

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

JOE SILVESTRI, *Applicant*

vs.

**UNION ENGINEERING; C&S PIPELINE;
DW BURHOE CONSTRUCTION, *Defendants***

**Adjudication Numbers: ADJ1848273 (VEN 0088536); ADJ1686013 (VEN 0104075);
ADJ1729947 (OXN 0126298)
Oxnard District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Lien claimant, through its representative Billing Dynamics, seeks reconsideration of the Order dismissing lien (Order), issued by the workers' compensation administrative law judge (WCJ) on August 30, 2023, wherein the WCJ ordered that the lien of Alan Moelleken, M.D., be dismissed with prejudice in case number ADJ1848273.

Lien claimant contends that the WCJ erred in dismissing case numbers ADJ1686013 and ADJ1729947, as lien claimant did not receive notice of the intention to dismiss the lien claims in those cases. Lien claimant further contends it is not a party to case number ADJ1848273 because the lien claim was resolved in that case.

We have not received an answer from any party.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied as to case number ADJ1848273 and dismissed as to case numbers ADJ1686013 and ADJ1729947.

We have considered the allegations in the Petition and the contents of the Report with respect thereto.

Based on our review of the record, and as discussed herein, we will grant reconsideration, rescind the Order of dismissal in case number ADJ1848273, and we will return the matter to the

WCJ for further proceedings, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

The petition for reconsideration was filed in three related, or companion, cases: ADJ1848273, ADJ1686013, and ADJ1729947. The Order of Dismissal that petitioner seeks reconsideration of issued solely as to case number ADJ1848273, and does not include either case number ADJ1686013 or ADJ1729947. The Order issued in response to a Notice of Intention to Dismiss (Notice of Intention) that issued solely as to ADJ1848273, although the basis for the Notice of Intention pertains to events that took place in case number ADJ1686013. Therefore, we will briefly review the relevant procedural history of case number ADJ1848273, case number ADJ1686013, and case number ADJ1729947.

In all three cases, lien claimant filed a notice and request for allowance of lien, as follows: in case number ADJ1686013, a notice and request for allowance of lien was filed on March 13, 2010 by lien claimant Alan Moelleken, M.D. A subsequent notice of representation was filed on August 21, 2014, identifying Billing Dynamics as the lien claimant representative. In case number ADJ1729947, a notice and request for allowance of lien was filed on behalf of Spine and Orthopedic Center on a December 5, 2012, identifying Billing Dynamics as the lien claimant representative. In case number ADJ1848273, Dr. Moelleken filed a notice and request for allowance of lien for Carrillo Surgery Center on March 13, 2010.

In case number ADJ1686013, applicant and defendant employer DW Burhoe Construction and their carrier Golden Eagle, through their attorneys of record Goldman Magdalin, entered into a compromise and release (C&R) in July 2009, settling only case ADJ1686013 and the date of injury of August 28, 1995 to September 29, 1996. (C&R, dated July 30, 2009.) Relevant here, the parties stipulated that “all liens are beleived (sic) resolved defendant requests conference for any lien on official address record.” (July 30, 2009 C&R, p. 6, ¶ 8.) On August 5, 2009, defendant submitted the signed C&R to the WCJ for approval by way of mail, referencing case number ADJ1686013 and case number ADJ1848273 in the cover letter. (Correspondence to WCJ, dated August 3, 2009.)

On September 9, 2009, an OACR issued by WCJ Jeffrey Morgan, approving settlement in both case number ADJ1686013 and case number ADJ1848273, which included the following

language: “The Board shall retain jurisdiction of unpaid medical-legal, self-procured medical, other liens, and penalty and interest claims.” (Joint OACR, dated September 9, 2009, p. 1.)

Separately, on July 14, 2010, the applicant and defendant employer Union Engineering, and their carrier CNA Claims, by and through their attorneys of record Harrison Eichenberg, submitted a compromise and release settling only case number ADJ1848273, for a date of injury of May 29, 1991 through May 28, 1992. On July 14, 2010, WCJ William Carero issued an order approving this settlement.

On March 13, 2010, lien claimant filed a notice and request for allowance of lien in case number ADJ1686013. A subsequent notice of representation was filed on August 21, 2014, identifying Billing Dynamics as the lien claimant representative for Dr. Moelleken.

On May 23, 2023, lien claimant’s representative, Billing Dynamics, filed a declaration of readiness to proceed to a lien conference (DOR) in case number ADJ1686013 on the following issue: “No LC in the past 90 days, multiple attempts to resolve lien. WCAB assistance required.” (DOR, filed May 23, 2023, p. 7 (all-caps in original.)) On the DOR, lien claimant answered in the affirmative that companion cases exist and provided case numbers ADJ1848273 and ADJ1729947. (DOR, filed May 23, 2023, p. 1.) Lien claimant filed a copy of the DOR in both of the companion cases.

On July 27, 2023, an Order taking the lien conference off calendar (OTOC) issued in case number ADJ1686013. The minutes indicate that the reason for the OTOC was the non-appearance of lien claimant. (July 27, 2023 minutes, p. 1.) A copy of the minutes was also filed in case number ADJ1848273.

On August 3, 2023, the WCJ issued a Notice of Intention to dismiss lien, absent written objection, in case number ADJ1848273. The notice states as follows:

IT APPEARING THAT Lien Claimant Alan Moelleken failed to appear at the duly noticed Lien Conference on 7/27/23, and;

NOTICE IS HEREBY GIVEN the lien of Alan Moelleken will be dismissed with prejudice in 10 days absent written objection filed with the WCAB

(August 3, 2023 Notice of Intention, p. 1.)

