

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

MARTHA PEREZ ZUNIGA, *Applicant*

vs.

**FLYING FOOD GROUP, INC.;
LIBERTY MUTUAL INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ2136048 (LAO 0886988)
Los Angeles 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, we will grant reconsideration, rescind the WCJ's November 23, 2020 Order to Dismiss Liens, and return this matter to the WCJ for further proceedings and decision.¹ This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of the November 23, 2020 Order to Dismiss Liens is **GRANTED**.

¹ While the Petition for Reconsideration was also filed in Case Nos. ADJ3325494 and ADJ2731467, the December 9, 2020 Order to Dismiss Lien was only issued in Case No. ADJ2136048. Therefore, we are granting reconsideration only in Case No. ADJ2136048.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the November 23, 2020 Order to Dismiss Liens is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 8, 2021

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

**MARTHA PEREZ ZUNIGA
GRAIWER & KAPLAN, LLP
OSCAR GALDAMEZ
KIRK & MYERS**

PAG/ara

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 LIEN CLAIMANT OSCAR GALDAMEZ'S PETITION FOR
RECONSIDERATION

I
INTRODUCTION

Lien claimant Oscar Galdamez, through his attorneys of record Graiwer and Kaplan, has filed a reconsideration petition in response to this judge's order served 11/23/20, which dismissed said lien for petitioner's failure to appear at a lien conference on 12/9/19. Mr. Galdamez's petition is timely and verified. Said petition is served on defense counsel at an address that matches State Bar address of the previous handling attorney for Kirk and Myers, Kathe Moore. However, the address of service does not match the WCAB address of record for Ms. Moore's firm, Kirk and Myers. (Accordingly, I am directing below that a copy of this petition be served on Kirk and Myers as per the Official Address Record.)

Mr. Galdamez's petition contends this dismissal order was issued in error because 1) petitioner's attorney's Graiwer and Kaplan, in fact appeared at the 12/9/19 lien conference in question; 2) no notice of intent to dismiss the lien of Mr. Galdamez was served on lien claimant Galdamez's attorneys, Graiwer and Kaplan, prior to the date that I issued the dismissal order on 11/23/20.

As explained below, the undersigned's report is going out at this late date largely because I only recently learned that the proposed order I had intended to issue to vacate the dismissal pursuant to WCAB rule 10961(b) was not in fact served within the 15-day deadline allowed for the issuance of such an order.

II
FACTS

On 5/6/08, applicant herein, Martha Perez-Zuniga, filed application for adjudication in the within case for a claim of specific injury to various orthopedic and other body parts. Per this application, she sustained said injury while lifting trays of dishes on 12/5/07.

On 6/14/11 petitioner herein, Oscar Galdamez filed a lien for "reasonable homecare services provided to applicant." This lien very clearly listed Mr. Galdamez's attorney of record as Graiwer and Kaplan, the same firm that is representing the applicant in this matter.

On 6/19/19 the within case, together with two other cases brought by the same injured worker (ADJ3325494 and ADJ2731467) resolved via joint order approving compromise and release in the amount of \$216,544.96 issued by Judge Watkins. The C&R agreement provided that defendant would "pay, negotiate, settle and or litigate all liens of record...."

A lien conference took place in the within case and the two companion matters on 12/9/19. According to EAMS records, notice of this hearing went to both Mr. Galdamez and his attorneys,

Graiwer and Kaplan, on 10/1/19. Graiwer and Kaplan in fact appeared at this hearing of 12/9/19 through hearing representative Vivian Riddick, as clearly shown in the minutes of said hearing. Ms. Riddick did sign in under the line designated for “Applicant Represented By” rather than the line marked “Others appearing” where lien claimant representatives normally sign in. A representative for a second lien claimant, Beverly Hills Pharmacy, also signed in.

According to the minutes of the 12/9/19 hearing, the parties jointly requested a continuance of the lien conference for further discovery. I denied this request, finding no good cause, and ordered the matter off calendar.

At the 12/9/19 hearing, I also issued notices of intent (NOIs) to dismiss the liens of both petitioner Oscar Galdamez and another lien claimant, Dr. Arthur Lipper.

I have no independent recollection of this hearing. My typical practice is to issue notices of intent to dismiss liens, if it is clear that the lien claimant in question did not appear, once defense counsel prepares such a notice and presents it to me for signature. I am reasonably certain this is what happened at the 12/9/19 hearing, although I have no independent recollection of this or any other events at the 12/9/19 hearing.

I am also reasonably certain that had I known that the Graiwer firm was representing both applicant and petitioner Galdamez, I would not have signed the notice of intent.

At the 12/9/19 hearing, according to Mr. Galdamez’s sworn reconsideration petition, “Defense counsel and Applicant Counsel never discussed the lien of Oscar Galdamez as all home care issues had been deferred.... It appears defendants obtained a Notice of Intent for Dismissal of the Oscar Galdamez Lien after Graiwer & Kaplan had left the hearing.”

On 1/27/20, defendant herein filed a “petition/other” consisting of a copy of the lien of Dr. Lipper and a proof of service dated 12/19/19 averring service of both the NOI pertaining to Dr. Lipper and the NOI pertaining to petitioner. Said proof of service shows service by mail on Mr. Galdamez but notably does not show service on Mr. Galdamez’s attorneys of record, Graiwer and Kaplan.

