

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

CARLOS MENA, *Applicant*

vs.

**HOLIDAY INN; CYPRESS INSURANCE COMPANY, administered by BERKSHIRE
HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ9876087
Los Angeles District Office**

**OPINION AND ORDER
DENYING PETITION FOR
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 discussed below, we will deny reconsideration.

We agree with petitioner that the rule applicable at the time of the August 15, 2018 lien conference was former WCAB rule 10770.1 and that new WCAB Rules 10625 and 10875 did not become effective until January 1, 2021. Nevertheless, at the time of the 2018 trial, lien claimant had a duty to serve defendant with its exhibits before trial. (See former Cal. Code Regs., tit. 8, § 10608.) Former WCAB Rule 10622 provided that "The Workers' Compensation Appeals Board may decline to receive in evidence, either at or subsequent to a hearing, any report offered under the provisions of Labor Code § 5703 by a party who has failed to comply with the provisions of Rules 10600, 10608, 10615, 10616 or 10618." (Cal. Code Regs., tit. 8, former § 10622, now § 10670 (eff. Jan. 1, 2020).) These rules were intended to assure due process and give an opposing party an opportunity to inspect the documents and offer other evidence in explanation or rebuttal. (*Katzin vs. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703 [57 Cal. Comp. Cases 230, 236]; see also *Hirschi v. Workers' Comp. Appeals Bd.* (1995) 60 Cal. Comp. Cases 773, 776 (writ den.) Moreover, a lien claimant has the burden to prove all of the elements necessary to the establishment of its lien by a preponderance of the evidence. (*Torres v. AJC Sandblasting* (2012)

77 Cal.Comp.Cases 1113 (Appeals Bd. en banc); *Tapia v. Skill Master Staffing* (2008) 73 Cal.Comp.Cases 1338 (Appeals Bd. en banc); *Kunz v. Patterson Floor Company, Inc.* (2002) 67 Cal.Comp.Cases 1588 (Appeals Bd. en banc.) Finally, the decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, § 5952; *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) We agree with the WCJ that lien claimant did not present substantial evidence that it fulfilled its duty to serve its exhibits on defendant prior to trial.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 12, 2021

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

**CITYWIDE SCANNING SERVICE, INC.
ROSENBERG YUDIN & PEATMAN LLP**

PAG/bea

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Carlos Mena, a 42-year-old doorman for Holiday Inn, filed an Application for Adjudication on 3/13/15 alleging that during the period commencing 11/7/13-11/7/14, he sustained injury arising out of and occurring in the course of employment to his back, elbows, legs, feet, shoulders, hands, wrists, digestive system, and psyche, as a result of repetitive job duties. The claim was denied by the employer.

Defendant Cypress Insurance Company, administered by Berkshire Hathaway Homestate Companies, has filed a timely, verified, Petition for Reconsideration of the Findings and Order dated 7/22/21 which does not cite any statutory grounds for reconsideration.

Petitioner contends that the Court erred in determining that Petitioner failed to establish that its exhibits (1, 2, 3 & 5) which could potentially meet its burden of proof under Labor Code section 4621, were actually served on Defendant, and thus excluded.

II

FACTS

Petitioner Citywide Scanning charged Defendant for photocopy services alleges to have been provided on behalf of Applicant's attorney Susan M. Garrett. Invoices issued by Lien Claimant to Defendant during the period commencing 1/6/15 through 6/16/15 (Lien Claimant exhibit 4).

Defendant disputed liability for the charges and the matter was tried on 8/15/18. At trial, petitioner's exhibits 1, 2, 3, and 5 were all excluded because they had not been served on Defendant as of the time of the Lien Conference in accordance with then existing regulation 10601. Those exhibits included, among other things, order forms and subpoenas with declarations relating to Petitioner's services. Despite the lack of exhibits which could establish that the services were actually provided in accordance with Labor Code section 4621, the Court issued a

Findings and Order on 9/11/18 wherein Defendant was ordered to reimburse Lien Claimant for all of its incurred charges plus penalty and interest because Defendant did not conduct any explanations of review relative to Petitioner's invoices.

Following a Petition for Reconsideration filed by Defendant on 10/3/18, the Court, initially recommended that the Petition be denied, but subsequently recommended that it be granted after reviewing the transcript of proceedings which revealed that Defendant specifically raised the issue whether the charges were reasonably, actually, and necessarily incurred. Additionally, [m]ore pointedly, Defendant specifically raised the issue of whether the services were actually provided noting that they had not, even as of the trial date, been served with the subpoenas and declarations which could prove the actual provision of services (Transcript of proceedings pages 5 & 6, EAMS Doc ID 68509543).

The WCAB granted reconsideration for further study on 12/3/18 and subsequently issued an Opinion and Decision after Reconsideration on 8/19/20 wherein the Findings and Order of 9/11/18 was rescinded, and the matter remanded to specifically address whether Petitioner met its burden of proof under section 4621(a).

The matter was again submitted for decision on 2/26/21. The Court issued a Findings and Order on 3/11/21 wherein Petitioner's lien was disallowed in its entirety because it did not meet the burden of proof required by section 4621(a). That decision was rescinded on 4/29/21 following a Petition for Reconsideration filed by Petitioner due to the fact that the proceedings where the case had been re-submitted were not conducted on the record.

In preparing for the pending lien trial setting scheduled for 5/19/21, The Court realized that the basis for excluding Petitioner's exhibits at the time of trial on 8/15/18, was grounded on section 10601 which had subsequently been repealed and effectively replaced and expanded upon by section 10635. As a result, at the time of the Lien Trial on 5/19/21, the Court rescinded the prior order excluding Petitioner's exhibits and provided Defendant the opportunity to object to their admission on other grounds. Defendant objected to the admissibility of the previously excluded exhibits citing section 10635. Petitioner's exhibits 1, 2, 3 & 5

were marked for identification and Petitioner was afforded the opportunity to provide the Court with written argument and any supporting documentation to prove when the subject exhibits were served.

Petitioner filed its written argument on 7/2/21 (EAMS DOC ID 37303255). Attached to that document was a proof of service dated 7/26/18 (which was after the original Lien Conference but before the first Lien Trial) wherein the description of what was served was stated simply as:

“EXHIBITS OF CITIWIDE SCANNING INC”

The Court issued a new Findings and Order on 7/22/21 wherein Petitioner’s exhibits 1,2,3, & 5 were excluded from evidence as a matter of due process because it was determined that Petitioner did not prove that they had served any of the exhibits in issue. As a result, the Court ordered that Petitioner’s charges be disallowed because it did not meet its burden of proof as to whether the charges were actually incurred per section 4621(a).

III

DISCUSSION

EXCLUSION OF EXHIBITS

CCP section 1013a provides the methods from which a proof of service by mail may be made.¹

As pertinent to this case, section 1013a(1) and 1013a(3) set forth the following methods:

(1) An affidavit setting forth the exact title of the document served and filed in the cause, showing the name and residence or business address of the person making the service, showing that he or she is a resident of or employed in the county where the mailing occurs, that he or she is over the age of 18 years and not a party to the cause, and showing the date and place of deposit in the mail, the name and address of the person served as shown on the envelope, and also

¹ The Court made a clerical error in the Opinion on Decision by citing the section as 1013(a) as opposed to 1013a.

showing that the envelope was sealed and deposited in the mail with the postage thereon fully prepaid....

(3) An affidavit setting forth the exact title of the document served and filed in the cause, showing (A) the name and residence or business address of the person making the service, (B) that he or she is a resident of, or employed in, the county where the mailing occurs, (C) that he or she is over the age of 18 years and not a party to the cause, (D) that he or she is readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service, (E) that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business, (F) the name and address of the person served as shown on the envelope, and the date and place of business where the correspondence was placed for deposit in the United States Postal Service, and (G) that the envelope was sealed and placed for collection and mailing on that date following ordinary business practices. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the affidavit.

CCP section 1013a is consistent with Title VIII CCR section 10625(c) which became operative on 1/1/20. That section provides:

‘Proof of service’ means a dated and verified declaration identifying the document(s) served.....’

The proof of service at issue in this case did not set forth the exact titles or any title of the individual documents that were allegedly served, which is a requirement by CCP1013a, (and currently under regulation 10625(c)) for said proof of service to be valid. As such, Petitioner did not establish that the documents in question were ever served, and that would lend credence to Defendant's assertion that in fact they had not. Defendant's inability to examine evidence being offered into evidence by its opponent creates an obvious prejudicial effect. As a result, the exhibits were excluded as a matter of fundamental due process.

Since the exhibits at issue were excluded on due process grounds, the distinction as to whether sections 10635 (and by extension 10670(b)) are applicable to lien conferences is a moot point.

IV

RECOMMENDATION

For the foregoing reasons, the undersigned WCALJ recommends that the Petition for Reconsideration be **DENIED**.

DATE: 8/26/21

Jeffrey Morgan
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE