WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MAURICIO MARTINEZ, *Applicant*

vs.

TITO'S MARKET;
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Numbers: ADJ10450982 (MF); ADJ10450937
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, and for the reasons stated below, we will grant reconsideration solely to make a finding that lien claimant did not meet its burden of proof on the issue of injury arising out of and occurring in the course of employment (AOE/COE). We will otherwise affirm the WCJ's decision.

A lien for medical treatment is allowable only when the treatment rendered is reasonably required to cure or relieve an injured worker from the effects of an industrial injury. (Lab. Code, §§ 4600(a), 4903(b).) A defendant will not be liable for a medical treatment where there is no industrial injury. (*Kunz v. Patterson Floor Coverings* (2002) 67 Cal.Comp.Cases 1588, 1593 (en banc).) Therefore, where a lien claimant, rather than the injured worker, litigates the issue of entitlement to payment for industrially-related medical treatment, the lien claimant stands in the shoes of the injured worker and the lien claimant must establish injury by preponderance of evidence. (*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57, 67 [50 Cal.Comp.Cases 411]; *Kunz, supra*, 67 Cal.Comp.Cases at p. 1592.)

Moreover, any award, order or decision of the Appeals Board must be supported by substantial evidence in light of the entire record. (Lab. Code § 5952(d); *Lamb v. Workers' Comp. Appeals Bd*. (1974) 11 Cal.3d 274, 280 [39 Cal.Comp.Cases 310].) The term "substantial evidence" means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…. It must be reasonable in nature, credible, and of solid value. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566].)

In this case, we agree with the WCJ that lien claimant did not meet its burden of proof on the issue of injury AOE/COE. However, while the WCJ's decision makes clear that lien claimant is to take nothing on its claim, the WCJ did not explicitly make a finding on the issue of injury AOE/COE, which was raised at trial. Therefore, we will grant reconsideration solely to amend the decision to find that lien claimant did not meet its burden of proof on that issue.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the September 20, 2021 Joint Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the September 20, 2021 Joint Findings and Order is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. Lien claimant did not meet its burden of proof on the issue of injury arising out of and occurring in the course of employment (AOE/COE) in either Case. No. ADJ10450982 or Case No. ADJ10450937.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 10, 2021

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

OPTIMAL HEALTH INSTITUTE
LAW OFFICE OF JIE CI DING, INC.
STATE COMPENSATION INSURANCE FUND

PAG/abs

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

Date of Injury:	MF: 3/4/16-6/2/16; 5/5/16
Parts of Body Injured: MF-CT:	eyes, hands/fingers, digestive system specific: right wrist
Identity of Petitioner:	lien claimant Optimal Health Institute
Timeliness:	timely filed on 10/11/21
Verification:	Petition was verified.
Date of Issuance of Order:	9/20/21
Petitioner's contention:	PTP is not required to address all issues in medical reports; WCJ should have developed the record to allow lien claimant to correct errors in their evidence

II
FACTS

Very little information was available at time of trial. A majority of the information was gleaned from medical reports and pleadings.

Applicant was employed as a cook/food preparer in the deli section of Tito's Market from March 4, 2016 through June 2, 2016. Applicant's employment ended on June 2, 2016. On that same date, applicant retained an attorney who filed two applications for adjudication of claim on June 13, 2016. The first application was for the entire period of employment, March 4, 2016 through June 2, 2016 alleging injury to eyes, hands/fingers and digestive system and was assigned case number ADJ10450982. The second claim was a specific injury to the right wrist that allegedly occurred on May 5, 2016, and was assigned case number ADJ10450937.

Applicant was sent for treatment by his original attorney to Edward Stokes MD in June 2016. On July 7, 2016, Dr. Stokes sent a request for authorization for upper extremity EMG/NCS, wrist MRI, an eye exam, dermatology evaluation, transdermal creams, physical therapy, wrist brace and Motrin. Defendant objected to the treatment being provided by Dr. Stokes as outside of their MPN. One month later, in August 2016 Defendant denied the claims.

Applicant substituted out his original attorney and obtained representation from a new attorney in July 2017. Applicant was then sent for treatment from lien claimant Optimal Health by naming Dr. Andrew Shen as the new primary treating physician. Per the 4600 letter, the initial

appointment was July 21, 2017 for both cases. The cases resolved by joint compromise & release with an order approving on December 14, 2017.

The matter proceeded to various lien conferences until it was finally set for trial on August 17, 2021. On the morning of trial, one of the lien claimants withdrew their lien while the other proceeded to trial. Lien claimant offered no witnesses at trial and the matter was submitted on the record. A decision finding no injury AOE/COE issued. Lien claimant took exception to the decision and filed the present petition for reconsideration.

III

DISCUSSION

Lien claimant first argues that there is no requirement that a treating physician discuss all pertinent issues and information in their medical reports. Lien claimant cites Regulation §9785, arguing that they are only required to address medical issues, not legal ones.

The court found that the medical reporting of lien claimant was not substantial medical evidence and, therefore not capable of addressing causation of injury for either the cumulative trauma or the specific injuries pled by the applicant. The applicant sought representation and treatment the same day he ended his 3-month employment with defendant. The only information given to the undersigned judge regarding the initial medical treatment was denials of requests for authorization (RFA). Based on the medical billing and liens on file, it appears that the applicant had nerve conduction studies, x-rays, MRIs, medication and physical therapy with Dr. Stokes, the original PTP.

