

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

LUCY BLASI, *Applicant*

vs.

**CREATIVE DIRECT MARKETING GROUP; CIGA FOR AMERICAN
MANUFACTURING, in liquidation, *Defendants***

**Adjudication Number: ADJ3348532
Long Beach 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.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER



/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 18, 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
LAUGHLIN FALBO LEVY & MORESI, LLP
DAVID SILVER, M.D.**

PAG/bea

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION:

Applicant, [] sustained an admitted cumulative trauma injury during the periods 2/22/2001 through 2/20/2003 to her neck, hands, wrists, fibromyalgia, psoriatic arthritis, and gastric hyperacidity while working as an executive assistant for the employer. The case-in-chief settled by way of multiple stipulations with request for Award, the last being 4/23/2019.

Lien claimant, Dr. David Silver, is the Petitioner herein, and filed a timely, verified Petition for Reconsideration (hereinafter, the “Petition”) on 8/18/2021. Petitioner takes issue with this Court’s Findings and Orders dated 8/2/2021. In that Findings, the undersigned WCJ found that lien claimant, Dr. David Silver, has been adequately compensated by Defendant for the services rendered in this case, there was no basis to award any additional reimbursement to lien claimant, there was no basis to award any penalties and interest to lien claimant, and there was no basis to impose any costs or sanctions against Defendant. This court Ordered lien claimant, Dr. David Silver, to take nothing further on their pending lien claim and Ordered lien claimant’s Petition for Costs and Sanctions dated 3/18/2016 be denied.

Petitioner contends that the undersigned WCJ erred in so doing, contending that *Defendant’s Exhibit B* should have been excluded, the Court should have relied upon *Lien Claimant’s Exhibit 1* as a basis for payments made by Defendant, Defendant’s bill reviewer should not have been found to be an expert bill review witness, Defendant’s bill reviewer should not have been allowed to testify at trial, the Court should not have assumed Dr. Silver was not the primary treating physician, and lien claimant’s Petition for Costs should have been granted.

II. STATEMENT OF FACTS:

This case involves an accepted case, as indicated above, with Applicant alleging multiple orthopedic and internal complaints. The matter previously settled by way of stipulations with request for Award for 63% permanent disability and was subject to a Petition to Reopen for New and Further Disability, although neither documents appear in the court’s file as they pre-date EAMS. The case-in-chief

eventually, finally, resolved by way of another stipulation with request for Award for 80% permanent disability, dated 4/23/2019.

Lien claimant, Dr. David Silver, filed their notice and request for allowance of lien on 2/18/2005.

Prior to the final Award, lien claimant, Dr. David Silver, filed a Declaration of Readiness to Proceed to a lien conference dated 10/13/2015 and a lien conference was held on 1/13/2016.

Defendant did not make an appearance at that time, but a representative for Applicant was present and representatives for lien claimants, including a representative for Dr. Silver, were present according to the Minutes of Hearing. The matter was continued to another lien conference, with a notation “Defendant did not get notice.”

On 3/18/2016, the representative for lien claimant, Dr. David Silver, filed a Petition for Costs and Sanctions against Defendant for defense counsel’s failure to appear at the hearing on 1/13/2016. That Petition for Costs and Sanctions has an unsigned verification attached.

On 3/21/2016, the parties appeared for another lien conference, this time with defense counsel and representatives for lien claimants, including a representative for Dr. Silver, present. The matter was taken off calendar at that hearing for further discovery.

On 4/8/2016, Defendant filed an Answer to the Petition for Costs and Sanctions.

