WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MIGUEL JIMENEZ, *Applicant*

vs.

YANG WU INTERNATIONAL INC. and CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, self-administered, for TOWER SELECT/AMTRUST/ CASTLEPOINT, in liquidation, *Defendants*

Adjudication Number: ADJ9091752

Oxnard District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted lien claimant Dental Trauma Center's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Dental Trauma Center (DTC) seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on February 27, 2020, wherein the WCJ found in pertinent part that the treatment furnished by DTC was not reasonably required to cure or relieve applicant from the effects of his industrial injury; and that the initial evaluation and reporting by DTC was not a reasonable medical legal expense; the WCJ ordered that DTC's lien be disallowed.

DTC contends that the fact that applicant did not allege a dental injury should not be considered, that defendant had notice of the claim of dental injury, that defendant was not prejudiced or misled by lack of pleading a dental injury, that DTC cannot be adversely affected by the failure of applicant to plead a dental injury, and that defendant had notice that dental treatment was being provided.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from defendant California Insurance Guarantee Association (CIGA).

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will affirm the F&O.

BACKGROUND

Applicant claimed injury to his neck, shoulders, back, chest, and respiratory system, while employed by defendant as a shipping clerk during the period from January 1, 2012, through May 14, 2013. On April 22, 2014, the parties proceeded to trial and by the May 27, 2014, Findings and Award, a WCJ determined that applicant sustained injury AOE/COE to his neck, back, chest, shoulders, and respiratory system. On July 15, 2016, applicant was seen by Mayer Schames, D.D.S., a dentist with DTC, and Dr. Schames issued a Doctor's First Report of Injury. (L.C. Exh. 4, Dr. Schames, July 15, 2016.)[1] The injury claim was resolved by Compromise and Release; paragraph 1 (page three) states that applicant alleged injury to his neck, back, chest, shoulder, respiratory and internal systems, and his knees. A WCJ issued the Order Approving Compromise and Release on July 18, 2016. On August 24, 2016, Dr. Schames issued an "Initial Report" pertaining to the July 15, 2016, examination of applicant. (L.C. Exh. 3, Dr. Schames, July 29, 2016.)

[1] We note that the proof of services indicates the report was served on "DEFENSE ATTORNEY: Colantoni & Collins, 660 South Figueroa Street, Suite 1110, Los Angeles, CA 90017" and "INSURANCE CARRIER: Tower National, PO BOX 4026, Concord, CA 94524." (L.C. Exh. 4, p. 6.) Our review of the Electronic Adjudication Management System (EAMS) ADJ file indicates that Bradford Barthel Tarzana filed a Substitution of Attorneys (replacing Peterson Colantoni) January 21, 2014, and applicant's attorney was served the Substitution on January 20, 2014. CIGA subsequently filed a Substitution of Attorneys on May 5, 2017.

DISCUSSION

Initially, we note that to be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1), former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, former § 10840(a), now § 10940(a) [eff. Jan. 1, 2020].) Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Section 5315 provides the Appeals Board with 60 days within which to confirm, adopt, modify, or set aside the findings, order, decision, or award of a workers' compensation administrative law judge. (Lab. Code, § 5315.)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020, in response to the spread of the novel coronavirus (COVID-19). In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020, stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (In re: COVID-19 State of Emergency En Banc (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020. Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020, and the Petition was timely filed. Therefore, the Petition is deemed filed on April 13, 2020, and the opinion granting the Petition issued within the 60-day period.

Having reviewed the trial record, as well as the Electronic Adjudication Management System (EAMS) ADJ file, we agree with the WCJ's analysis and reasoning for reaching his conclusions as stated in the F&O, and his explanation of those conclusions as stated in the Report.

Notwithstanding the fact that we agree with the WCJ disallowing DTC's lien, for the purpose of clarity, we will address DTC's argument that its lien should be, "…decided on the merits of the case, not on alleged procedural defects" (Petition pp. 4 – 5.). We first note that pursuant to Labor Code section 5705, "The burden of proof rests upon the party or lien claimant holding the affirmative of the issue." (Lab. Code, § 5705.) A lien claimant treating physician's

burden of proof includes the burden of showing that he or she provided medical treatment "reasonably required to cure or relieve" the injured worker from the effects of an industrial injury. (Lab. Code, § 4600(a); *Williams v. Industrial Acc. Com.* (1966) 64 Cal.2d 618 [31 Cal.Comp.Cases 186]; *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd.* (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461].)

Here, the report from qualified medical examiner John L. Howard, M.D., submitted by DTC as exhibit 7, states that applicant was "post cervical strain" and "post lumbar strain", and the doctor stated that, "Future medical treatment is not required." (L.C. Exh. 7, Dr. Howard, October 7, 2015, pp. 9 – 10.) Dr. Howard also noted that applicant had been released from care by treating physician Dr. Michael Moheimani, in July 2015. (L.C. Exh. 7, p. 3.) Dr. Schames did not explain why after being released from care, that applicant needed further treatment. Nor did Dr. Schames explain why, that even though applicant had not claimed injury to his teeth or dental system, the dental treatment Dr. Schames provided was reasonably required to cure or relieve applicant from the effects of applicant's industrial injury. (Lab. Code, § 4600(a).) A medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358]; *Granado v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 407 [33 Cal.Comp.Cases 647].) Thus, Dr. Schames' reports are not substantial evidence and in turn, would not be an appropriate basis for awarding payment of DTC's lien. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) Again, as noted by the WCJ, all other issues, "are moot in light of the foregoing." (F&O, p. 2.)

Accordingly, we affirm the F&O.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued by the WCJ on February 27, 2020, is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 26, 2022

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

MIGUEL JIMENEZ
BRADFORD & BARTHEL
SOLOV & TEITELL
SAAM AHMADINIA
GUILFORD SARVAS & CARBONARA
THE DENTAL TRAUMA CENTER

TLH/mc

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, Miguel Jimenez, **…,** while employed during the period 01/01/2012 through 05/14/2013 as a shipping clerk and packer at Los Angeles, California by Yang Wu International whose workers' compensation carrier was Tower Select / Amtrust / Castlepoint, in liquidation and now California Insurance Guarantee Association, self-administered, sustained injury arising out of and occurring in the course of employment to his neck, back, chest, shoulders and respiratory system.

Petitioner lien claimant Dental Trauma Center seeks reconsideration of the 02/27/2020 decision that defendant did not have liability for self-procured evaluation or treatment to applicant's teeth.

I. CONTENTIONS

Petitioner lien claimant Dental Trauma Center contends that the undersigned should not have considered that no allegation of dental injury was made, that no law was cited to support the finding that no treatment to applicant's teeth was required for this allegedly injured body part, that defendant had notice of the claim of dental injury, that defendant was not prejudiced or misled by lack of pleading a dental injury, that petitioner cannot be adversely affected by the failure of applicant to plead a dental injury, and that defendant had notice that dental treatment was being provided.

II. FACTS

On 04/22/2014 the parties to the case in chief proceeded to trial, applicant alleging industrial injury to his neck, back, chest, shoulders and respiratory system. Defendants asserted a post- termination bar defense.

On 05/27/2014 the alleged injury was found compensable to those parts of body.

More than two years later, on 07/09/2016, applicant's attorney requested a report from petitioner (Lien Claimant's Exhibit 5) advising the doctor that "this case is going to court on 07/18/2016" and that the report is requested on a rush basis.

Petitioner issued a report on 07/15/2016 (Lien Claimant's Exhibit 4). This was a doctor's first report of injury with a request for authorization for treatment.

Three days later, applicant and defendant appeared at MSC on 07/18/2016 and settled by compromise and release.

III. DISCUSSION

Allegation of Dental Injury

Petitioner asserts bias on the part of the undersigned WCALJ for considering the pleadings of the parties, and the prior Findings of Fact, including what body parts were injured, arguing that defendant never raised the issue of whether a dental injury was alleged. A prior decision in a case cannot be ignored in subsequent proceedings. Neither is it the product of bias to review and consider the filed pleadings.

Law Supporting Finding / Burden of Proof

Petitioner asserts that it carried its burden of proof to support reimbursement for its lien.

The claim is for $17,687.96. Charges of $12,915.37 related to for studies, dental appliances and examination on 07/15/2016, and then another $1,235.00 was charged for a report on 07/29/2016. A charge of $3,537.50 in penalty and interest is set forth in the billing (Lien Claimant's Exhibit 1).

As discussed below, at the time of this evaluation, there was no claim of injury to the teeth or any other dental allegation.

It is the provider's burden to demonstrate that there was a contested claim. Injury had been found two years before petitioner's services.

While no specific citation was set forth, Labor Code Section 4622 and *Colamonico v. Secure Transportation,* en banc (2019) 84 Cal.Comp.Cases 1059 govern the necessity of demonstrating the existence of a contested claim to support medical legal charges, and Labor Code Section 4062 governs reimbursement for treatment. To prove injury AOE/COE to the teeth, petitioner would need substantial medical evidence. A doctor's first report and an RFA are insufficient.

Defendant's Notice of Claim of Dental Injury

The burden of showing that a provider's treatment or medical legal services were reasonably required rests with the provider.

Here, applicant's attorney sent a FAX letter to petitioner (Exhibit 5). Nothing suggests service on defendants or defense counsel.

Petitioner relies on Exhibit 4, the 07/15/2016 DFR with the RFA, to support the allegation that defendant had sufficient notice of the claim of dental injury. Additionally, petitioner states: "Lien Claimant contends that Defendant received Notice when Lien Claimant served its Exhibit #3 to overcome any argument that its lien be dismissed due to lack of an amended application."

First, petitioner completely ignores the timing of the events in this case. The 07/15/2016 report could not possibly have been served on defendants to constitute notice of anything as of 07/18/2016 when the case settled. It is noteworthy that the compromise and release makes no mention of any dental or teeth injury or condition. This is enough to question whether even applicant's attorney knew of reporting when settling the case.

Reliance upon Exhibit 3, a 07/29/2016 report, is plainly misplaced, since the case was settled eleven days earlier.

Prejudice

The decision as to the lien of Dental Trauma Center was not based on prejudice to defendants. It is based on a failure to establish the existence of a contested claim to support a medical legal charge and a failure to offer substantial medical evidence of an industrial dental injury.

Effect of Pleadings on Lien Claimant

Similarly, the lack of mention of a dental claim in the application was not the sole reason for disallowing the lien. The overall record is devoid of any such claim.

Defendant's Notice of Dental Treatment

Petitioner asserts that since defendant learned of the treatment from the RFA it had sufficient notice of the dental injury and therefore liability for the evaluation and/or treatment. There is no evidence that defendants were provided with the doctor's first or the RFA before the case settled three days later. Further, notice of the treatment falls short of proving that it is reasonably required to cure or relieve from the effects of an industrial injury.

IV. RECOMMENDATION

Based on the foregoing the undersigned WCALJ recommends that the petition for reconsideration be denied.

DATED AT OXNARD, CALIFORNIA

DATE: 03/25/2020 WILLIAM M CARERO

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

SERVICE:

GUILFORD SARVAS ANAHEIM, US Mail
SAAM AHMADINIA BEVERLY HILLS, US Mail

Served on above parties by preferred method of service shown above at addresses shown on attached

Proof of Service: ON: 3-25-2020