

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

KIMBERLY KENNEY, *Applicant*

vs.

**SEGUOYAH, INC.
FARMERS INSURANCE EXCHANGE, et al., *Defendants***

***Real Parties in Interest:*
Firstline Health, Inc. dba U.S. Health & Orthopedics, *Lien Claimant***

**Adjudication Number: SAU8813471
Van Nuys District Office**

**OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND
DECISION AFTER RECONSIDERATION**

Lien claimant Firstline Health, Inc. dba U.S. Health & Orthopedics (lien claimant) seeks reconsideration of the Order of Adverse Inference Order Re Costs issued on October 18, 2023 by a workers' compensation administration law judge (WCJ).¹ The WCJ found that lien claimant willfully failed to comply with the Court's May 23, 2023 order to file a verified statement listing all entities/individuals claiming ownership interest in lien claimant's liens, and that there was no response to the Court's September 12, 2023 Notice of Intention to Issue an Order of Adverse Inference [and] Order of Costs (September NIT). The WCJ found good cause based on these findings to order an adverse determination of "an adverse assignment of any and all of the liens of Firstline Health, Inc.," and that lien claimant pay liaison counsel Mokri Vanis \$1,800.00 in litigation costs on behalf of the joint carriers in this matter.

Lien claimant contends that it provided sufficient response to the May 23, 2023 order and the NIT on August 22, 2023; that there is no assignment of its liens to any person or entity and it

¹ Lien claimant filed a pleading titled, "Lien Claimant's Response to October 24, 2023 Order Regarding Its Ownership and the Ownership of its Liens; Supplemental Declaration of Patrick Rubeiz," wherein lien claimant requested rescission of the Order instead of filing a petition for reconsideration and/or removal of the Order to the Appeals Board as required under Labor Code section 5900 or WCAB Rule 10955. The Order includes a final order of costs against lien claimant and therefore we treat the pleading as a petition for reconsideration. (Lab. Code, § 5900 (Lab. Code, §§ 5900, 5901, 5950; see *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1255; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1074.) We hereinafter refer to lien claimant's pleading as "petition" or "Petition for Reconsideration."

is the real party in interest in these consolidated proceedings in that no other person or entity owns its liens or has a right to seek recovery; and, that regardless, an assignment of an entity's liens does not define ownership of the lien claimant entity.

Joint carriers filed a response to lien claimant's petition (answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration/Removal (Report) recommending that the petition be dismissed as untimely and/or otherwise denied.²

We have reviewed the record in this case, the allegations of the petition and the answer, and the contents of the Report. Based on our review of the record and for the reasons set forth below, we grant reconsideration. It is our decision after reconsideration to rescind the Order and return this matter to the trial level for further proceedings consistent with this decision.

I.

To be timely, a petition for reconsideration must be filed and received by the Appeals Board within 20 days of the service of the final order, plus an additional five days if service of the decision is by any method other than personal service, including by e-mail or mail, upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) The petition for reconsideration can be filed at any district office of the WCAB. (Cal. Code Regs., tit. 8, § 10940(a).) If the last day to file a petition for reconsideration falls on a weekend or a holiday on which the Workers Compensation Appeals Board is closed, the deadline moves to the next business day. (Cal. Code Regs., tit. 8, § 10600(b).)

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d

² The WCJ titles the Report in the alternative as addressing a petition for reconsideration and/or removal, but only addresses the removal standard. As stated in footnote 1, *supra*, the Order includes a final order of costs against lien claimant and we therefore treat the petition as a petition for reconsideration. We concur with the WCJ's complaint that Mr. Shohet failed to properly file a petition for reconsideration or removal. Mr. Shohet has appeared before the Appeals Board on petitions for removal and reconsideration on numerous occasions in the past and is therefore aware that the remedy for seeking review of a final order is a petition for reconsideration with the Appeals Board, which includes an initial review by the WCJ for rescission or amendment by the WCJ (Cal. Code Regs., tit. 8, § 10961). We therefore admonish George A. Shohet and the Law Offices of George A. Shohet for failing to comply with the Labor Code and the WCAB Rules which could in the future subject them to an order of sanctions and costs pursuant to Labor Code section 5813 and WCAB Rule 10421 (Cal. Code Regs., tit. 8, § 10421).

