien claimant, as well as the testimony of attorney Dennis Weaver on lien claimant's behalf. As reflected on pages 4-5 of the December 14, 2020, Minutes of Hearing[3], Mr. Weaver was not disclosed as a potential witness at the time of the Mandatory Settlement Conference. However, approximately two weeks before trial, lien claimant sent an unsolicited electronic communication to the court and all parties, advising of its intention to present Mr. Weaver's testimony. On the day of trial, he attempted to make an offer of proof, but it was rejected by LOIW's representative, who sought to cross-examine the witness. Lien claimant then sought to introduce the text of the would-be offer of proof as a documentary exhibit, but it was excluded as hearsay. However, Mr. Weaver was allowed to testify, over LOIW's objection based on Labor Code section 5502, subdivision (d)(3), for the reasons documented in the final paragraph on page 5 of the Minutes.

The exhibits that were admitted are summarized on pages 2-6 of the Opinion. Petitioner's sole exhibit was a 2007 medical-legal report clearly issued before petitioner became counsel of record and otherwise holding little probative value. Lien claimant's exhibits show that it was hired to represent the injured worker in December 2004 (exhibit A) and filed two applications for adjudication

[1] Hereinafter "the Opinion."
[2] It does not appear that Case No.
[3] Hereinafter "the Minutes."

about a month later (exhibit C). In February 2005, defendants agreed to accept both claims, provide applicant with temporary disability indemnity, and reimburse the Employment Development Department (exhibit D). An Agreed Medical Evaluation (AME) was arranged. Beginning around April 2005, lien claimant began receiving correspondence from Mr. Flores, then with The Weltin Law Office, to the effect that his firm was taking over applicant's representation (exhibit F). This included an apparently unfiled substitution of attorneys (exhibit E), which lien claimant refused to acknowledge because it was not signed by an attorney on behalf of the would-be new counsel of record. Mr. Weaver sent letters to both the injured worker and the Weltin firm, indicating that he did not find it appropriate to release applicant's file in the absence of a properly executed substitution or dismissal and advising Mr. Guzman that McDonnell & Weaver still considered itself his attorneys of record (exhibit G).

Lien claimant was formally dismissed as applicant's counsel on July 18, 2006 (exhibit I). There is no question, however, that it no longer had an active role in applicant's representation for some time by then, as evidenced by the fact that notice of its lien was filed in May 2006 (exhibit H). More importantly, when the parties to the underlying cases entered into Stipulations with Request for Award (exhibit J), Mr. Flores executed the agreement as applicant's representative and lien claimant accepted $540 of the $1,566 awarded in attorney fees. On July 18, 2006, applicant received a joint award of 15 percent permanent partial disability and further medical care. As noted above, there was no petition to reopen filed in either case. In fact, the evidence at trial does not reflect any developments until August 2019, when Mr. Flores, now with LOIW, asked Mr. Weaver for a copy of the 2006 stipulations and joint award (exhibit K). LOIW's substitution of attorneys had been filed in April 2019, but apparently not served on lien claimant.

Although neither party offered the final settlement documents into evidence, I found it appropriate to take judicial notice of the C&R filed in ADJ640631 on August 2, 2019, as well as the order approving it issued on the same day (EAMS Document ID Nos. 70973544 and 70973542, respectively). Although the individual who signed the C&R as applicant's representative is not named in

the document, I also took judicial notice of that day's minutes of hearing (EAMS Document ID No. 70973540), according to which Mr. Flores appeared on applicant's behalf. Both the settlement agreement and the order include language directing LOIW to hold the $6,000 fee awarded on the C&R in trust "for the lien filed by the prior attorney" according to the former and "pending resolution of lien of prior attorney, Dennis Weaver" according to the latter.

Mr. Weaver's testimony, which is summarized on pages 6-7 of the Opinion, was consistentwith the history established by the exhibits. On cross-examination, he acknowledged that the medical expert he and defense counsel arranged to use as the AME was later replaced. While he could not remember when Mr. Guzman terminated lien claimant's representation, he agreed that he did not provide any legal services in connection with applicant's medical award after July 18, 2006.

