

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

ADAN LOMELI, *Applicant*

vs.

GRIMMER FARMS; ZENITH INSURANCE, *Defendants*

**REACH AIR MEDICAL SERVICES, LLC; CAL-ORE LIFE FLIGHT, LLC; CASTAR
AIR MEDICAL SERVICES, LLC; MED-TRANS CORPORATION dba MED-TRANS
AEROMEDICAL CORPORATION; AIR EVAC EMS, INC., *Lien Claimants***

**Adjudication Number: SAU10596185
Sacramento District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration on November 8, 2021 in order to further study the legal and factual issues raised by the Petition for Reconsideration, and to enable us to reach a just and reasoned decision. This is our Opinion and Decision After Reconsideration.

Lien claimants sought reconsideration of the Findings of Fact and Order (F&O) issued on June 17, 2021 by a workers' compensation administrative law judge (WCJ).¹ The WCJ found that the preemption provision of the Airline Deregulation Act of 1978 (ADA) (49 U.S.C. § 41713), does not prohibit the Workers' Compensation Appeals Board (WCAB) from evaluating the reasonableness of an air carrier's billed charges for air ambulance cases. The WCJ ordered all other issues relating to ADA preemption deferred.

Lien claimants contend that reconsideration should be granted, the F&O rescinded, and the matter returned to the WCJ for further proceedings given the WCJ's erroneous conclusion that the holding in *Enriquez v. Couto Dairy* (2013) 78 Cal.Comp.Cases 323 (Appeals Bd. en banc), rejected

¹ Lien claimants sought relief in the alternative, i.e., reconsideration or removal. We concur with lien claimants that the F&O determined a threshold issue, as a negative finding by the WCJ is a final order sufficient for reconsideration (Petition for Reconsideration or Removal, p. 1, fn. 1), and therefore treat the petition as one for reconsideration.

preemption of Labor Code² 4600; and, that *Enriquez* actually determined that an insurer retains its obligation to pay air ambulance providers' charges even if the "reasonableness" standard of section 4600 is preempted by the ADA. Lien claimants also contend that regardless, the *Enriquez* en banc was later abrogated by the United States Supreme Court's decision in *Northwest, Inc. v. Ginsberg* (2014) 134 S.Ct. 1422 (Ginsberg).

Defendant Zenith Insurance filed an Answer to Lien Claimants' Petition for Reconsideration or Removal (Answer). The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the petition be denied.

We have reviewed the record in this matter, and have considered the allegations of the Petition for Reconsideration and the contents of the Report. Based on the reasons set forth below, as our decision after reconsideration, we will rescind the F&O and return the matter to the trial level for further proceedings. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

DISCUSSION

I.

Section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice...." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493]; see *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635 fn. 22 [70 Cal.Comp.Cases 312].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits. (*Shipley, supra*, 7 Cal.App.4th at p. 1106.) The Appeals Board had not acted on applicant's petition because, through no fault of the parties, it had misplaced the file. (*Ibid.*)

The Court of Appeal reversed the Appeals Board, holding that the time to act on the petition was tolled during the period the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1007.) The Court emphasized that "Shipley's file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control." (*Shipley, supra*, 7 Cal.App.4th at p. 1007.) "Shipley's right to reconsideration by the board is likewise statutorily provided and cannot be

² All further references are to the Labor Code unless otherwise noted.

denied him without due process. Any other result offends not only elementary due process principles but common sensibilities.” (*Id.*, at p. 1108.)³

Applicant’s Petition for Reconsideration was filed in EAMS on July 7, 2021. However, due to an internal processing error related to the Electronic Adjudication Management System (EAMS) used in the workers’ compensation system, which was not the fault of any party in this matter, the Appeals Board failed to act within 60 days of its filing date (Lab. Code, § 5909). As a result of the EAMS error, the first notice the Appeals Board received of the Petition for Reconsideration or Removal was a September 17, 2021 inquiry letter served by lien claimants on the Appeals Board via electronic mail, requesting an update on its petition.⁴

Like the Court in *Shipley*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Thus, the time within which the Appeals Board was to act on applicant’s Petition was tolled until September 17, 2021. The Appeals Board therefore timely issued the Opinion and Order Granting Petition for Reconsideration (Grant for Study) on November 8, 2021, i.e., within 60 days of September 17, 2021.

We note that the Grant for Study is not a final decision on the merits of the Petition for Reconsideration or Removal, as it did not determine substantive right or liability in this case. (See *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171; *Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65 Cal.Comp.Cases 650].) Rather, the Grant for Study was an exercise of jurisdiction over the above captioned matter in order for the Appeals Board to further study the legal and factual issues, and reach a just and reasoned decision. Section 5901 states:

No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers’ compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision,

³ The Court also stated that the fundamental principles of substantial justice (Cal. Const., art. XIV, § 4), and the policies enunciated by Labor Code section 3202 “to construe the act liberally ‘with the purpose of extending their benefits for the protection of person injured in the course of their employment,’” compelled its finding that the time to act on applicant’s petition was tolled during the period that the file was misplaced. (*Id.*, at p. 1107.)

⁴ We note that according to the proof of serviced filed in EAMS, the Appeals Board was not served by mail with the Petition for Reconsideration or Removal. (See “04-AMGH-Proof of Service 7-7-21.”) We also note that lien claimants filed a letter in EAMS on August 10, 2021, attempting to bring to our attention new precedent relevant to their contentions. (“02-AMGH-LTO WCAB re Air Evac v Sullivan Case 8-10-21.pdf,” filed in EAMS on August 10, 2021.) However, that letter was issued “VIA EAMS ONLY.” (*Ibid.*) Unfortunately, there is no mechanism in EAMS that automatically alerts the Appeals Board to all EAMS filings.

or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. Nothing herein contained shall prevent the enforcement of any final order, decision, or award, in the manner provided in this division. (Lab. Code, § 5901.)

In addition, the Appeals Board is unable to review the merits of the Petition for Reconsideration or Removal in this case. Section 5313 requires that together with findings of fact, orders, and/or awards, a WCJ “shall” serve “a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613, 621-22.) The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 476, citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A WCJ’s decision must be based on admitted evidence (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc)); and, must be supported by substantial evidence (Lab. Code, §§ 5903, 5952 (d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd. (Garza)* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]).

The WCJ is charged with preparing the minutes of hearing and a summary of evidence at the conclusion of each hearing. (Cal. Code Regs., tit. 8, § 10787; *Hamilton, supra*, at p. 476.) The minutes of hearing and summary of evidence must include all interlocutory orders, admissions and stipulations, the issues and matters in controversy, a descriptive listing of all exhibits received for identification or in evidence, the disposition of the matter, and a fair and unbiased summary of the testimony given by each witness. (Cal. Code Regs., tit. 8, § 10787; *Hamilton, supra*, at p. 476.)

Here, the WCJ issued a final decision based solely on the briefings, including letters, filed by the parties. There is no record of a pre-trial conference in this consolidated matter, wherein the parties have the opportunity to identify evidence and issues for trial. There is also no evidence of a hearing or trial in this matter, which means that there are no minutes of hearing and summary of evidence to identify for the record the issues to be determined, and the evidence on which each party relies. Briefs and letters are obviously not evidence. In other words, there is no record in this

case sufficient for a meaningful review by the Appeals Board. It appears that the WCJ issued a partial judgment on the pleadings, and/or summarily adjudicated a threshold issue – both of which are *expressly forbidden* in workers’ compensation cases: “Demurrers, petitions for judgment on the pleadings and petitions for summary judgment are not permitted.” (Cal. Code Regs., tit. 8, § 10515.)

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; see *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).) Therefore, it is the decision after reconsideration to rescind the F&O and return this matter to the trial level for further development of the record so that all stipulations, issues, and evidence as to lien claimant’s liens⁵ may be identified in the record, and so that all issues may be fully adjudicated.

Accordingly, and as requested by lien claimants, it is the decision after reconsideration to rescind the F&O, and return this matter to the trial level for further proceedings consistent with this decision. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

⁵ A lien claimant “must prove by a preponderance of the evidence all elements necessary to establish the validity of their lien before the burden of proof shifts to the defendant...” (*Torres v. AJC Sandblasting* (2012) 77 Cal.Comp.Cases 1113, 1115 [2012 Cal.Wrk.Comp. LEXIS 160].)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order issued on June 17, 2021 by a workers' compensation administrative law judge is **RESCINDED** and this matter **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 29, 2021

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

**ADAN LOMELI
CHARLOTTE TAYLOR
CHERNOW LIEB
GOLDMAN, MAGDALIN
HANNA BROPHY
HANSON BRIDGETT
JOSHUA FUCHS
MATTHEW BAUMGARTNER
RATTO LAW
REACH AIR MEDICAL SERVICES
ZENITH INSURANCE**

AJF/ara

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