The Notice of Intention was served by way of US Mail on Alan Moelleken, M.D., CNA Casualty of California, and Harrison Eichenberg. (August 3, 2023 Notice of Intention, p. 1.) No written objection to the Notice of Intention was filed.

On August 30, 2023, the WCJ filed an Order dismissing lien in case number ADJ1848273, which was served by way of US Mail on Alan Moelleken, M.D., CNA Casualty of California, and Harrison Eichenberg. (August 30, 2023 Order dismissing lien, p. 1.)

On September 20, 2023, lien claimant, through its representative Billing Dynamics, filed the instant Petition for reconsideration in case numbers ADJ1848273, ADJ1686013, and ADJ1729947.

DISCUSSION

As the WCJ notes, the Appeals Board maintains jurisdiction over Dr. Moelleken in case numbers ADJ1848273, ADJ1686013, and ADJ1729947. In all three cases, lien claimant filed a notice and request for allowance of lien pursuant to Labor Code section 4903.05.¹ (Lab. Code, § 4903.05.) We do not see a notification of resolution or a withdrawal of the lien claims in the Electronic Adjudication Management System (EAMS) for any of the cases, thus the Appeals Board retains jurisdiction. (Lab. Code, §§ 5300, 5304; Cal. Code Regs., tit. 8, § 10872.)

The WCJ is required to “make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Bd. en banc).) The purpose of this requirement is to enable “the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc), citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350].)

The WCJ must prepare a Minutes of Hearing and Summary of Evidence (MOH/SOE) at the conclusion of each hearing. (Cal. Code Regs., tit. 8, § 10787(c).) Even if the disposition is an order taking the matter off calendar, the MOH/SOE must include the issues and matters in controversy, a descriptive listing of exhibits received in evidence, if any, and the disposition of the matter. (Cal. Code Regs., tit. 8, § 10787(c)(3)-(4).)

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

“The Workers’ Compensation Appeals Board shall serve ... all parties of record with any final order, decision or award issued by it on a disputed issue after submission....” (Cal. Code Regs., tit. 8, § 10628(a).) Here, lien claimant’s DOR requesting a lien conference was filed in case number ADJ1686013. The Notice of Intention based on lien claimant’s representative’s failure to appear at the lien conference in case number ADJ1686013 issued only in case number ADJ1848273, which was not the subject of the DOR. Contrary to WCAB Rules regarding filing and service of documents, lien claimant’s representative was never served with the Notice of Intention, as it was only served on Alan Moelleken, M.D., CNA Casualty of California, and Harrison Eichenberg. (August 3, 2023 Notice of Intention, p. 1; Cal. Code Regs., tit. 8, §§ 10610, 10615, 10625, 10628.)

While we understand the WCJ’s frustration regarding the procedural morass presented here, if lien claimant was not served with the Notice of Intention, it raises procedural due process concerns. There is a strong public policy favoring disposition of cases on their merits rather than on procedural grounds. (*Bland v. Workers Comp. Appeals Bd.* (1970) 3 Cal.3d 324 [35 Cal.Comp.Cases 513]; *Fox v. Workers’ Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196, 1205 [57 Cal.Comp.Cases 149].)

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].) A fair hearing includes, but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (*Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

The Appeals Board also has a constitutional mandate to “ensure substantial justice in all cases” and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [65 Cal.Comp.Cases 264].) The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *McClune v.*

Workers' Comp. Appeals Bd. (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].)

In the *Fox* case, as here, a lien claimant's case was dismissed due to his failure to appear. (*Fox, supra*, at 1206.) The court of appeal held "that lien claimants may seek relief from the consequences of a failure to appear by utilizing a procedure substantially similar to Code of Civil Procedure section 473." (*Fox, supra*, at 1205; Code Civ. Proc., § 473; see Lab. Code, § 5506.) Code of Civil Procedure section 473, subd. (b) provides, in relevant part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (Code Civ. Proc., § 473(b).)

Based on the record before us, and in light of the petitioner's statement that the lien on case ADJ1848273 has been resolved, we are unable to evaluate the basis or need for the WCJ's order of dismissal as to ADJ1848273. Therefore, we must return this matter to the trial level for further proceedings and decision(s). Upon return to the trial level, we recommend that the WCJ hold a lien conference on the merits of the lien claim in case number ADJ1686013.

When the WCJ conducts further proceedings, the record of proceeding are to be maintained with care so that the rights of the parties and lien claimant are properly preserved as to each case actually at issue. It is also important that the record be maintained in such a manner as to facilitate further meaningful judicial review should that become necessary. (*Fox, supra*, at 1206-1207.)

Accordingly, we grant lien claimant's Petition and rescind the August 30, 2023 Order to Dismiss the lien in case number ADJ1848273, which is the only case for which an Order of dismissal has issued.

For the foregoing reasons,

IT IS ORDERED that lien claimant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Order dismissing lien issued by the WCJ on August 30, 2023 in case number ADJ1848273 is **RESCINDED**.

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

NOVEMBER 20, 2023

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

**ALAN MOELLEKEN, M.D.
BILLING DYNAMICS
HARRISON EICHENBERG
TOBIN LUCKS
GOLDMAN MAGDALIN**

JB/cs

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