After analyzing the record in view of applicable authority, I concluded that lien claimant exercised a significant level of responsibility and care in connection with its representation of the injured worker, as evidenced by the timeliness of its efforts after being retained leading to defendants' acceptance of the two claims, as well as by the caution it exercised in order to protect applicant's interests by refusing to release his file or potentially leave him without formal legal representation in the absence of a fully executed substitution or dismissal of attorneys. Equally importantly, I found that the entire value of the 2019 C&R lay in applicant relinquishing his right to future medical care, since the Appeals Board no longer had jurisdiction to award any other benefits by then. That right had been secured for Mr. Guzman by lien claimant during the time it was undoubtedly his counsel of record and, while lien claimant was paid part of the fee awarded in 2006, that fee represented a percentage of the indemnity applicant was to receive, not the medical benefits. Even though 13 years elapsed between lien claimant's dismissal and the C&R, I found it significant that LOIW did not demonstrate how its efforts were at all involved in generating value for the 2019 settlement. As a result, after balancing the relevant factors, I concluded that lien claimant is entitled to one-third of all fees awarded over the life of these cases, which amounted to an additional $1,982 to be paid to McDonnell & Weaver from the funds held in trust by petitioner.

3. Contentions on reconsideration.

In its petition, LOIW argues that McDonnell & Weaver's lien claim was extinguished when it received a share of the fee awarded in 2006. Alternatively, it asserts that lien claimant should only receive $750 from the fee awarded on the C&R and that $1,982 is excessive. Finally, petitioner contends that it was error to allow lien claimant's witness to testify and that, if Mr. Weaver's testimony was excluded, lien claimant would have recovered nothing.

DISCUSSION

1. McDonnel & Weaver did not relinquish its lien rights by accepting part of the 2006 fee.

Contrary to petitioner's argument, the evidence does not show that lien claimant's future interests were extinguished at the time it accepted $540 of the $1,566 fee on the 2006 joint award. Neither the Stipulations nor the award (both found in lien claimant's exhibit J) characterize the fee division agreement as a full and final settlement of the attorney fee lien and there is no writing in the record purporting to satisfy, withdraw, dismiss, or otherwise extinguish the lien. Moreover, petitioner itself acknowledged the existence of McDonnell & Weaver's lien claim in 2019 when it agreed, as part of the terms of the C&R, to hold all fees in trust pending the lien's resolution. As noted above, that provision was expressly incorporated into the Order Approving, with language specifically referencing Mr. Weaver as the interest holder.

Determining the appropriate method for dividing attorney fees requires a balancing of several factors. This includes gauging the results obtained for the injured worker by the respective attorneys. Petitioner's position—that the former attorney should have filed a new lien notice after the 2006 award in order to recover anything further—is inconsistent with this principle in situations where a law firm enters the case shortly before a C&R is negotiated and seeks to collect a fee on a settlement that may have been years in the making, even if an award previously issued.

2. A one-third share of the total fees was appropriately awarded to lien claimant.

As its alternative argument, petitioner asserts that lien claimant should only have been allocated $750 from the C&R fee, without explaining how or why this amount is justified. It is not. Awarding lien claimant $750 would have given it a total share of $1,290 or approximately 17 percent of the overall fees awarded over the life of these cases. As discussed on pages 7-8 of the Opinion, lien claimant was counsel of record for 587 days, whereas LOIW's representation lasted 120 days, and McDonnell & Weaver's efforts yielded verifiable results:

> Although lien claimant received a portion of the fee on the award, the evidence shows that these claims had not been accepted prior to its entry into the case and its efforts therefore gave rise to all the compensation paid to the injured worker. There is no evidence that a petition to reopen was filed in either case subsequent to the 2006 joint award. Consequently, the only thing settled via C&R in 2019 was applicant's entitlement to further medical care on an industrial basis, a benefit secured in the first instanceby lien claimant. There is evidence, consisting of applicant's exhibit 1, that discovery was undertaken after lien claimant was no longer counsel of record. That, however, does not invalidate lien claimant's work during its representation, which included obtaining records and entering into an AME (the record is silent as to the reason Dr. Gravina was later replaced with Dr. Lavorgna). In addition, I find from lien claimant's correspondence in exhibits D and G that it did employ significant responsibility and care toprotect the client's interests. The same cannot be said of applicant's later counsel—not necessarily because of any evidence of dereliction of their duties, but because the record is mostly silent concerning the actual work performed.