979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

Here, the Order was signed and was served by mail and e-mail on lien claimant on October 18, 2023. (Order, p. 3, Proof of Service.) Therefore, any petition for reconsideration of the Order needed to be filed on or before Monday, November 13, 2023. Applicant's Petition was filed on Monday, November 13, 2023, and was therefore timely filed.

II.

The Order arose at a May 23, 2023 conference in these consolidated Labor Code section 4615³ matters as follows:

LET THE MINUTES FURTHER REFLECT that there is further discussion noting that Firstline is in a winding-down stage. They are attempting to complete activities. It turns out that the listed owner, David R. Johnson, has passed. *Liaison counsel has put to question as to whom the ownership is going to and whether there has been an assignment and whether the assignment was proper, whether it be partial versus full assignment, and the timing of that assignment.*

Counsel for lien claimant advises that Mr. Turley is now becoming available for deposition. It seems to the Board that his testimony would be relevant to many of the questions that both parties have. There will be a continuance date so that that deposition can occur.

In the meantime, there is this question of whether there was an assignment, and *a verified statement by the lien claimant's counsel would be appropriate to advise whether there was any sort of assignment in this time frame.* It is **ORDERED** that lien claimants set forth a verified statement as to whether there has been an assignment and the parties to whom the assignment has been made. It will also include a list of any person who owns the outstanding liens.

(Minutes of Hearing and Summary of Evidence, May 23, 2023 (May MOH), p. 3, italics added.)

There was no date certain for response included in the May MOH order that lien claimant produce a verified statement of assignment or list of "any person" who owns the outstanding liens (May Order). (May MOH, p. 3.)

On August 3, 2023, the WCJ issued an Order to Show Cause (August OSC) to lien claimant that it would be held in contempt of court if lien claimant did not show good cause for its willful

³ All further references are to the Labor Code unless otherwise noted.

failure to comply with the May Order “to file a verified Statement listing all *entities*/individuals who are claiming an ownership interest in lien claimant’s liens.” (August OSC, italics added.)

On August 22, 2023, lien claimant filed its Response to Order to Show Cause Filed August 3, 2023 (OSC Response). In the OSC Response, lien claimant provided the sworn Declaration of Patrick Rubeiz wherein Mr. Rubeiz declares, as an officer and director of lien claimant (since 2019) and based on personal knowledge, that lien claimant “did not assign any of its liens.” (OSC Response, Declaration of Patrick Rubeiz, p. 1, ¶ 3.) The OSC Response was verified by lien claimant’s counsel. (*Id.*, Verification.)

On September 12, 2023, the WCJ issued a notice of intention based on the following:

In that there is *no service on the Special Adjudication of good cause* by U.S. Health & Orthopedics, Inc./Firstline Health, Inc. *as to their willful failure to comply with this Court's May 23, 2023 ORDER to file a verified Statement listing all entities/individuals who are claiming an ownership interest in lien claimant's liens*; and,

In that there is *no response to the Order to Show Good Cause of 08/03/2023*; and,

In that the Liaison Counsel has sought costs for the litigation necessary for compelling Firstline Health, Inc., to disclose the information, with the Judge determining a rate of \$450/hr. for 2 hours for the petitions and actions, and 1 hour each for the 05/23/2023 and 08/03/2023 hearings on this issue as appropriate; and,

(September NIT, italics added.)

The Order was issued on October 18, 2023 after lien claimant failed to file a response to the September NIT.

III.

There was arguably no good cause stated by the WCJ to issue either the August OSC or the September NIT. First as to the August OSC, the WCJ issued the August OSC threatening contempt proceedings and costs sanctions against lien claimants based solely on its failure to comply with the May Order as of August 3, 2023. However, lien claimant is correct that the May Order did not include any date certain for lien claimant to respond, and we find no amendment to that order identifying a date certain for response nor any explanation in the August OSC as to prior or subsequent attempts by joint carriers or the WCJ to obtain the requested information and/or compliance with the May Order. In addition, the August OSC does not fairly characterize the May

Order as requesting a list of “entities” claiming ownership interest in lien claimant’s liens. (August OSC.) The May Order ordered lien claimant to provide only a “list of any *person* who owns the outstanding liens.” (May Order.)

Regardless, lien claimant filed its verified OSC Response on August 22, 2023, which included a sworn declaration from its officer and director Patrick Rubeiz responding that none of its liens had ever been assigned to any person. It is true that the OSC Response did not provide a list of persons holding ownership interest in its liens, or a statement that no such list could be made as no person held ownership interest in the liens. We note that it *could be* inferred that there is no person that holds ownership interest in the liens from the fact that no assignment has ever been made of lien claimant’s liens to any “person,” and the fact that lien claimant repeatedly refers to the liens as “its liens” in the OSC Response, and that it is legally entitled to litigate “its claims.” (OSC Response, pp. 1-2, Declaration of Patrick Rubeiz.)

As to the September NIT, it was based once again on the good cause of lien claimant’s “willful failure to comply” with the May Order, and the additional grounds of lien claimant’s failure to respond to the August OSC. The September NIT is problematic for the same reasons as the August OSC, but also because the WCJ appears to ignore the fact that lien claimant *did* file a response to the August OSC. (September NIT [“there is no response to the Order to Show Good Cause of 08/03/2023”].) Of course, if there was insufficient good cause stated to support the August OSC for contempt and costs sanctions, any failure to respond may not have been sufficient support for good cause; however, lien claimant did file the OSC Response in response to the August OSC and moreover, it could be said that the OSC Response responded in large part to the May Order. The WCJ did not acknowledge the OSC Response nor discuss its merits or lack of merits. We must therefore conclude that the WCJ did not review the OSC Response prior to issuing the September NIT. In addition, the September NIT repeats the mischaracterization of the May Order from the August OSC.

Finally, the Order finds and relies on the fact that lien claimant failed to respond to the September NIT. However, the September NIT, like the May Order, did not include any date certain for lien claimant to respond. Even so, the WCJ issued the Order imposing evidentiary and costs sanctions against lien claimant on October 18, 2023.

When considered together, these circumstances present a situation where lien claimant was denied the right to reasonable notice and a fair hearing in violation of due process. (*Rucker v.*

Workers' Comp. Appeals Bd. (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805] [*all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions.*.]

We note that lien claimant's current petition to the May Order contends that lien claimant owns its own liens and that no "person" or "individual" owns its liens. (Petition for Reconsideration, p. 9.) It also goes further to respond to the "new" order from the flawed August OSC and September NIT to identify whether any other "entities" own lien claimant's liens. (*Id.*) However, this contention is based on the Supplemental Declaration of Patrick Rubeiz, (Supplemental Declaration). Although not offered below and therefore not attached to the petition in violation of WCAB Rule 10945, subdivision (c)(1) (Cal. Code Regs., tit. 8, § 10945(c)(1)), the Petition for Reconsideration is not based on "newly discovered evidence," and therefore the Supplemental Declaration and its Appendix of Documents was filed in violation of WCAB Rule 10945, subdivision (c)(2). We therefore do not consider the Supplemental Declaration or its Appendix of Documents.

Finally, we acknowledge the discussion of the parties, the DIR-AFU, and the WCJ in the February 6, 2024 Minutes of Hearing and Summary of Evidence related to the re-consolidation of these matters under section 139.21 due to the apparent and final suspension of lien claimant under section 139.21(a)(1)(D). However, until such time as a new consolidation order issues in these matters, the August 22, 2022 order of consolidation still controls these proceedings.

After delegation of authority from the Chief Judge, based on the complexity of the claims and issues as set forth therein, and Cal. Code Regs., tit. 8, § 10396, it is ordered that the liens filed by FLH identified in Attachment A are consolidated for adjudication of *whether the liens of FLH fall within the provisions of Labor Code Section 4615 such that a stay of the liens is required*. The purpose of the consolidation hearing is to prevent the erroneous application of Section 4615 and not for disputing whether the liens arise from the alleged conduct giving rise to the criminal charges, or for adjudication on the merits of any liens filed by FLH.

(Order of Consolidation and Stay, Designation of Master File and Notice of Continued Hearing, August 22, 2022, p. 1, italics added.)

Upon return to the trial level for further proceedings, therefore, it is important to note that *who owns the liens* is not a relevant question in these consolidated section 4615 matters. The issue *may* become relevant *should* these matters be re-consolidated under section 139.21; however, the

issue is currently not ripe for adjudication as these matters are still consolidated for purposes of section 4615 and *not* section 139.21.⁴ On the other hand, the question of *who controls the lien claimant* as defined by section 139.21 and *Villanueva v. Teva Foods* (2019) 84 Cal.Comp.Cases 198 [2019 Cal. Wrk.Comp. LEXIS 13], (significant panel), may be relevant in a section 4615 stay proceeding. (*Hernandez v. Select Staffing*, 2020 Cal.Wrk.Comp. P.D. LEXIS 107, *8, 10-11, 18, italics added, citing Lab. Code, §§ 4615, 139.21(a)(3) [“a finding of control is necessary to subject the liens of Firstline to a section 4615 stay”].)⁵

Accordingly, as the totality of the deficiencies taken together in the May Order, the August OSC, the September NIT, and the Order resulted in violation of lien claimant’s right to due process, we grant reconsideration and as our decision after reconsideration, we rescind the Order and return these consolidated section 4615 proceedings to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that lien claimant’s Petition for Reconsideration of the Order of Adverse Inference Order Re Costs issued on October 18, 2023 by a workers’ compensation administration law judge is **GRANTED**.

⁴ If these proceedings are re-consolidated into section 139.21 consolidated proceedings, the issue of who owns the liens *may or may not be relevant* to issues related to subdivision (e)(1) or (j). The ownership of the liens *may or may not* become relevant much later in the merits lien trials for any of lien claimant’s liens. Even if these proceedings are re-consolidated under section 139.21, subdivisions (e)(2)-(h), the issue may or may not become relevant in the merits lien trials for those liens not deemed dismissed with prejudice by operation of (Lab. Code, § 139.21(e)(1)), and/or are then determined *not* to arise from the conduct subjecting lien claimant to suspension (Lab. Code, § 139.21(i).)

⁵ The issue of who controls the lien claimant may also be relevant in section 139.21 *suspension* proceedings. However, we note that once the matter reaches consolidation under section 139.21, subdivisions (e)(2)-(h), the matter of control has ostensibly been finally determined through the proceedings with the administrative director. (Lab. Code, § 139.21; Cal. Code Regs., tit. 8, § 9788.1-9788.6; see *Lopez v. EDCO Floor Co.*, 2023 Cal.Wrk.Comp. P.D. LEXIS 163; *Sablan (Yolanda) v. County of Los Angeles*, 2021 Cal.Wrk.Comp. P.D. LEXIS 11.)

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Order of Adverse Inference Order Re Costs issued on October 18, 2023 by a workers' compensation administration law judge is **RESCINDED** and these Labor Code section 4615 consolidated matters are **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 15, 2024

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

**KIMBERLY KENNEY
FIRSTLINE HEALTH, INC.
MOKRI, VANIS & JONES
LAW OFFICES OF GEORGE A. SHOHET
DEPARTMENT OF INDUSTRIAL RELATIONS, ANTI-FRAUD UNIT**

AJF/abs

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