WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BLANCA AGUILAR, ***Applicant***

vs.

VANITAS MANUFACTURERS, INC.
CIGA for LUMBERMEN'S UNDERWRITING ALLIANCE, in liquidation, ***Defendants***

TOWER IMAGING/TOWER COPY,
Lien Claimant

Adjudication Numbers: ADJ8246120, ADJ8247077
Los Angeles District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Lien claimant Tower Imaging seeks reconsideration of the December 21, 2021 Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that Tower is entitled to $944.43 in full and complete satisfaction of its Petition for Determination of Medical-legal Expense Dispute. The WCJ also found that Tower is not entitled to penalties and interest and ordered petitioner to meet and confer with defendant regarding payment discrepancies for sums already paid.

Tower contends that its petition is timely. Lien claimant further contends that defendant waived its objections to lien claimant's bills by failing to follow the WCAB Rules of Practice and Procedure and by failure to follow the rules of the administrative director. Tower also contends that it is entitled to recover expenses in accordance with its unrebutted market rate analysis.

Defendant California Insurance Guarantee Association (CIGA) filed an Answer wherein it alleged that Tower's petition was untimely. The workers' compensation administrative law judge (WCJ) prepared a Report and Recommendation on Petition for Reconsideration (Report) wherein he agreed with defendant that the Petition was untimely and recommended that, if the petition is

not dismissed as untimely, that the petition be denied based on additional grounds. Based on our review of the record, for the reasons stated by the WCJ in the December 21, 2021 Opinion on Decision and for the reasons stated below, we will deny reconsideration.

As an initial matter, we note that Tower's petition is timely. Defendant's argument that the Petition is not timely relies on the Code of Civil Procedure and California Rules of Court. However, proceedings before the Workers' Compensation Appeals Board are governed by the WCAB Rules of Practice and Procedure.

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).) If the last day to file a petition for 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.) Defendant contends, in its answer, that applicant's petition for reconsideration was untimely because the WCJ served the decision by e-mail and Section 1010.6 of the California Code of Civil Procedure (CCP) provides that where a document is served by e-mail, the time to act is extended by 2 days. In *Messele v. Pitco Foods, Inc.* (2011) 76 Cal.Comp.Cases 956, 965 (Appeals Board en banc), determined that "the WCAB's Rules govern service if they differ from CCP section 1013." The same analysis applies to CCP 1010.6.

Turning to the merits of lien claimant's petition, we will briefly review the relevant facts. Tower provided copy services requested by applicant's attorney on 18 dates of service in 2013 and 2014. At trial, the sole issue was "Tower Copy's Cost Petition in the amount of $12, 369.97." Various sub-issues were identified including penalties and sanctions, defendant's failure to file EORs and Tower's failure to file requests for second review. Defendant offered a single exhibit, an August 3, 2018 Explanation of Review (EOR) prepared by CostFirstCorp. (Exh. A) Defendant called Victoria Watson as a bill review expert. She testified that there were two unpaid dates of service and provided testimony regarding the reasonable value of Tower's invoices. (July 7, 2021, Minutes of Hearing and Summary of Evidence (MOH/SOE), p. 6.) When cross-examined by Tower's representative, Ms. Watson acknowledged that the August 3, 2018 EOR was not prepared or served within 60 days of the dates of service. (October 13, 2021 MOH/SOE, p. 6.) Ms. Watson

testified regarding each date of service and the factors she considered when reaching conclusions regarding a reasonable fee.

In the Report, the WCJ discussed Tower's burden of proof and asserted that Tower had not shown that it could recover med-legal costs because it did not prove that there was a contested claim. "It cannot be presumed that ALL of the services were or can be lumped together under the illustrious cloak of 'medical legal.'" (Report, p. 3.) The WCJ also takes issue with Tower filing a Petition for Resolution of a Non-IBR Medical-legal Expense Dispute, arguing that Tower failed to show that the dispute did not involve a fee schedule. Ultimately, the WCJ did not rely on either of these factors to determine the amount owed. The WCJ's awarded Tower reasonable costs in accordance with defendant's Exhibit A and Ms. Watson's testimony which he found more persuasive than lien claimant's exhibits. (Report, p. 5.)

Labor Code section 4622 requires that a defendant pay "[a]ll medical-legal expenses for which the employer is liable."[1] As provided in section 4620(a), "a medical-legal expense means any costs and expenses incurred by or on behalf of any party,…which expenses may include …. medical records, …for the purpose of proving or disproving a contested claim." Copy service fees incurred to obtain medical and other records are considered medical-legal expenses under section 4620(a) that may be recovered by the filing of a lien claim. (*Cornejo v. Younique Cafe, Inc.* (2015) 81 Cal.Comp.Cases 48 (Appeals Board en banc); *Martinez v. Terrazas* (2013) 78 Cal.Comp.Cases 444 (Appeals Board en banc).)

A lien claimant holds the burden of proof to establish all elements necessary to establish its claim. (See *Torres v. AJC Sandblasting* (2012) 77 Cal.Comp.Cases 1113, 1117 (Appeals Board en banc).) Thus, a lien claimant is required to establish that a contested claim existed at the time the expenses were incurred, that the expenses were incurred for the purpose of proving or disproving the contested claim, and that the expenses were reasonable and necessary at the time they were incurred. (Lab. Code, §§ 4620, 4621.) Assuming a lien claimant has met its burden of proof pursuant to sections 4620 and 4621, the analysis shifts to the reasonable value of the invoice pursuant to section 4622. (*Colamonico v. Secure Transportation* (2019) 84 Cal.Comp.Cases 1059 (Appeals Board en banc).) Tower is incorrect that defendant's failure to produce EORs means that

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

defendant has waived all objections to the amount of the bills. Defendant may still dispute the reasonableness of the invoices. The WCJ properly considered all the evidence presented on the reasonableness of the charges and correctly arrived at the amount due.

In this case, in his Report, the WCJ discussed issues that were not addressed at trial including whether the relevant dates of service were subject to a fee schedule. In fact, there was no copy service fee schedule for 2013 and 2014 dates of service.[2] Furthermore, no party alleged that Tower's services were subject to a fee schedule. Similarly, the issue of whether copy service fees could be recovered as medical-legal expenses and the sub-issue of whether there a contested claim were not raised at trial. However, because the WCJ correctly addressed and evaluated the evidence regarding the reasonable value of Tower's services pursuant to *Colamonico, supra,* the decision is well supported and we will deny Tower's petition.

[2] Section 5307.9 provides:

> On or before December 31, 2013, the administrative director, in consultation with the Commission on Health and Safety and Workers' Compensation, shall adopt, after public hearings, a schedule of reasonable maximum fees payable for copy and related services, including, but not limited to, records or documents that have been reproduced or recorded in paper, electronic, film, digital, or other format. The schedule shall specify the services allowed and shall require specificity in billing for these services, and shall not allow for payment for services provided within 30 days of a request by an injured worker or his or her authorized representative to an employer, claims administrator, or workers' compensation insurer for copies of records in the employer's, claims administrator's, or workers' compensation insurer's possession that are relevant to the employee's claim. The schedule shall be applicable regardless of whether payments of copy service costs are claimed under the authority of Section 4600, 4620, or 5811, or any other authority except a contract between the employer and the copy service provider.

Effective July 1, 2015, the administrative director adopted regulations that included a copy service fee schedule.

For the foregoing reasons,

IT IS ORDERED that lien claimant's Petition for Reconsideration of the December 21, 2021 Findings and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 21, 2022

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

TOWER IMAGING/TOWER COPY
FLOYD SKEREN MANUKIAN & LANGEVIN

MWH/abs

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

JOINT OPINION ON DECISION

The issues presented pertain to Tower Imaging and its filed lien and cost petition. It is noted that the lien is filed in ADJ8246120 only, while the 4/16/19 cost petition is filed in both. The underlying injuries are a combination of an admitted CT 9/23/10 to 9/23/11 (AD.18247077) and a denied specific on 5/1/07 (ADJ8246120). The case in chief settled by C&R on 10/26/15. Exhibit 9.

The lien claimant and/or cost petitioner. like any party, must meet its burden of proof by a preponderance of the evidence per Labor Code §3202.5, the trier of fact must weigh all the evidence, including testimony and its credibility, to determine whether there is a sufficient record based upon which a finding in its favor can be reached. Garza v. WCAB (1970) 3 Cal.3d 312.

I found the testimony of defendant's bill review expert, Victoria Watson, to be truthful and forthright, and to the best of her knowledge. She readily admitted when she did not know defendant's intentions or why a service date was paid when it was or why it was reviewed when it was. Therefore, I found what she did testify to, to be matter-of-fact and exactly pointed to what she was hired to do. That being said, I went over the service dates with using Ms. Watsons testimony, and covered each and every review and payment that she could testify about. See MOH/SOE, 10/13/21, pg. 3, 4, and 5 at lines 1-17.

I find as follows. based upon the testimony of Ms. Watson and per date of service: 6/26/13: $801.80 is owed per the 8/2/20 review, noting that nothing was paid. Cost petitioner did not provide its asserted bill review value so I based the value on the August 2020 review. However, for those that the August 2020 bill review showed an overpayment, I did not give defendant a credit. I do not believe it is fair or reasonable to penalize a provider for what a prior bill review in 2013 provided payment for, and to now reduce its payments on a retroactive bill review from 2020 is unreasonable, especially when the parties did not submit the prior bill review. I rely upon the fact defendant paid per bill review and that the lien claimant did not request secondary bill reviews or object to the payments received when the services occurred and were partially paid. Therefore, on several of the dates of service, while defendant requests a credit to be assessed because of what was paid in 2013 and the reduced figures provided by the August 2020 bill review, I will not do so. I will only address what is owed to the provider. if anything.

June 28, 2013 Dr. Nehzat service date: This was one of the overpaid dates of service. The bill reviewer testifies that the August 2020 review indicates a credit, but I will not assess that upon the provider 7 years after the fact. If either party had an issue with what was paid, it could have been raised then either by secondary bill review or objection or other means. This date of service is therefore satisfied.

6/28/13 Rite Care - Defendant owes $4.11.

On the 6/28/13 United Services Plus dba Ronco Drugs, 6/28/13 COSC, 6/28/13 Zhong, and 10/24/13 Superior Medical, these all are also paid in full - same overpayment issue as above.

10/29/13 Long Beach Memorial - Defendant owes $135.76.

10/29/13 Foundation Medical - Same overpayment issue as above.

10/29/13 Dr. Williams - Defendant owes $2. 76.

10/29/13 Southern CA Diagnostic, 10/29/13 Medilab Corporation, 10/29/13 Advanced Professional, 10/29/13 Dr. Ko, 10/29/13 Axiom Imaging, 10/29/13 Quest Diagnostic, 10/29/13 Dr. Haronian, and 10/30/13 Healthcare Partners Medical Group - Same overpayment issue as above.

I understand the Kunz argument on both sides and the geographical survey of similarly situated services. I note the subsequent fee schedule which was established to avoid abuses and excessive fees being charged. I do not find that the billing here was reasonable and do I find that it was excessive as was provided by the bill review and the testimony of Ms. Watson. The provider did not have any substantial evidence to support its assertions of market rates and the bases for what was billed. The market rate analysis (Exhibit 7) was not persuasive and an example of what I found highly excessive was charging $20 for a CD transfer (that presumably was not authorized by defendant, nor required). $3 for writing a check, $19 for shipping and handling regardless of the size of the records or any evidence provided as to what "shipping and handling" means or what the postage was, and so on. I also find it unreasonable that the provider should charge for "additional sets" unless defendant actually asked for them. If these were just 2 sets for the applicant's attorney, it is not defendant's responsibility to pay for applicant's attorney's costs of doing business, aka photocopies.

Therefore, I find some of the charges to be suspect and am not surprised by the vast reductions made by the August 2020 review. However. I do find that defendant should pay the differences outlined above within 60 days. According to the math, this means $801.80, $2.76, $135.76, and $4.11, totaling $944.43. The parties need the additional time for payment because they have to meet and confer over what they each claim was paid and received, since Defendant claims $3,287.15 was paid, while Tower Imaging indicates $2,756.30 was received. The parties need to sort this out between themselves, as no one, including witness Ms. Watson, could identify why or where there is this discrepancy. This may require getting old/canceled checks or records from the bank and/or storage.

Also, no penalties or interest are owed. Defendant CIGA is correct that it is not liable for the actions of the pre-liquidated carrier. I will not award any penalties or interest in this matter. Also, I find that defendant's dispute over what is owed versus what they claim was paid, plus the issue of the 2020 bill review showing an overpayment and leading defendant to have a good faith dispute over it having credit rights to assess against the provider's lien or petition. I do not find either party here acted in bad faith. The provider has a right to seek its cost petition, especially on an unpaid date of service, and the defendant has the right to claim credits in good faith and to base its claim of payments on its own benefit printout. Therefore, I do not find that defendant is subject to sanctions nor penalties nor interest. Conversely, I do not find that defendant is entitled to any sanctions, costs or fees against the provider, nor do I find defendant is entitled to the credit for alleged overpayments per that 2020 bill review. The bill review closest in time to the services/bills is deemed reasonable and for those dates of service, all were paid and satisfied at that time.

Also, the issues raised by Defendant per Colomonico, while there may not have been an objection to an EOR, there was also no previous EOR submitted. I agree that defendant did not waive any of its defenses. While Tower Imaging did not request a secondary bill review, there is also no bill review submitted. They could have objected to what they were paid and requested further evaluation regardless of their receipt of a bill review, but I do not find that they should be barred from additional monies if the 2020 bill review shows more is owed. Also, on the one date of service that went unpaid, with no objections to the reasonableness of the actual services that were rendered and no motion to quash having been filed, that service date should be paid and pursuant to the only bill review we have - the August 2020 one.

In conclusion, Defendant owes Tower Imaging $944.43 and this should be paid within 60 days, once the parties can meet and confer over, and sort out, the discrepancy in what Defendant claims was paid (according to their benefit printout) versus what Tower claims was received, and the parties can then apply their agreed math on the above calculations of what was paid in full versus what remains open/owed.

Dated: December 17, 2021

KARINNEH ASLANIAN
Workers' Compensation Administrative Law Judge