While I once again have no independent recollection here, the file shows that I did issue an order dismissing Dr. Lipper’s lien in a companion case on 2/5/20 but did not issue an order dismissing petitioner’s lien at that time. I believe this was simply an oversight as the only NOI included in defendant’s “petition/other” (which did not include any actual petition) pertained to Dr. Lipper’s lien. I believe that I assumed from this, perhaps without closely inspecting the proof of service, that defendant was only seeking dismissal of Dr. Lipper’s lien.

The within case, along with the two companion matters, was subsequently set for lien trial on 11/17/20 in connection with a separate lien being prosecuted by Collective Resources on behalf of Beverly Hills Pharmacy. According to the minutes I prepared on 11/17/20, I indicated that I expected to issue an order dismissing petitioner’s lien. Most likely, this was based on a verbal request by defendant’s representative during the 11/17/20 telephone lien trial. (The lien trial itself was continued to 1/14/21 due to problems with filing and service of exhibits as between defendant and Collective Resources.)

I subsequently prepared such order dismissing petitioner's lien for service and my secretary served this on 11/23/20. At the time, I was not aware that Mr. Galdamez's lien pertained to a home health care claim or that Mr. Galdamez was using the same law firm in connection with this claim as the applicant was using.

Petitioner Oscar Galdamez's reconsideration petition followed on 12/10/20.

After reviewing the 12/10/20 reconsideration petition, it was evident to me that defendant did not serve the NOI, that was the predicate event for the dismissal, on petitioner's attorneys of record, Graiwer and Kaplan. On this basis, on 12/18/20, I prepared a proposed order for service, which is in the EAMS communications queue. This proposed order, which never actually issued, would have rescinded the order dismissing petitioner's lien pursuant to **rule 10961(b)**.¹ I forwarded this proposed order, along with an email regarding this, to my clerical staff for service. I note that our clerical office has had significant understaffing issues, which have been exacerbated by telecommuting protocols and other aspects of the COVID-19 crisis.

I was on vacation during the week of 12/21/20 to 12/24/20. On 12/31/20, I was preparing my month-end reports and saw in EAMS that there was no indication that this proposed order, which would have vacated the dismissal of petitioner's lien, had in fact gone out. I was also on vacation on 1/4/21. On 1/6/21, I was finally able to confirm that the proposed order to vacate petitioner's dismissal had not in fact been served. Accordingly, I prepared the within report in response to Mr. Galdamez's petition.

III DISCUSSION

It is quite clear in my opinion that Mr. Galdamez's petition is meritorious. This is for at least two reasons.

First, Mr. Galdamez was legally entitled to service of the notice of intent pursuant to rule 10888(e). Defendant never properly complied with this requirement prior to the dismissal.

I believe that this notice to Mr. Galdamez alone is clearly incomplete where the defendant never served this notice on Mr. Galdamez's attorney of record. This assertion seems obvious to this judge. However, I would also note that State Bar rule 2-100 explicitly precludes non-consensual communications between an opposing law firm and a represented client. While the service of the NOI on Mr. Galdamez without service on his attorney may have been inadvertent, it would certainly be anomalous to allow dismissal on this basis notwithstanding the State Bar Rules of Professional Conduct.

While I am not privy to Mr. Galdamez's level of legal sophistication, he is clearly not the typical medical lien claimant who provides substantial services within the workers' compensation system and is familiar with the ins and outs of that system.

¹ Rule 10961(b) allows a WCJ to issue such an order within 15 days of filing of a reconsideration petition.

Second, it is quite apparent that Mr. Galdamez's attorneys were in fact present at the 12/9/19 hearing, which is the basis herein for dismissing Mr. Galdamez's lien for failure to appear. While said attorneys signed in on the line normally designated for applicant's attorneys rather than lien claimants, dismissing petitioner's lien on this basis would greatly elevate form over substance.

It is my observation that the WCAB typically tries home health lien claims separately from other "garden variety" medical, pharmacy and other similar lien claims, because the issues are quite distinct and because live testimony is nearly always necessary. Thus, I find credible petitioner's counsel's assertion that she reasonably believed the parties had agreed to defer the home health care lien issues.

It also bears noting that the Board has a strong policy favoring determination of issues on their merits. Viewing the record as a whole, I am not seeing how substantial justice would be served by dismissing Mr. Galdamez's lien on purely procedural grounds without a hearing on its merits.

Perhaps ideally I would have investigated further to determine the identity of Mr. Galdamez's attorneys, if any, and confirmed that the proof of service of the NOI went to these attorneys before issuing the dismissal order in question. As stated elsewhere, had I known that 1) Mr. Galdamez was a home health care claimant represented by the same firm that appeared at the 12/9/19 hearing and 2) that defendant never served the NOI on Mr. Galdamez's attorneys, I would not have issued the dismissal order. As discussed above, my original intent was to vacate this dismissal order per rule 10961(b) once I learned these facts upon reviewing Mr. Galdamez's reconsideration petition. I am only preparing this report because said proposed order to vacate the dismissal was not in fact served within time limitations allowed under rule 10961(b).

IV **RECOMMENDATION**

It is respectfully recommended that petitioner/lien claimant Oscar Galdamez's reconsideration petition be granted, and that the undersigned's 11/23/20 order dismissing petitioner's lien be vacated and rescinded.

Dated: January 11, 2021

Respectfully submitted,

DANIEL A. DOBRIN
Workers' Compensation Judge