WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MERLYN CAROLINA FERMAN, *Applicant*

vs.

HI D HI BAR; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION for TOWER/CASTLEPOINT NATIONAL INSURANCE, in liquidation, Defendants

Adjudication Number: ADJ8107286
Anaheim District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Lien claimant Premier Psychological Services seeks reconsideration of the July 28, 2021 Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed during the period June 13, 2010 through March 13, 2011 by the Hi D Hi Bar did not sustain an industrial injury to her neck, back, shoulders, upper and lower extremities, psyche, legs, sleep disorder, neurological system and anxiety. The WCJ also found that Dr. Michael's reports were not substantial medical evidence and were not properly obtained pursuant to the Labor Code. The WCJ ordered that lien claimant take nothing by way of its lien.

Lien claimant contends, in essence, that it is entitled to recover on the lien, arguing that defendant did not timely deny applicant's claim which "created a contested claim and a claim that was presumptively compensable." (Petition, p. 2.) Lien claimant further contends that it is entitled to medical-legal expenses because Mark H Michaels Ph.D. of Premier Psychological Services performed a medical-legal evaluation on November 19, 2012 for the purpose of proving or disproving a contested claim.

We have reviewed the record in this matter. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the petition be denied. For the reasons discussed below, we will deny reconsideration.

On November 19, 2012, Dr. Michaels issued a report addressed to applicant's attorney. In the report, he stated: "This report is a request for authorization." (Exh. 1, November 19, 2020,

Mark H. Michaels, Ph.D., Psychological Comprehensive Medical Legal Evaluation, p. 1.) The purpose of the evaluation was to "clarify her current cognitive and emotional functioning, establish her initial diagnosis, assess disability, and identify any relevant need for information." (Id. at p. 2.) After administering multiple tests, Dr. Michaels did not arrive at a diagnosis. (Id. at p. 13.) He found that "no treatment is recommended" and "no permanent psychological injury is present." (Id. at p.14.)

Lien claimant's Exhibit 2 is a bill from Premier Psychological Services and Dr. Michaels dated August 19, 2015. There is no proof of service or other indication that the bill was sent to or served on defendant.

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.)

In this case, Dr. Michaels did not treat applicant or request authorization for treatment. Accordingly, this is a lien for medical-legal expenses rather than medical treatment. If lien claimant were to pursue payment on this lien as a medical treatment lien, lien claimant would not be entitled to payment because it did not show by the preponderance of the evidence that applicant sustained an industrial injury. The November 19, 2012 report does not address the issue of whether applicant sustained an injury AOE/COE.

If lien claimant intended to rely on an argument that the injury was presumed compensable, lien claimant needed to introduce evidence of defendant's late denial including a claim form. The 90 day period to deny a claim "runs only from the date the worker *files* a claim form with the employer." (*Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal.4th 24, 29

[70 Cal.Comp.Cases 97] (*Honeywell*), emphasis added.) Here, because there is an absence of evidence of the date the claim form was filed, lien claimant has not established that applicant's claim was presumed compensable.

Turning to whether lien claimant is entitled to recover reimbursement of medical-legal expenses, an employer is required to reimburse allowable medical-legal expenses incurred for the purpose of proving or disproving a contested claim. (Lab. Code, §§ 4620, 4621, and 4622.)

"The employer shall be liable for the cost of each reasonable and necessary comprehensive medical-legal evaluation obtained by the employee pursuant to Sections 4060, 4061, and 4062." (Lab. Code, § 4064(a).) Section 4060 addresses comprehensive medical-legal evaluations where no body parts have been accepted and permits evaluations by a treating physician, a qualified medical evaluator (QME) or an agreed medical evaluator (AME). Section 4061 addresses medical-legal evaluations to determine the amount of permanent disability and allows the parties to obtain an AME or a QME after "either the employee or employer objects to a medical determination made by the treating physician." (Lab. Code, § 4061(b) and (c).) Section 4062 addresses medical-legal evaluations to determine medical treatment issues where the utilization review/ independent medical review process does not apply.

Lien claimant has failed to meet its burden to demonstrate that the November 19, 2012 "Comprehensive Medical-Legal Evaluation" qualifies as a compensable medical-legal evaluation pursuant to Labor Code sections 4060(b) and 4064(d), because as explained above, it did not show that the examination was by a treating physician. The necessity of the evaluation is also questionable because a medical opinion on a proposed course of treatment (or in this case, no treatment) is only necessary if applicant has an industrial injury. Dr. Michaels did not address the issue of whether applicant sustained an injury AOE/COE and as discussed above, lien claimant did not meet its burden on that issue. While proving industrial injury is generally not a requirement for recovering medical-legal expenses, it was not reasonable or necessary to obtain a medical-legal report on the issue of treatment authorization without first obtaining an opinion on industrial causation.

For the foregoing reasons,

IT IS ORDERED that lien claimant's Petition for Reconsideration of the July 28, 2021 Findings and Order is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 22, 2021

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

GUILFORD SARVAS & CARBONARA
MERLYN CAROLINA FERMAN
PAPERWORK & MORE

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