After further proceedings on the case-in-chief, and subsequent proceedings on the pending lien issues, the pending lien issue of lien claimant, Dr. David Silver, was eventually set for trial in front of the undersigned WCJ. On 7/15/2021, the parties appeared before the undersigned WCJ, via phone conference and videoconference, for lien trial. The stipulations and issues of the parties were identified and the evidence was marked for the record. Defendant objected to the admissibility of various documents from lien claimant, which was overruled by the Court, and the representative for lien claimant objected to all of Defendant’s exhibits. The undersigned WCJ overruled the objections to *Defendant’s Exhibit A*

and *B*, and sustained the objection to *Defendant's Exhibit C*. Lien claimant, Dr. David Silver, offered no witness testimony. Defendant offered the testimony of their bill review expert, Yollete Capalla, as the only witness. During the questioning of Ms. Capalla, the representative for lien claimant challenged the qualifications of the witness. At the conclusion of lien claimant's questioning of Ms. Capalla's qualifications, the Court gave the representative for lien claimant the opportunity to do further discovery on the issue of the witness' qualifications, through a reopening of the record, if the representative for lien claimant wanted to pursue additional evidence to challenge the witness' certification. The representative for lien claimant declined the court's offer (*Minutes of Hearing and Summary of Evidence*, dated 7/15/2021, page 8, lines 8 to 12). Based upon Ms. Capalla's credible and un rebutted testimony, the witness was found to be an expert bill review witness by the Court. At the conclusion of the testimony by Ms. Capalla, the matter stood submitted for decision at that time.

On 8/2/2021, the Court issued the Findings and Order and Opinion on Decision at issue herein. This court found that lien claimant, Dr. David Silver, has been adequately compensated by Defendant for the services rendered in this case, there was no basis to award any additional reimbursement to lien claimant, there was no basis to award any penalties and interest to lien claimant, and there was no basis to impose any costs or sanctions against Defendant. This court Ordered lien claimant, Dr. David Silver, to take nothing further on their pending lien claim and Ordered lien claimant's Petition for Costs and Sanctions dated 3/18/2016 be denied.

On 8/18/2021, Petitioner filed the instant Petition. Petitioner contends, as indicated above, that *Defendant's Exhibit B* should have been excluded, the Court should have relied upon *Lien Claimant's Exhibit 1* as a basis for payments made by Defendant, Defendant's bill reviewer should not have been found to be an expert bill review witness, Defendant's bill reviewer should not have been allowed to testify at trial, the Court should not have assumed Dr. Silver was not the primary treating physician, and that lien claimant's Petition for Costs should have been granted. Petitioner requests reconsideration of the Court's Findings and Orders, but with no specific prayer for relief.

No response to the Petition has been received from Defendant as of the time of submission of this Report and Recommendation.

III. DISCUSSION:

A. Defendant's Exhibit B was properly admitted into the evidentiary record:

Petitioner contends “[t]he WCJ should not have admitted [*Defendant's Exhibit B*] into evidence over Petitioner's objection” (*Petition*, page 3, lines 15 to 17) because the document is dated 3/11/2016 and was listed on the pretrial conference statement as 3/18/2016. This court disagrees with Petitioner's contention. Although there does appear to be an error in the listing of the document, there is no indication that this error in any way prejudiced lien claimant. The document was listed with sufficient specificity to put lien claimant on notice as to what Defendant intended to offer as evidence at trial, i.e. Defendant's payment history. Lien claimant was, therefore, well aware that Defendant would be offering this payment history into evidence. The representative for lien claimant provided no evidence or argument at trial as to how this error prejudiced lien claimant, and Petitioner offers nothing further. In addition, Petitioner does not deny receipt of or knowledge of that payment history.

Based upon the above, the undersigned WCJ believes that the Court properly overruled the objection the admissibility of *Defendant's Exhibit B*, and properly admitted the document into the evidentiary record.

B. There is no basis to Award any additional payments to lien claimant, Dr. David Silver, based upon the evidence present:

