

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

MILAGROS PAUL, *Applicant*

vs.

**ICON, INC.;;
TECHNOLOGY INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ10360307
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board previously granted reconsideration to further study the factual and legal issues in this case. This is our decision after reconsideration.

Defendant seeks reconsideration of the August 19, 2021, Findings of Fact and Orders (F&O), wherein the workers' compensation administrative law judge (WCJ) found that the Employment Development Department (EDD) was entitled to reimbursement of its lien from defendant.

Defendant contends that the EDD should be estopped from seeking reimbursement for the lien because any reimbursement would result in EDD obtaining an unjust enrichment by allowing it to escape its legal obligation to pay applicant 52 weeks of state disability.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. Based on our review of the record, for the reasons discussed below, and for the reasons stated in the WCJ's report, which we adopt and incorporate, it is our decision after reconsideration to affirm the August 19, 2021, F&O.

FACTS

Applicant claimed that, while employed by defendant as a hair stylist from August 30, 2002, to August 14, 2015, she sustained an industrial injury to her neck, upper extremities, back,

shoulders, nervous system, and psyche due to repetitive work. She was temporarily disabled from September 8, 2015, to January 9, 2019.

It is undisputed that the defendant paid temporary disability benefits from September 8, 2015, to March 2, 2016, and again from June 1, 2017, to January 9, 2019. (Petition, p. 2.) It is also undisputed that the EDD paid temporary disability benefits from May 9, 2016, to May 7, 2017. (Petition, p. 2.)

On June 27, 2016, EDD mailed a Notice of Lien Claim to Amtrust North American at an address in Concord, CA, correctly identifying the applicant and her employer. (EDD Ex. 1.) On June 30, 2017, EDD filed a Notice and Request for Allowance of Lien (Lien). The Lien transposed applicant's first and last name but listed her social security number correctly. (Lien, p. 6.) It also listed her employer Icon at its correct address in Woodland Hills; defendant Amtrust Covina at its correct address in Cleveland, Ohio; and the defendant's law firm, McNamara Drass in Santa Ana.¹ (Lien, pp. 7-8.) The proof of service states that the EDD served the persons listed above in the document as well as the applicant's attorney. (Lien, p. 10.)

In the only report from the QME Dr. Strazzeri, he found the applicant to be permanent and stationary as of his examination of her on January 23, 2020. (Court's Ex. X, pp. 2, 6.) Applicant's case was resolved by way of a Compromise and Release agreement (C&R) on March 31, 2021, and an order approving issued on April 6, 2021. (Defendant's Ex. A.) Defendant held applicant harmless for the EDD lien. (C&R, p. 6.)

The case went to trial on August 18, 2021, on the issue of EDD's entitlement to reimbursement of its lien of \$20,436 for disability payments made from May 9, 2016, through May 7, 2020. (Opinion on Decision (OOD), p. 1.) The F&O issued on August 19, 2021, wherein the WCJ ordered that the EDD lien was allowed in its entirety plus interest. (F&O, p. 2.) In the OOD, the WCJ clarified the finding by stating that "When the employer makes voluntary payment of benefits with full knowledge of the EDD lien, it makes those payments at its own risk." (OOD at p. 3.) The WCJ further found:

With clear notice of a lien, the Defendant ought to have reimbursed EDD for its lien. The Defendant is not permitted to simply allow EDD to pay benefits and do nothing while temporary disability is work related. Reimbursement is mandatory under sec. 4904(b)(1) whenever there is payment by the Department

¹ The address for the defendant's law firm does not match the address in the official address record (OAR).

that is ultimately determined to be temporary disability under workers' compensation law.

Had the employer reimbursed EDD it could then include those weeks in calculating when the 2 year limit of Section 4656(c)(2) would occur. Having failed to reimburse EDD it cannot now claim that its payments made more than 2 years after temporary disability commenced allow it to "take credit" against EDD for those payments. The two year limit of Sec. 4656(c)(2) is calculated only on payments the Defendant has actually made, not those it has watched someone else pay. Cal. Lab. Code sec. 3752 specifically prevents the Defendant from claiming such.

(OOD at p. 4.)

DISCUSSION

As explained below, we will not disturb the WCJ's finding as to EDD's lien, and we will affirm the F&O. We agree with the WCJ that when an employer is on notice of an EDD lien and still makes payments, it does so at its own peril. (*Whelden v. Golden Empire Transit District* (Dec. 9, 2011, ADJ2004717, ADJ4639734) 2011 Cal.Wrk.Comp.P.D.LEXIS 595 (*Whelden*).)² We also agree that the WCJ is correct that defendant's reliance on Labor Code section 4656(c)(2) does not obviate EDD's entitlement to repayment pursuant to Labor Code sections 4903 and 4904.

Establishment of notice is not a requirement before we can apply *Whelden*. Here, defendant was served with the Lien on June 30, 2017. (Lien, p. 10.) Unlike the defendant in *Whelden, supra*, defendant did not contend that the lien was invalid or that it had been misled. Instead, it contends that the EDD is estopped from seeking reimbursement for the lien as the EDD would be unjustly enriched. (Petition, pp. 2-3.) However, the burden was on the defendant to dispute a lack of notice of the lien and it failed to do so. (See Lab. Code, § 5705.)

In *Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803 [2018 Cal.Wrk.Comp LEXIS 100] (Appeals Board en banc), we held that a document that is correctly addressed and properly mailed is presumed to have been received. (*Id.* at p. 1817, citing Evid. Code, § 641.) The WCJ may consider lack of receipt of the document *if the opposing party alleges that the*

² While it is true that Appeals Board panel decisions are not binding precedent and have no stare decisis effect (*Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal. Comp. Cases 236]), we consider them to the extent we find their reasoning persuasive. Unlike unpublished appellate court opinions, which, pursuant to California Rules of Court, rule 8.1115(a), may not be cited or relied on, except as specified by rule 8.1115(b), Appeals Board panel decisions are citable, even though they have no precedential value. (*See Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal. Comp. Cases 145].)

information was not received. (*Suon v. California Dairies, supra*, 83 Cal.Comp.Cases at p. 1817 [emphasis added].) Further, the recipient must produce sufficient evidence that it did not receive the document; a mere allegation that it was not received is insufficient to rebut the presumption that it was received. (*Id.*) Once the recipient provides sufficient evidence of non-receipt, the WCJ must then weigh the evidence of non-receipt against the proof of mailing and decide whether or not the document was received. (*Id.*)

In the instant case, defendant presented no evidence or offer of proof as to when it received notice that would dispute the presumption that notice was appropriately provided. Moreover, defendant never complained that it did not receive notice of the lien at the hearing; there is no mention of this issue in the pre-trial conference statement, minutes of hearing, OOD, or the F&O. The WCJ found that defendant was on notice of the EDD lien as of June 27, 2016. (F&O, Finding of Fact no. 7.) Therefore, we can correctly presume that defendant received the lien.

Further, we note that defendant did not raise lack of notice of the lien at the hearing or in its Petition for Reconsideration.

The petition for reconsideration shall set forth specifically and in full detail the grounds upon which the petitioner considers the final order, decision or award made and filed by the appeals board or a workers' compensation judge to be unjust or unlawful, and every issue to be considered by the appeals board.

(Lab. Code, § 5902.)

The party petitioning for reconsideration

shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration.

(Lab. Code, § 5904; see also *Truck Ins. Exchange v. Workers' Comp. Appeals Bd.* (2016) 2 Cal.App.5th 394, 403 & fn. 7; *Guerra v. Workers' Comp. Appeals Bd.* (2016) 246 Cal.App.4th 1301, 1305, fn. 3; *Suon v. California Dairies, supra*, 83 Cal.Comp.Cases at pp. 1805, 1812 [finding that the failure to object to an issue may be construed as implicit agreement by the opposing party].) Therefore, even if defendant had raised the issue of lack of notice earlier in the case, the issue would still have been waived by the failure to raise in it the Petition for Reconsideration. Therefore, the issue of notice has been waived. (Lab. Code, §§ 5902, 5904.)

Finally, defendant did not raise any issue regarding the filing of the lien. (Cal. Code Regs., tit. 8, § 10617.) There is no evidence in the record that the lien was defective. Defendant did not contest the filing of the lien at the hearing; there is no mention of this issue in the pre-trial conference statement, minutes of hearing, OOD, or the F&O. Defendant also failed to raise this issue in its Petition for Reconsideration. Therefore, any issue regarding mistakes on the lien is also waived. (Lab. Code, §§ 5902, 5904.)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the August 19, 2021, Findings of Fact and Orders is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DEIDRA E. LOWE, COMMISSIONER
PARTICIPATING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 31, 2022

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

**MILAGROS PAUL
MCNAMARA & DRASS
EMPLOYMENT DEVELOPMENT DEPARTMENT**

JMR/pc

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