

**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 Claimants***

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

**OPINION AND ORDER
DENYING REMOVAL**

Lien claimant Firstline Health, Inc. dba U.S. Health & Orthopedics (lien claimant) seeks removal of the Order of Consolidation and Stay, Designation of Master File and Notice of Continued Hearing (Consolidation Order), issued on August 22, 2022 by a workers' compensation administrative law judge (WCJ). In pertinent part, the WCJ ordered that liens filed by lien claimant in identified cases (liens at issue) be consolidated for the purpose of determining the sole issue of whether lien claimant's liens are subject to a Labor Code¹ section 4615 stay. The WCJ specifically excluded from the consolidation any issues related to whether the liens at issue arose from any alleged conduct giving rise to any criminal charges alleged, or adjudication on the merits of any of the liens at issue. The WCJ also stayed the liens at issue pending further determination of the section 4615 issues.

Lien claimant contends that staying the liens at issue pending adjudication of whether the liens are subject to a section 4615 stay is a violation of due process in that it has not yet been determined that the liens at issue are actually subject to a section 4615 stay (*Galdames v. Vinyl Tech.*, 2019 Cal.Wrk Comp. P.D. LEXIS 471; *Sablan v. County of Los Angeles* (2021) 86 Cal.Comp.Cases 524, 552-553 [2021 Cal. Wrk. Comp. P.D. LEXIS 11]). Lien claimant also contends that consolidating the 20 liens filed by lien claimant involving defendant Farmers

¹ All further references are to the Labor Code unless otherwise noted.

Insurance Exchange (Farmers) will not achieve efficiency or avoid duplicate or inconsistent orders under WCAB Rule 10396 (Cal. Code Regs., tit. 8, § 10396), given that there are hundreds of other pending lien claims involving lien claimant and the 20 Farmers' liens constitute only 1% of its filed liens; and, given that should lien claimant prevail on the section 4615 issues in the consolidation, lien claimant would still be subject to re-litigating the issues with all the other carriers involved in the other 99% of liens because lien claimant could not raise issue preclusion against carriers who are not parties in this consolidation.

Farmers filed an "Answer to Lien Claimant's Petition for Removal of Order of Consolidation and Stay, Designation of Master File and Notice of Continued Hearing" (Answer). The WCJ filed a Report and Recommendation on Petition for Removal (Report) recommending that the Petition for Removal be denied and the matter returned to the trial level for further proceedings and "joinder of additional liens..." (Report, p. 11.)

We have reviewed the record in this case, the allegations of the Petition for Removal and the Answer, as well as the contents of the Report. Based on the reasons set forth in the Report and for reasons set forth below, we deny removal. Lien claimant sustained no severe prejudice or irreparable harm as a result of the Consolidation Order, and reconsideration remains a viable remedy should any final orders issue in this consolidated matter.

I.

As an initial matter, it is true that the Consolidation Order issued without an opinion on decision. The WCJ is required to "make and file findings upon all facts involved in the controversy..." (Lab. Code, § 5313.) As explained in *Hamilton, supra*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

However, a WCJ's report may cure any technical or alleged defect in satisfying the requirements of Labor Code section 5313. (*City of San Diego v. Workers' Comp. Appeals Bd. (Rutherford)* (1989) 54 Cal.Comp.Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 1026 (writ den.).)

Here, any deficiency in the Consolidation Order was cured by the WCJ's Report wherein he detailed the procedural and substantive grounds for consolidating and temporarily staying the liens at issue herein.

II.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10843(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10843(a).)

Lien claimant objects to the Consolidation Order based on WCAB Rule 10396 and due process.

(a) Consolidation of *two or more related cases*, involving either the same injured employee or multiple injured employees, rests in the sound discretion of the Workers' Compensation Appeals Board. In exercising that discretion, the Workers' Compensation Appeals Board shall take into consideration any relevant factors, including but not limited to the following:

- (1) Whether there are common issues of fact or law;
- (2) The complexity of the issues involved;
- (3) The potential prejudice to any party, including but not limited to whether granting consolidation would significantly delay the trial of any of the cases involved;
- (4) The avoidance of duplicate or inconsistent orders; and
- (5) The efficient utilization of judicial resources.

Consolidation may be ordered for limited purposes or for all purposes.

(Cal. Code Regs., tit. 8, § 10396, emphasis added.)

Here, the Consolidation Order is an interlocutory procedural order consolidating and temporarily staying a limited number of liens for purposes of discovery and adjudication of one

common issue: whether or not lien claimant was “controlled” by Paul Turley (or other charged or convicted medical physician, practitioner, or provider pursuant to section 139.41, subdivision (a)(3) (section 139.41(a)(3)),² thereby subjecting all liens filed by lien claimant to the automatic stay prescribed by section 4615 (common issue).³ This issue is common to all lien claims filed by lien claimant, regardless of when services were rendered or to whom. Therefore, consolidation was properly ordered in more than two cases, on a complex issue of fact and law, in order to avoid duplicate or inconsistent orders, and for the efficient utilization of judicial resources.