Petitioner contends “[b]ecause Defendant did not produce the cancelled checks, the Board should have deemed that the Payment Ledger by Dr. Silver to be the more convincing evidence” (*Petition*, page 4, lines 16 to 18). This Court disagrees with Petitioner's contention that Defendant was required to provide copies of cancelled checks and that this court should have relied upon any of the payment ledgers provided by lien claimant. Lien claimant did not offer any evidence disputing any of the payments made by Defendant, as reflected in *Defendant's Exhibit B*. Lien claimant just offered three rather confused and contradictory

payment ledgers as evidence (*Lien Claimant's Exhibits 1, 2, and 3*). Petitioner, now, only urges this court to rely upon *Lien Claimant's Exhibit 1*. That document is confusing, at best. In addition to the issues identified in the Opinion on Decision (*Opinion on Decision*, dated 8/2/2021, page 1, second paragraph), *Lien Claimant's Exhibit 1* seems designed to make it as difficult as possible to figure out the charges alleged and payments received and is so unfinished that it has to be totaled by hand. It fails to list dates of services 9/24/2004 and 7/30/2004 with payments made by Defendant for those dates (*Defendant's Exhibit B*) and fails to include charges related to dates of service 5/11/2004 (*Lien Claimant's Exhibit 17*) and 5/3/2004 (*Lien Claimant's Exhibit 20*). Lien claimant offered no evidence to explain any of these discrepancies, or to explain the basis for any additional reimbursement for the pending lien claim of lien claimant.

In addition to the above, and as indicated by the testimony of Defendant's bill review expert, Yollete Capalla, even taking into account the payments listed by lien claimant's own payment ledger, lien claimant has been overpaid according to the official medical fee schedule (*Minutes of Hearing/Summary of Evidence*, dated 7/15/2021, page 9, lines 24 to 25, and page 11, lines 1 to 6).

Based upon all of the above, the undersigned WCJ maintains that lien claimant, Dr. David Silver, has been adequately compensated by Defendant for the services rendered on this case and there is no basis to Award any additional payments.

C. The un rebutted evidence established that Defendant's witness, Yollete Capalla, was an expert bill review witness:

Petitioner contends that Defendant's bill review witness, Yollete Capalla, "has not satisfied, through documentary evidence, the requirements to be a medical bill reviewer and testify as an expert bill reviewer" (*Petition*, page 9, lines 12 to 13). Petitioner concludes that the witness should not have been considered an expert bill review witness, therefore. This court disagrees with Petitioner's contention and conclusion.

Defendant's witness, Ms. Capalla, testified extensively about her qualifications, certifications, and training, and the representative for lien claimant

asked exhaustive questions of the witness in this regard (*Minutes of Hearing and Summary of Evidence*, dated 7/15/2021, page 19, line 19 through page 8, line 7). Ms. Capalla's testimony was detailed and very credible, and can be relied upon by this court to make a finding that she is an expert bill review witness. The representative for lien claimant offered nothing to rebut her testimony, and now only argues that additional documentary evidence was not supplied to this court to support Ms. Capalla's qualifications. This Court does not need such documentary evidence to consider Ms. Capalla an expert bill review witness. Ms. Capalla's credible, un rebutted testimony is sufficient for this purpose. This court gave the representative for lien claimant an opportunity to investigate Ms. Capalla's qualifications further, through additional discovery, but the representative for lien claimant declined (*Minutes of Hearing and Summary of Evidence*, dated 7/15/2021, page 8, lines 8 to 12). This Court can, and properly did, rely upon Ms. Capalla's testimony as evidence of her qualifications.

Based upon the above, this Court maintains that the un rebutted evidence established Defendant's witness, Yollete Capalla, was an expert bill review witness.

D. Defendant's expert bill review witness was properly allowed to testify at trial:

Similar to the above argument, Petitioner claims that because Defendant's witness, Yollete Capalla, did not offer documentary evidence of her qualifications, the witness should not have been allowed to testify at trial. Petitioner concludes that "[b]ecause the witness is not legally authorized to review medical bills, the WCJ erred in both allowing and relying on the testimony" (*Petition*, page 10, lines 18 to 19). As indicated above, there is sufficient evidence that this court can, and did, rely upon to find Defendant's witness, Yollete Capalla, to be an expert bill review witness. Petitioner's insistence that there must be also be documentary evidence to support Ms. Capalla's testimony is misplaced and without basis.

Based upon all of the above, this Court maintains that Defendant's expert bill review witness, Yollete Capalla, was properly allowed to testify at trial.