Thus, while there was a long period between lien claimant's dismissal and the 2019 C&R, it appears to have been a period of inactivity—at least based on the trial record. Therefore, a one- third share of the total fee was reasonable and appropriate.

3. Lien claimant's witness was appropriately allowed to testify and, even if his testimony should have been excluded, petitioner was not prejudiced because said testimony did not give rise to any findings adverse to its interests.

Although failure to disclose a witness at the time of the mandatory settlement conference generally leads to the exclusion of that witness' testimony at trial, this is not an absolute rule. The purpose of subdivision (d)(3) of Labor Code

section 5502 is to prevent undue surprise and ensure parties' due process discovery rights. Here, even in the absence of Mr. Weaver's November 30 email to the court and Mr. Flores (found at EAMS Document ID No. 73563038), there would have been little, if any, surprise to LOIW that a handling attorney would testify in support of an attorney fee lien. What's more, in addition to cross-examining Mr. Weaver, petitioner was given the opportunity to conduct additional discovery or call a rebuttal witness, which it declined.

More importantly, contrary to petitioner's contention, Mr. Weaver's testimony did not give rise to any findings supporting the lien claimant's fee award. The circumstances of lien claimant's representation of applicant, as well as the results it produced, were gleaned from the exhibits, as set forth in the Opinion. Mr. Weaver's testimony on direct examination contained no new information germane to his fee claim. In fact, I found the statements elicited on cross-examination more probative and those were admissions generally inuring to petitioner's benefit in this trial and not lien claimants. As a result, had the witness been barred from testifying, lien claimant would have been awarded no less than $1,982.

RECOMMENDATION

For the foregoing reasons, I recommend that applicant's Petition for Reconsideration, filedherein on March 22, 2021, be denied.

DATED: MARCH 31, 2021
SERVED: APRIL 1, 2021

EUGENE GOGERMAN
Workers' Compensation Judge
Workers' Compensation Appeals Board

OPINION ON DECISION

Introduction and Procedural History

The sole issue submitted to me was an attorney fee lien filed after the lien claimant's representation of the injured worker was terminated. In 2004, applicant claimed two industrial injuries and the employer initially denied him compensation. After the cases became litigated in early 2005, both claims were accepted. A stipulated joint award was issued in 2006 and a Compromise and Release (C&R) encompassing both cases was approved in 2019. Lien claimant McDonnell & Weaver was applicant's counsel of record early on, after which it was replaced by non-party Weltin, Streb & Weltin, LLP (known at the time as Weltin Law Office). That firm, in turn, was eventually replaced as applicant's attorneys of record by former attorney Marc Terbeek (also not a party to these proceedings), then by Law Offices for the Injured Worker, Inc. (hereinafter"LOIW"), which remains in that role through the present.[1] An attorney fee of $6,000 was awarded on the 2019 C&R and ordered into trust pending resolution of lien claimant's rights. Those are the funds at issue.

The record at trial consisted of 11 exhibits admitted without objection. An additional exhibit was marked for identification, with admissibility addressed below. One exhibit was excluded in the course of the hearing. The only witness was called by the lien claimant.

[1] To be more precise, it appears that the individual primarily responsible for handling applicant's cases at the Weltin firm was hearing representative Leonardo Flores. The period during which applicant was represented by Mr. Terbeek appears to have coincided with Mr. Flores's tenure with his firm. This also seems to be the case at LOIW and Mr. Flores represented the applicant on its behalf at this trial. As discussed below, beginning with the Weltin firm's entry to the case, there is no evidence of anyone other than Mr. Flores representing the injured worker at a hearing or signing a settlement agreement as his counsel. Neither the Weltin office nor Mr. Terbeek filed an attorney fee lien, according to the EAMS dockets.