Exhibit 3 is the medical report prepared by lien claimant regarding the May 5, 2016 specific injury. In that report, the history of prior treatment consists of a comment that applicant had some physical therapy, which did not provide relief. It also indicates the applicant had over-the-counter eye drops and Advil for his wrist pain. There is no other description of treatment or diagnostic testing. The injury is listed as a specific injury due to continuous flipping of fry baskets but the report indicates that the pain began gradually and was first noticed on May 5, 2016, which then worsened. That is a description of a cumulative trauma injury, not a specific injury. There is no discussion in the remainder of that medical report or any others as to how this specific injury actually occurred. There is also no diagnosis, history of prior medical conditions, or history of a cumulative trauma claim being filed along with this specific injury.

A review of the entire file also notes there was never a lien for EDD benefits. Exhibit 3 does note that the applicant was temporarily totally disabled for 45 days but takes no history of employment, level of physical activity or discussion of activities of daily living between June 2, 2016 and July 21, 2017, the date of examination. Petitioner argues that that is not necessary for that information to be contained in a medical report as that is for lawyers to address. In actuality, a medical report is what determines an injured worker's disability status. A medical opinion regarding disability status is not substantial medical evidence if it does not address the injured workers current capabilities or work status/history, or is not based on any current subjective complaints, objective findings or activities of daily living.

The applicant was examined on August 7, 2017 by the same physician in order to address his cumulative trauma injury claim. The Lien claimant produced a report regarding that examination (Exhibit 4), which describes the injury as continuous repetitive movements with the right arm and wrist and degreasing a fryer causing injury to the eyes. Page 2 of that report indicates onset of pain was gradual and first noticed on March 4, 2016. The medical report does not explain how pain can come on gradually but first noticed on the first day of employment. Further, exhibit 3's initial evaluation for the right hand specific injury indicates the pain came on gradually and was first noticed on May 5, 2016. The discrepancy is not addressed in either medical report. Both medical reports contain the same typographical errors such as "Weak right hand grip when compared to the right." Once again, like Exhibit 3, Exhibit 4 has no diagnosis except for "other visual disturbances."

The pattern of discussing each date of injury with a separate examination and separate report continues for each progress report. Exhibit 5 is a progress report dated September 1, 2017 for the specific injury claim only. That report reiterates the same confusing history of injury, same physical examination results including the typographical errors regarding weakness of the right hand compared to the right and lack of discussion of the other claim to the same body part. This time it does contain a discussion of an MRI and diagnosis. Exhibit 6 is a progress report dated September 7, 2017 for the cumulative trauma claim only. That report reiterates the same description of a gradual onset of pain first noticed on the first day of employment. Even though the examination is for the right wrist/hand and the eyes, there is no diagnosis for the right wrist, the MRI of the right wrist is not addressed nor is there an acknowledgment that the applicant has a second claim being treated by the same doctor for the right wrist. All other progress reports follow the same pattern.

The reports treat the injuries separately with no acknowledgment of additional injury claims in the opposing reports and contain contradictory dates of when the pain first surfaced and what kind of activity causes the pain. Further, the doctor takes no history as to activities of daily living or employment history between the time the applicant stopped working for defendant and sought treatment from this medical provider. Finally, the medical reporting also fails to address how the applicant suffered a cumulative trauma injury to his hand on the very first day of his 3-month term of employment.

Lien claimant argues that their lien should not be disallowed based on the poor quality of their medical reporting. The Lien claimant has the burden of proving injury AOE/COE to show that they provided treatment to cure or relieve from an *industrial injury*. These medical reports are not capable of meeting that burden for all of the reasons addressed above. The court cannot order defendant to pay for medical treatment that was provided for a non-industrial injury.

Lien claimant also argues that if the court found medical reporting to contain clerical errors, the court should have ordered development of the record to allow lien claimant to correct the clerical errors.

Exhibits 11, 12 and 13 are all acupuncture reports from Dr. Wong at Optimal Health. Each of those three exhibits has a caption at the top of the page indicating an employee name of Mauricio Martinez, this applicant. It also identifies the date of injury as March 4, 2016. Applicant has not filed any claims with a date of injury of March 4, 2016. All three of the reports indicate under

subjective findings: "Ms. Elizabeth Cardoso presented to my office today with a chief complaint of left hip, left pelvic, left sacroiliac, and left buttock pain." The objective findings are regarding the pelvis left SI joint, left buttock and left hip. The assessment is a diagnosis of sprained ligaments of the lumbar spine. These are very clearly not the objective findings of Mr. Martinez, who has alleged a right hand injury. Medical reports that appear to treat a different person than the applicant with different injured body parts cannot prove the treatment was provided to Mr. Martinez. Lien claimant believes it would be appropriate to alter these medical records to prove they actually treated Mr. Martinez.

The court does not feel that it is not appropriate to develop the record to allow lien claimant to alter these medical records for the following reasons: First and foremost, lien claimant chose to present these exhibits. Lien claimant is responsible for their content, not the court. If they do not show treatment to Mr. Martinez then lien claimant should not have offered them as evidence. Secondly, any "clerical corrections" to the medical record results in an alteration to the medical record rendering the exhibit of questionable probative value. This is not a simple clerical error. Nothing contained in exhibits 11, 12 and 13 is about Mr. Martinez and his two claims currently before the court. Mr. Martinez has no claim of injury on March 4, 2016. Nor does he have a claim of injury to his hip, buttocks or low back. Any alteration to these reports would consist of rewriting the entire report.

These exhibits cannot prove that the applicant, Mauricio Martinez, suffered a cumulative trauma or specific injury while employed at Tito's Market. Nor are three of the exhibits capable of proving treatment was provided to applicant Mauricio Martinez on the dates in question. It is not the court's responsibility to make sure the exhibits are capable of meeting the lien claimant's burden of proof.

IV
RECOMMENDATIONS

Based on the foregoing, it is recommended that lien claimant, Optimal Health's petition for reconsideration be denied.

Respectfully submitted,

Dated in Santa Ana on October 20, 2021

ROBIN BETH LEVITON
Workers' Compensation Judge