In addition, the common issue was raised by Farmers in defense of lien claims filed by lien claimant, and is an issue precedent to whether lien claimant will be able to litigate any of their workers’ compensation lien claims. There can be no dispute that Farmers has the right to defend claims asserted by lien claimant and indeed, has the affirmative burden of proof to establish its defenses to claims filed by lien claimant. (Lab. Code, § 5705.) At least one Appellate Court has found that a workers’ compensation defendant has the constitutional right to petition the Workers’ Compensation Appeals Board (WCAB) to consolidate and “stay processing of workers’ compensation bills and lien claims” based on allegations of illegal business practices. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464 [71 Cal.Comp.Cases 210] (Premier) [Anti-SLAPP motion against lien claimants granted in favor of defendants.])⁴

² Section 139.21(a)(3) states: “For purposes of this section and Section 4615, an entity is controlled by an individual if the individual is an officer or a director of the entity, or a shareholder with a 10 percent or greater interest in the entity.” (Cal Lab Code § 139.21(a)(3).) We note that the Appeals Board issued a significant panel decision interpreting section 139.21(a)(3), and found: “Control under section 139(a)(3) may be established with admissible evidence that the physician, practitioner or provider charged with a crime as defined in section 139(a)(1)(A) is or was an “officer or a director” of the entity; is or was “a shareholder with a 10 percent or greater interest” in the entity; or, held de facto ownership of the entity or de facto control consistent with the rights and duties of an officer or director of the entity. (*Villanueva v. Teva Foods* (2019) 84 Cal.Comp.Cases 198, 200 (2019 Cal.Wrk.Comp. LEXIS 13).)

³ “(a) Upon the filing of criminal charges against a physician, practitioner, or provider for any crime described in subparagraph (A) of paragraph (1) of subdivision (a) of Section 139.21, the following shall occur: ¶ (1) Any lien filed by, or on behalf of, the physician, practitioner, or provider *or any entity controlled, as defined in paragraph (3) of subdivision (a) of Section 139.21, by the physician, practitioner, or provider* for medical treatment services under Section 4600 or medical-legal services under Section 4621, and any accrual of interest related to the lien, shall be automatically stayed.” (Lab. Code, § 4615, emphasis added.) The automatic section 4615 stay “shall remain in effect” after conviction and through the section 139.21 lien consolidation procedures and adjudication. (Lab. Code, § 4615(b).)

⁴ In *Premier*, lien claimants filed a complaint against defendants who petitioned for and were granted consolidation and stay of lien claims in order to determine common issues of illegal billing practices. (*Premier, supra*, 136 Cal.App.4th at p. 469-470.) “The gravamen of the complaint is that after Premier submitted plaintiff physicians’ bills to defendants for payment, and filed liens in numerous workers’ compensation cases before the WCAB, defendants

Lien claimant contends that the Consolidation Order violates its right to due process by staying lien claims that have not yet been adjudicated to be subject to a stay under section 4615 (section 4615 stay), i.e., the common issue.

[T]he stay imposed on lien claimants' liens without a fair hearing constitutes a violation of due process. (*Rucker, supra*; *Gangwish, supra*; see *Villanueva v. Teva Foods* (2019) 84 Cal. Comp. Cases 198 [2019 Cal. Wrk. Comp. LEXIS 13] (significant panel decision) (*Villanueva*); see also, *Hernandez v. Select Staffing*, 2020 Cal. Wrk. Comp. P.D. LEXIS 107 (*Hernandez*.) *If a question arises regarding whether or not an entity is "controlled" by a criminally charged physician, practitioner or provider, and thus subject to a section 4615 stay, an evidentiary hearing must be held to protect the parties' right to due process and right to redress.* (See *Barri, supra*, 28 Cal. App. 5th at pp. 468–470; *Juarez, supra*.) (*Sablan (Yolanda) v. County of Los Angeles*, (2021) 86 Cal. Comp. Cases 524, 552 (2021 Cal. Wrk. Comp. P.D. LEXIS 11) (*Sablan*) emphasis added.)

However, the Consolidation Order does not impose a section 4615 stay on its claims; rather, it imposes a *temporary* stay of other lien issues pending resolution of the common issue. Although not a bifurcation of issues, the Consolidation Order acts as a bifurcation of the common issue for adjudication prior to the adjudication of the merits of any individual lien. Lien claimant's contention therefore misses the point of the Consolidation Order, which was issued for the very purpose of adjudicating the common issue required by *Sablan*.⁵

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. (Consolidation Order, p. 1, emphasis added.)

Moreover, lien claimants received notice of defendant's Petition to Consolidate, filed an answer, and are now seeking removal of the Consolidation Order. As the WCJ states in the Report:

collectively conspired to contest, delay, and avoid payment of these bills and liens." (*Id.*, at p. 470.) The Court in *Premier* granted defendants anti-SLAPP (strategic lawsuit against public participation) motion.

⁵ This case is thereby clearly distinguishable on its facts from *Galdames v. Vinyl Technology, Inc.*, 2019 Cal. Wrk. Comp. P.D. LEXIS 471. (See Petition for Removal, p. 2.)

