WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARTHA SILVA, ***Applicant***

vs.

PARLIER UNIFIED SCHOOL DISTRICT, self-insured, administered by TRISTAR RISK MANAGEMENT, ***Defendants***

Adjudication Number: ADJ7858609
Fresno 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. 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/ JOSEPH V. CAPURRO, COMMISSONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 17, 2023

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

MARTHA SILVA
THE NIELSEN LAW FIRM
SUPREME COPY SERVICE, INC., LIEN CLAIMANT
MULLEN & FILIPPI, LLP

AS/mc

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

I

INTRODUCTION

1. Applicant's Occupation:	**Substitute Teacher**
Age at Injury:	**52**
Date of Injury:	**10/30/2009**
Parts of Body Alleged Injured:	**back and knee**
2. Identity of Petitioner:	**Defendant**
Timeliness:	**The Petition was timely filed on 5/18/23**
Verification:	**The Petition was Verified.**
3.	**Date of Award: 4/24/23**
4. Petitioner contends:	

a. Lien Claimant failed to meet their burden of proof of reasonable value of their services.

b. There is no evidence that records were actually produced in connection with subpoenas issued for Tristar Insurance, Charles Lewis, M.D., Ronald Castonguay, M.D., MRI Imaging Center, Fresno Imaging Center, Key Health or WCAB.

c. There is no evidence of mileage incurred as billed on Invoices #93875, 93876, 93877, 93878, 93879, 93880, 93881 or 93883.

d. Labor Code section 4622(a)(1) for penalty and interest should not be applied.

II

FACTS

Applicant's claimed industrial injury was initially denied by Defendant on 2/25/11. (Exh. 29, Denial letter dated 2/25/11) Applicant's attorney filed an Application for Adjudication of claim dated 6/8/11 indicating disputed issues of temporary disability indemnity, reimbursement for medical expenses, medical treatment, compensation rate, permanent disability indemnity, rehabilitation, and supplemental job displacement/return to work. (Exh. 30, Application dated 6/8/11) Applicant's attorney ordered subpoenas from various sources through Supreme Copy Service. (Exh. 2, Order Referral from Applicant's Attorney dated 7/27/12) Supreme Copy Service issued 10 subpoenas and submitted invoices to defendant for dates of service between 7/27/12 and 9/11/12 which were served upon Defendant between the dates of 8/16/12 and 11/19/12. (Exhs. 13 – 22, Invoices dated 7/27/12 –9/11/12.) Defendant offered no evidence showing that it issued either payment or a timely explanation of the contested amount in response to these invoices. (Exh. 32, Compromise and Release dated 2/25/14.)

Defendant sent an objection letter to Lien Claimant on 1/15/15 indicating objection to the bills on the basis that records had been served on the requesting party therefore the services are duplication of services already provided. (Exh. A, Tristar Correspondence to Supreme Copy Service dated 1/15/15.) Lien Claimant filed their lien on 2/7/17.

The issue of Lien Claimant's lien was submitted for decision on 2/23/23. The undersigned found that at the time of the claimed medical-legal expense, there existed a contested claim and that the expenses were reasonably incurred for the purpose of proving or disproving the contested claim. The undersigned then calculated a reasonable cost for services set forth in each invoice based upon Lien Claimant's Exhibit 25 showing what this defendant usually paid and the lien claimant accepted as compared to the amounts billed. The undersigned also adjusted Lien Claimant's bills to disallow services that appeared to be unreasonable on their face. Defendant did not submit any evidence in support of an alternative method to calculate the reasonable cost of services. It is from the determination of the reasonable costs of services along with finding that interest and penalties were due that Defendant seeks reconsideration.

Lien Claimant has filed a timely Response to Defendant's Petition.

III

DISCUSSION

Defendant contends that because Lien Claimant did not submit the actual records produced in response to the various subpoenas, Lien Claimant has failed to meet their burden of proof that the records were actually produced where there was no Declaration from the Custodian of Records. Defendant notes that there is a Declaration from the Custodian of Records included with the subpoena exhibits for the records related to St. Agnes Medical Center, Reedley Physical Therapy and Marc Johnson M.D., which Defendant accepts as proof that the records were actually produced. (Exh. 6, SDT number 93877 for St. Agnes Medical Center dated 7/27/12; Exh. 9, SDT number 93880 for Reedley Physical Therapy dated 8/10/12; Exh. 11 SDT number 93882 for Mark Johnson M.D. dated 8/10/12.)

Whether or not the Custodian of Records for the entity that is the subject of a subpoena completes and returns the Declaration is beyond the control of the lien claimant copy service. There is no case law cited by Defendant that requires lien claimants to submit either the Declaration of the Custodian of Records or the actual subpoenaed records in order to prove that the records were actually produced. This court relied upon the submitted Invoices that showed how many pages were copied as evidence that the records were actually provided. The court also notes that one of the locations that did not produce a Declaration of the Custodian of Records was the defendant. However, the defendant did not produce any evidence showing that they failed to comply with the subpoena or did not produce the number of pages of records as shown on the invoice.

Defendant disputes the mileage claimed on several of the invoices by asserting that the subpoenas were served by mail and that on the Declaration of Custodian of Records there was a place where the Custodian could indicate that the records were delivered to the copy service. However, Defendant infers that because the Custodian of Records could indicate that the records were delivered, this is evidence that lien claimant did not incur any mileage expense related to obtaining the records.

However, in only one of the Exhibits cited by Defendant did the Custodian of Records actually check the box indicating that the records were delivered to the copy service. (Exh. 6, SDT for St. Agnes Medical Center dated 7/27/12) In all of the other exhibits cited by Defendant, the Declaration of the Custodian of Records had not been filled out. It is noted that in Lien Claimant's Description of Charges, under Mileage, an explanation is provided indicating that the mileage charge is for serving subpoenas and for record pick up. (Exh. 23, Fee Breakdown Sheet dated 4/1/09.) The mere fact that a subpoena location has delivered the records to the copy company rather than requiring them to copy the records does not establish the method by which those records were delivered. Defendant assumes that delivery was by mail, but it would be just as likely that the records would be picked up by the copy service as indicated in their description of services.

Defendant contends that they should not be liable for penalty and interest as set forth in Labor Code section 4622(a)(1) because they had a possibly reasonable argument to support their objection to Lien Claimant's billings. However, while having a possible argument may be sufficient to shield against sanctions and costs under

Labor Code section 5813, it is not sufficient to avoid penalties and interest as set forth in Labor Code section 4622. Labor Code section 4622(a)(2) sets forth what is required to avoid penalty provided for in paragraph (1) as follows: The penalty provided for in paragraph (1) shall not apply if both of the following occur: A) The employer pays the provider that portion of his or her charges that do not exceed the amount deemed reasonable pursuant to subdivision (e) within 60 days of receipt of the report and itemized billing. (B) The employer prevails.

In this case, the penalty and interest were calculated solely upon that portion of the lien claimant's billing that was determined to be reasonable and the employer did not prevail in defeating the lien claimant's claim in its entirety. Further, defendant failed to respond to lien claimant's billing with any objection or explanation of benefits for nearly two and a half years. Such a delay is clearly unreasonable and subjects the defendant to the penalty and interest as set forth in Labor Code section 4622.

Defendant claims that assessing penalties and interest would unjustly enrich the lien claimant but fails to explain how it is the lien claimant that is unjustly enriched when it is the defendant who has had use of the money to which lien claimant was entitled for the past 4 ½ years. It appears that it was defendant's litigation strategy to not file a Declaration of Readiness to Proceed to resolve the outstanding lien in hopes that the lien claimant had acquiesced to

defendant's position. The consequence of that strategy is that Defendant is liable for the interest that has accrued over that period of time.

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

[DATED:] 6/5/23

Respectfully submitted,

DEBRA SANDOVAL
Workers' Compensation Judge

Date: 6/5/23
Served on parties as shown on
Official Address Record.
By: WCAB / K. Malagon