E. There was no evidence submitted to establish that Dr. Silver was the primary treating physician:

Petitioner contends that “[t]he WCJ should not have relied on the assumption by the adjuster that Dr. Silver was a secondary treating physician since this is not a fact supported by any evidence in the record” (*Petition*, page 11, lines 23 to 25). This Court relied upon no such assumptions. This court relied upon the evidence presented by the parties and, rather, the lack of evidence presented by lien claimant.

Lien claimant did not offer any evidence establishing that Dr. Silver was ever designated as the primary treating physician. In all of the medical reporting generated by Dr. Silver and supplied to this Court, Dr. Silver never referred to himself as the primary treating physician (*Lien Claimant’s Exhibits 4 through 23*). In all of the medical reporting generated by Dr. Silver and supplied to this Court, Dr. Silver continually refers to the Applicant as being a patient of Dr. Robert Hunt and the Applicant having been referred by Dr. Hunt to Dr. Silver (*Lien Claimant’s Exhibits 4 through 23*). None of the medical reporting generated by Dr. Silver and supplied to this Court establish that Dr. Silver was ever the primary treating physician in this case. Lien claimant has failed, therefore, to meet their burden to establish they are entitled to bill and be reimbursed as the primary treating physician. Defendant’s expert bill review witness, Yollete Capalla, properly reviewed lien claimant’s billing and supporting documents as a secondary treating physician’s billing and reports, and reduced those charges accordingly. No assumptions were made by either Ms. Capalla or this Court, but rather the analysis was done based upon lien claimant’s own exhibits and medial reporting.

Based upon the above, this Court maintains that because there was no evidence submitted by lien claimant, Dr. David Silver, establishing that Dr. Silver was ever the primary treating physician, lien claimant cannot bill or be reimbursed as the primary treating physician.

F. There is no basis to award Costs or impose sanctions against Defendant for their failure to appear at the hearing dated 1/13/2016:

Petitioner makes a rather contradictory argument that Defendant’s clerical

error is sufficient to Award costs and impose sanctions against Defendant, but the representative for lien claimant's clerical error is excusable and should be ignored. Firstly, Petitioner claims "Defendant's lack of notice resulted from the "defective Substitution of Attorneys" filed by Defendant's attorneys" (*Petition*, page 12, lines 8 to 10, quotes in original). This error resulted in Defendant not getting notice of the lien conference scheduled for 1/13/2016 and resulted in defense counsel's failure to appear at that hearing. This, lien claimant alleges, is sufficient to impose sanctions against Defendant and award costs to lien claimant. This court disagrees with this conclusion. As indicated in the Opinion on Decision, there is no indication or evidence submitted to this court to establish Defendant's actions were "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay" pursuant to Labor Code §5813. Defendant's failure to appear was an excusable error, and this Court will not Award costs or impose sanctions based upon an excusable error.

Secondly, Petitioner makes the contradictory argument that the representative for lien claimant's own clerical error should be ignored and the representative for lien claimant should "have been given the opportunity to cure this defect" (*Petition*, page 13, lines 1 to 2). The representative for lien claimant was given ample opportunity to cure this defect, as Defendant raised this defect and the violation of CCR §10450(e) in their Answer to Petition for Costs and Sanctions dated 4/8/2016. The representative for lien claimant was made aware of this violation, therefore, and did nothing to cure it. The representative for lien claimant had over 5 years to cure this defect before proceeding to trial on their Petition for Costs and Sanctions and failed to cure it. The Petition for Costs and Sanctions dated 3/18/2016 was properly denied, therefore, based upon CCR §10510(d) (formerly CCR §10450(e)), in addition to the failure to state a basis for such costs and sanctions, as indicated above.

Based upon the above, this Court maintains that there is no basis to Award costs or impose sanctions against Defendant.

IV. RECOMMENDATION:

The undersigned WCJ recommends that the lien claimant's Petition for Reconsideration dated 8/17/2021, be denied.