Documentary Evidence

1. *Applicant's exhibit 1.*

Applicant's sole exhibit is a medical report from an orthopedic surgery Agreed Medical Evaluator (AME), Dr. John Lavorgna, dated October 16, 2007. Lien claimant objected to the exhibit, arguing that it is inadmissible for lack of relevance. Having considered its nature, I find that the document is sufficiently relevant to issues of legal representation in the course of these cases to warrant admission, even though its probative value is very low. I will overrule lien claimant's objection and admit applicant's exhibit 1.

Turning to its substance, I note that the AME report is captioned with only one date of injury:that in ADJ640631. The report shows that this was not the first time Dr. Lavorgna had examined the injured worker and it is unclear whether it was the last. Other than his billing justification paragraph, the AME does not mention having reviewed any records; as a result, it is unclear whether either party's attorney drafted an advocacy letter or furnished any documents in connection with thisevaluation. The report likely had little, if any, bearing on the ultimate case value.

2. *Lien claimant's exhibits.*

The documents contained in these exhibits establish a rough timeline of lien claimant's involvement with applicant's cases. Exhibit A contains a single Spanish-language DWC Form 3 fee disclosure signed by applicant and attorney Dennis Weaver and dated December 8, 2004. Accordingto exhibit B, Mr. Weaver wrote to the employer five days later, advising that his firm was representing applicant in connection with the two claims being filed concurrently. Two DWC-1 forms dated December 8, 2004, were enclosed. About a month later, on January 7, 2005, lien claimant filed on Mr. Guzman's behalf two applications for adjudication that appear to have given rise to these two cases (exhibit C).

According to exhibit D, Mr. Weaver wrote to defense counsel in late February 2005, confirming that the parties would use Dr. Richard Gravina as their AME and forwarding a draft jointcover letter, which is three pages long and

contains a largely generic set of questions pertaining to a standard medical-legal evaluation. Counsel also confirms in his correspondence defendants' agreement to pay his client temporary disability indemnity and reimburse the Employment Development Department, presumably for State Disability Insurance benefits paid to applicant in connection with at least one of the subject injuries.

The impending end of lien claimant's representation of applicant became apparent a short time later, though the actual termination of the attorney-client relationship apparently took more than a year to be acknowledged by all parties. Exhibit E comprises a substitution of attorneys captioned with the names of the parties to the instant cases, but lacking a case number. The document appoints the Weltin Law Office as applicant's counsel in place of lien claimant. It is signed by the injured worker and an unnamed representative of the Weltin firm. The substitution is dated April 5, 2005, and is accompanied by a proof of service dated May 13, 2005. There is no conformed, "filed" stamped copy of the substitution in evidence and I was unable to locate one in the EAMS file, which contains nothing uploaded before 2014. However, exhibit F contains a May 13, 2005, letter, signed by Mr. Flores on behalf of the Weltin Law Office, addressed to Mr. Weaver, to the effect that the Weltin firm had assumed representation of Mr. Guzman. Also in this exhibit is a two-way fax transmission, showing that Mr. Flores informed Mr. Weaver on May 19, 2005, that the injured worker would not be attending an upcoming appointment with Dr. Gravina, a fact Mr. Flores planned to convey to the claims examiner. In response, on May 23, Mr. Weaver faxed back as follows: "The form remains incomplete. Please state the name of the attorney on line 2 of the form and have that attorney sign the form at line 9. How and when did you contact Ms. Parker?"

A similar sentiment was conveyed in lien claimant's May 17, 2005, letter to Mr. Flores, found in exhibit G, which likely gave rise to Mr. Flores's May 19 fax in exhibit F. According to Mr.Weaver's letter, lien claimant had not been provided with a "properly executed original Substitution of Attorneys" (emphasis in original) and would not release applicant's file as a result. On July 22,2005, nearly four months after the substitution of attorneys was allegedly signed by the injured

worker, Mr. Weaver wrote to him, explaining that, in lien claimant's view, the substitution had not been validly executed because it was signed by Mr. Flores and not by a licensed attorney.

According to the letter, Mr. Flores advised Mr. Weaver that attorney Phil Weltin was on vacation, at which point Mr. Weaver suggested that applicant execute a dismissal of attorney so that lien claimant could release Mr. Guzman's file to the Weltin firm. Mr. Weaver expressed his firm's belief that it remained applicant's counsel of record.

Still, the status of applicant's legal representation remained cloudy. Pages 4-5 of exhibit Gcomprise a June 8, 2006, letter from Mr. Weaver to Mr. Flores. Counsel writes that the two representatives appeared for a scheduled hearing at the Appeals Board, only to discover that the carrier's attorney did not receive notice and therefore was absent. According to the letter, Mr. Weaver reiterated his position that a substitution of attorneys must be signed by a licensed attorney in order to be valid and, in response, Mr. Flores suggested that the parties seek guidance from the court, but they were unable to do so right away. It appears that Mr. Weaver later proceeded to have an *ex parte* conversation with the Honorable Gene Lam, who expressed his agreement with lien claimant's position. In the meanwhile, on May 2, 2006, McDonnel & Weaver filed notice of its lien in both cases, seeking $6,000 as "reasonable attorneys fees" (exhibit H).

Finally, a dismissal of attorney, captioned with both cases, and naming lien claimant as the attorney being dismissed, was signed by the injured worker on July 18, 2006, and filed the same day (exhibit I). This, evidently, was done in conjunction with the filing of Stipulations with Request for Award, wherein the parties agreed to 15 percent permanent partial disability and further medical care entitlement for injuries to the back, right leg, and shoulders. The settlement is signed by Mr. Flores on behalf of the Weltin firm. Although it is not signed by lien claimant, it contains the following provision: "The attorney fee awarded herein shall be paid as follows: $540.00 to McDonnell & Weaver … and $1,026.00 to The Weltin Law Firm." That is, lien claimant was to be paid approximately 34.5 percent of the total fee of $1,566. These figures appear in the joint award issued the same

day by the Honorable Larry Quan. According to the minutes of hearing, Mr. Weaver appeared on lien claimant's behalf at a Mandatory Settlement Conference that day. The Stipulations, joint award, and minutes of hearing comprise exhibit J.

Exhibit K contains a letter from Mr. Weaver to Mr. Flores, now with LOIW, dated August 15, 2019. It appears that the parties attended another hearing earlier that month[2], during which Mr.Flores asked for a copy of the Stipulations and joint award from July 2006. According to the letter, Mr. Weaver asked for a copy of the substitution of attorneys installing LOIW as counsel of record, indicating that no such document had previously been served. I take judicial notice of the substitution of attorneys signed April 4, 2019, and filed herein five days later, appointing LOIW as counsel in place of the Law Offices of Marc Terbeek (EAMS Document ID No. 69883407), along with a notice of representation (EAMS Document ID No. 69883408). According to the accompanying proof of service (EAMS Document ID No. 69883411), the substitution was, in fact,only served on defendant Farmers Insurance Company.

Witness Testimony

Attorney Dennis Weaver was the only trial witness, called to testify on behalf of lien claimant. He was cross-examined by applicant's representative. As relevant here, his testimony was as follows.

He has been an attorney since 1974 and is admitted in California. He has represented injured workers before the Appeals Board for over 40 years.

He represented applicant starting on December 3, 2004. They met to discuss the claims, through an interpreter, on December 8, 2004. He does not know whether the interpreter was certified. He recalls her translating the representation documents, which he typically has clients sign on the day of their meeting. He subsequently provided information to the Appeals Board and the employer, including the documents in the exhibits. The injured worker's deposition was completed in February 2005. Records from applicant's earlier medical treatment were obtained and a new primary treating physician (PTP) was designated at

[2] Judicial notice is taken of minutes of hearing dated August 2, 2019, at EAMS Document ID No. 70973540.

applicant's request. He does not remember the name of that PTP. He later learned that Dr. Esly Barreras eventually became the PTP. He does not recall designating Dr. Barreras.

He obtained defendants' agreement to accept the claim and pay retroactive temporary disability indemnity as of applicant's last day of work. In addition, he entered into an AME with defense counsel, using Dr. Gravina. He prepared and revised a joint AME cover letter. Dr. Gravina was eventually replaced. He did not agree to use Dr. Lavorgna.

He continued to represent applicant for about a year thereafter, though there was some confusion regarding the involvement of subsequent counsel. Applicant ultimately asked to represent himself; he is not sure when that occurred. He did not assist applicant with any medical treatment issues after July 18, 2006.

Analysis

Having carefully analyzed the documentary record and witness testimony, I find that the lien claimant has demonstrated sufficient care and expertise provided to the injured worker during its period of representation to warrant a commensurate fee in addition to what it was paid at the time of the joint award. The evidence shows that lien claimant began to represent applicant at the inception of these cases, in December 2004. I find that the initial substitution of attorneys form in exhibit E was invalid for lack of attorney signature—although the signor is unidentified in the document, Mr. Flores acknowledged in later correspondence that Mr. Weltin had not been available to execute the substitution. Lien claimant continued to act as applicant's counsel of record, writing letters to him and the Weltin firm and appearing at hearings in June and July 2006. Lien claimant's representation of the injured worker was not formally terminated until Mr. Guzman signed the dismissal of attorney form in exhibit I. The period from December 8, 2004, until July 18, 2006, lasted 587 days.[3]

[3] In contrast, it appears that LOW, tenure as applicant's counsel of record lasted 120 days, beginning with the substitution of attorneys filed on April 4, 2019, and ending with the approval of the C&R on August 2, 2019.

The total attorney fees awarded over the life of these cases were $7,566: $1,566 on the 2006 stipulated joint award and another $6,000 on the 2019 C&R. Although lien claimant received a portion of the fee on the award, the evidence shows that these claims had not been accepted prior to its entry into the case and its efforts therefore gave rise to all the compensation paid to the injured worker. There is no evidence that a petition to reopen was filed in either case subsequent to the 2006 joint award. Consequently, the only thing settled via C&R in 2019 was applicant's entitlement to further medical care on an industrial basis, a benefit secured in the first instance by lien claimant. There is evidence, consisting of applicant's exhibit 1, that discovery was undertaken after lien claimant was no longer counsel of record. That, however, does not invalidate lien claimant's work during its representation, which included obtaining records and entering into an AME (the record is silent as to the reason Dr. Gravina was later replaced with Dr. Lavorgna). In addition, I find from lien claimant's correspondence in exhibits D and G that it did employ significant responsibility and care to protect the client's interests. The same cannot be said of applicant's later counsel—not necessarily because of any evidence of dereliction of their duties, but because the record is mostly silent concerning the actual work performed.

Thus, considering the factors typically relied on by the Appeals Board (see, e.g., *Rose & Leventhal v. Workers' Comp. Appeals Bd.* (1978) 43 Cal. Comp. Cases 135, 136), dividing the fees in this case requires the balancing of (a) responsibility and care, which favor lien claimant against (b) time of representation, which does not, and (c) results, which are equivocal because the C&R was undoubtedly negotiated long after lien claimant was dismissed as counsel of record, yet its efforts early on gave rise to much of the C&R's value. The period from December 8, 2004, until August 2, 2019, when the C&R was approved, comprised 5,685 days.

Although lien claimant was only counsel of record for slightly more than 10% of the overall life of the cases, having performed the above-referenced balancing, I find that its contribution to the cases' ultimate value entitles lien claimant to one-third of the total fees awarded in the case, or $2,522 (I note that this is roughly consistent with the percentages agreed upon by lien claimant and the

Weltin firm at the time of the 2006 award). The remaining two-thirds are allocated to a combination of Weltin Law Office, Mr. Terbeek's former office, and LOIW; of course, there is no need to delineate among those three in the absence of any further liens. Having already received $540 from the fee awarded on the joint award, that means lien claimant should now be paid an additional $1,982 from the fee awarded on the C&R and held in trust by LOIW.

DATE: MARCH 1, 2021

EUGENE GOGERMAN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE