

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

REBECCA REYES, *Applicant*

vs.

**STAFFING RESOURCES GROUP;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ199880 (LAO 0786931), ADJ2257307 (LAO 0813502)
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board previously granted reconsideration to further study the factual and legal issues. This is our Decision After Reconsideration.

Lien claimant, David Silver M.D. seeks reconsideration of the January 27, 2021 Findings and Award. The workers' compensation administrative law judge (WCJ) found that lien claimant is entitled to reimbursement in the amount of \$24,957.86. The WCJ also found that defendant did not unreasonably delay or refuse the payment of compensation by not paying money to the lien claimant pursuant to the court's decision on July 20, 2011 and that defendant did not engage in bad faith tactics warranting a sanction. In addition, the WCJ found that there were no extraordinary circumstances which would justify payment of fees to Dr. Silver in excess of reasonable maximum fees.

Lien claimant contends that the WCJ abused his discretion by failing to find an unreasonable delay in defendant's refusal to pay any amount on the lien after a July 20, 2011 Order arguing that lien claimant "did reasonably and necessarily secure necessary medical services and/or medical-legal expense with David Silver, M.D." Lien claimant contends that the WCJ should have awarded a 5814 penalty, multiple sanctions and awarded costs. Lien claimant also contends that the WCJ erred in relying on Exhibits E and F which were not in evidence. Finally,

lien claimant contends that, because the official medical fee schedule (OMFS) was not placed in evidence and there were extraordinary circumstances in this case, the WCJ's determination that lien claimant is entitled to reimbursement in the amount of \$24,957.86 was not supported by the evidence.

We have considered the Petition and we have reviewed the record in this matter. Lien claimant requested leave to file a supplemental petition. We grant lien claimant's request and we have considered the supplemental petition. In the supplemental petition, lien claimant acknowledges that Exhibits E and F were placed in evidence. We have received a Report and Recommendation on Petition for Reconsideration (Report), from the WCJ recommending that the petition be denied. For the reasons set forth below, we will amend the decision to find an unreasonable delay between the July 20, 2011 Finding of Fact and defendant's payment on March 6, 2012. We will otherwise affirm the WCJ's decision for the reasons stated in his report with the exception of the WCJ's discussion of the effect of lien claimant's failure to challenge a particular finding of fact in an earlier decision at pages 6 through 7.¹

With respect to lien claimant's contention that Dr. Silver is entitled to a fee in excess of the OMFS, Labor Code section 5307.1 mandates that the Administrative Director adopt a fee schedule "that shall establish reasonable maximum fees." Prior to 2004 and SB 228, Labor Code section 5307.1(b), which authorizes and directs the establishment of the OMFS, permitted reimbursement in excess of the OMFS for medical treatment provided *the fee was reasonable, not in excess of the usual fee, and "accompanied by itemization and justified by an explanation of extraordinary circumstances related to the unusual nature of the medical services rendered."*² That provision was deleted by the legislature as part of the SB 228 workers' compensation reform, which was signed into law on September 30, 2003, and went into effect on January 1, 2004.

¹ Because the April 10, 2020 Findings and Order was rescinded, any petitions related to it do not preclude a party from raising additional issues on the new decision that were not raised in a petition related to the rescinded order.

² The pre-2004 OMFS included AD Rule 9792.1(c) which listed a number of exceptions to the pre-2004 OMFS maximum reimbursement formula including the "extraordinary circumstances" exception. (Cal. Code Regs, tit. 8, § 9792.1.)

After SB 228 amended Labor Code section 5307.1(b), the AD adopted a new OMFS. (See Administrator Director Rule 9789.11(a)(1).) For dates of service after January 1, 2004, neither former Labor Code section 5307.1 nor AD rule 9792.1(c) apply to provide an “extraordinary circumstances” exception to the OMFS. The transition to the 2004 OMFS is also reflected in the 2015 supplement to AD Rule 9790, which went into effect on March 5, 2015. Specifically, the newly created second sentence of that rule provides “Sections 9790.1 – 9792.1 and Appendices A-C, contained in this Article, are not applicable for physician services rendered and inpatient hospital facility services for discharges after January 1, 2004, unless otherwise specified in this Subchapter 1.”

Turning to whether a 5814 penalty should be awarded for unreasonable delay, despite lien claimant’s representation to the contrary, defendant did pay additional amounts on the lien after the July 20, 2011 Finding of Fact. However, defendant has offered no explanation for the delay in paying between July 20, 2011 and March 6, 2012.

For the foregoing reasons,

As our Decision After Reconsideration, **IT IS ORDERED** that the January 27, 2021 Findings and Award is **AFFIRMED, EXCEPT** Finding of Fact No. 1, and 2 are **AMENDED** as follows:

FINDINGS OF FACT

1. The defendant unreasonably delayed payment between the July 20, 2011 Finding of Fact and March 6, 2021. Lien claimant is entitled to a penalty pursuant to Labor Code section 5814 in an amount to be determined with jurisdiction reserved at the trial level in the event of a dispute.

2. The defendant did not engage in bad faith actions or tactics by delaying payment from the July 20, 2011 Finding of Fact until March 6, 2021.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 13, 2022

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

**DAVID SILVER, M.D.
LEGAL SERVICES BUREAU
STATE COMPENSATION INSURANCE FUND**

MWH/oo

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