FLH took advantage of due process. They were served with the Petition giving them notice and submitted an Answer that contained objections to Farmers' Petition, thus taking advantage of their opportunity to be heard. Farmers even agreed to allow additional time for FLH to respond to the Petition. (Answer, P1:L11-12) The Answer from FLH was reviewed and considered by me prior to issuing the Order. The matter was also set for a status conference and the matter discussed with the parties before I issued the Order. (MOH, 7/13/22) (Report, p. 9.)

Lien claimant therefore received notice and the opportunity to be heard on the issue of consolidation. To the extent the *temporary* stay of other issues pending resolution of the common issue might cause some prejudice to lien claimant, it does not overcome the substantial benefit of avoiding duplicate or inconsistent orders on the common issue, as well as the efficient utilization of judicial resources caused by such consolidation.

Next, lien claimant contends that the Consolidation Order will not achieve efficiency or avoid duplicate or inconsistent orders under WCAB Rule 10396 because it only consolidates 1% of its filed liens, and therefore, any findings, orders or awards issued in the consolidated proceedings could not be given preclusive effect against parties in the other 99% of its filed liens.

Issue preclusion prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. (*Mycogen, supra*, 28 Cal.4th at p. 896.) Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. (*Boeken, supra*, 48 Cal.4th at p. 797.) There is a limit to the reach of issue preclusion, however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party. (*Bernhard v. Bank of America, supra*, 19 Cal.2d at p. 812.)

...

“Only the party against whom the doctrine is invoked must be bound by the prior proceeding. [Citations.]” (*Ibid.*) In summary, issue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [272 Cal. Rptr. 767, 795 P.2d 1223]; *Vandenberg*, at p. 828; *Teitelbaum Furs, supra*, 58 Cal.2d at p. 604.)

(*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 [2015 Cal. LEXIS 4652].) 824-825.)

It should be noted that if lien claimant does *not* prevail on the common issue, then any findings or order issued to that effect could have preclusive effect against lien claimant and all claims filed by lien claimant. We understand, though, that lien claimant argues that should they prevail on the common issue, any findings or order issued to that effect would not have preclusive effect against other defendants in other lien claims. We agree.

However, the solution to the potential duplication of effort and rulings related to the common issue is clearly stated in the Consolidation Order and the Report. The WCJ states in the Consolidation Order that “[i]f it is later determined that additional matters should be included in this consolidation an additional order shall be issued.” (Consolidation Order, p. 1.) In the Report, the WCJ recommended that the Petition for Removal be denied and the matter returned to the trial level for further proceedings and “joinder of additional liens...” (Report, p. 11.) The WCJ clarified this recommendation as follows:

The only liens consolidated in this matter were the liens listed in the initial petition filed by Farmers. As FLH pointed out there are many other liens on file. *It is my experience in these matters that lien lists provided by the parties do not match those of the EAMS unit, especially when operating under a dba as is the case here, and as Farmers pointed out it is unclear who the real party in interest is for U.S. Health and Orthopedics, Inc. dba Firstline Health. (Pet. for Joinder, P4:L19-20) In order to properly identify the relevant liens on file in EAMS, the EAMS unit would have to be queried. It would be best to determine the identity of the relevant entity or entities before querying the EAMS unit for a list of cases, or issuing a further order of joinder. **What this means as a practical matter is that there are issues that can be addressed preliminarily such as the initial petition for consolidation but further enquiry is necessary to develop an accurate lien list for joinder of additional cases to provide a complete resolution.** It is for this reason that an order joining all the liens in FLH’s Answer was not issued and the necessity of issuing such an order was delegated to the assigned WCJ. **The assigned WCJ is well able to issue an order joining additional liens into the consolidation once the EAMS unit provides a complete list of liens, and this was the intent here.** Even assuming the argument by FLH has some merit, it does not mean the factors of Reg. 10396 have not been met. *There is no prejudice to FLH by the order only consolidating a limited number of liens because that will in all likelihood change before any hearing on the merits, especially since the parties have both contemplated these additions.* An initial order of consolidation followed by further enquiry and orders is contemplated within the process outlined in *Harvard Surgery Ctr. v. Workers’ Compensation Appeals Bd. (Yero)* (2005) 70 Cal. Comp. Cases 1354 [2005 Cal. Wrk. Comp. LEXIS 239] (writ den.). (Report, p. 5, emphasis added.)*

We concur with the WCJ's assessment that an accurate lien list must be obtained from the EAMS unit. Subsequent joinder of all lien cases necessary to avoid future duplicate or inconsistent orders related to the common issue should be accomplished prior to final adjudication of the common issue.

Accordingly, as there are sufficient grounds to affirm the Consolidation Order pursuant to WCAB Rule 10396, and as the Consolidation Order does not violate lien claimant's right to due process, we deny the Petition for Removal.

For the foregoing reasons,

IT IS ORDERED that lien claimant's Petition for Removal of the Order of Consolidation and Stay, Designation of Master File and Notice of Continued Hearing issued on August 22, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 7, 2023

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**

AJF/abs

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