Date: **August 30, 2021**

Peter M. Christiano
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

REASONABLENESS AND NECESSITY OF SERVICES:

Based upon the credible testimony of the expert bill reviewer, Yollete Capalla, it is found that lien claimant, David Silver, MD, has been adequately compensated by Defendant for the services rendered on this case. Ms. Capalla testified that lien claimant, David Silver, MD, has not only been paid according to the official medical fee schedule, but lien claimant, David Silver, MD, has been overpaid according to the official medical fee schedule (*Minutes of Hearing/Summary of Evidence*, dated 7/15/2021, page 9, lines 24 to 25, and page 11, lines 1 to 6) and the payment listing contained in *Defendant's Exhibit B*.

The only evidence lien claimant offered to rebut this testimony was the billing from lien claimant, David Silver, MD, and the "explanation of extraordinary circumstances" attached to that billing (*Lien Claimant's Exhibit 1, 2, and 3*). This court did not find that explanation at all compelling, as it was just general, canned language that had not relationship to specifics about this case or the complexity involved in the services provided by lien claimant, David Silver, MD, to this Applicant. The explanations provided were so confused and detached from this particular case that lien claimant, David Silver, MD, twice referred to Applicant as a male (*Lien Claimant's Exhibit 1*, page 6 and *Lien Claimant's Exhibit 3*, page 5) and once referred to Applicant as a female (*Lien Claimant's Exhibit 2*, page 4) in the process of justifying billing over the official medical fee schedule for the services provided to Applicant. This rather confused, canned explanation is not substantial evidence and is insufficient to rebut the testimony of the expert bill reviewer, Ms. Capalla.

Based upon the above, it is found that lien claimant, David Silver, MD, has been adequately compensated by Defendant for the services rendered on this case.

LIENS:

Based upon the above, it is found that there is no basis to award any additional reimbursement to lien claimant, David Silver, MD. The pending lien claim of lien claimant, David Silver, MD, is disallowed, therefore, and lien claimant shall take nothing further from the claim filed herein.

PENALTY AND INTEREST:

The only evidence submitted to this court indicating when the billing statements and supporting documentation were submitted to Defendants to trigger the time periods contained in Labor Code §4603.2(b)(2) were contained in *Lien Claimant's Exhibits 15, 12, 10, and 6* for each of those respective dates of service. The payments made for those dates of service do appear to be late, as indicated in the billing statement contained in *Lien Claimant's Exhibit 1*. Even with the addition of a penalty for those dates of service pursuant to Labor Code §4603.2(b)(2), lien claimant, David Silver, MD, has still been overpaid according to the payment listing

contained in *Defendant's Exhibit B*. No additional penalty can be awarded, therefore, beyond that which has been already paid by Defendant to lien claimant, David Silver, MD.

Pursuant to Insurance Code §1063.2(h), no interest is owed by this Defendant, CIGA, prior to the liquidation of the now insolvent carrier. As there is no further reimbursement currently owing to lien claimant, David Silver, MD, no interest can be Awarded.

Based upon the above, it is found that there is no basis to award any penalties and interest to lien claimant, David Silver, MD.

COSTS AND SANCTIONS:

Lien claimant, David Silver, MD, alleges, in their Petition dated 3/18/2016, that costs and sanctions should be imposed against Defendant in favor of lien claimant pursuant to Labor Code §5813 for Defense counsel's failure to appear at a lien conference on 1/13/2016. There is no indication that Defense counsel's failure to appear was in any way "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay" pursuant to Labor Code §5813.

Pursuant to Defendant's Answer dated 4/8/2016, Defense counsel simply did not get notice of the hearing. This court will not impose sanctions and costs against any party who did not get notice of a hearing, and, therefore, did not appear for a hearing. Such non-appearance is justified, therefore.

In addition to the above, lien claimant, David Silver, MD's, Petition dated 3/18/2016 fails to comply with CCR §10510(d) (formerly CCR §10450(e)). The Petition dated 3/18/2016 is denied, therefore, based upon CCR §10510(d).

Based upon all of the above, it is found that there is no basis to impose any costs or sanctions against Defendant.

Date: **August 2, 2021**

Peter M. Christiano
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE