

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

DAVID LEAL, *Applicant*

vs.

**MARMOL EXPORT USA, CIGA for CASTLEPOINT NATIONAL INSURANCE FUND,
in liquidation, *Defendants***

**Adjudication Number: ADJ9737864
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Lien claimant Citywide Scanning Service, Inc., seeks reconsideration of the Findings and Orders (F&O) issued on June 12, 2019, wherein the workers' compensation administrative law judge (WCJ) found as relevant that (1) lien claimant failed to establish its lien claim because it failed to offer admissible evidence in support thereof; and (2) lien claimant and its counsel, Amy Cosio, engaged in bad faith and frivolous actions designed solely to harass defendant by proceeding to trial in disregard of court rules and procedures, justifying Labor Code section 5813¹ sanctions and costs.

The WCJ ordered that lien claimant take nothing on its claim and that lien claimant and its representative, Ms. Cosio, jointly and severally pay sanctions of \$1,000.00 to the WCAB and costs to defendant.

Lien claimant contends that the WCJ erroneously (1) excluded its exhibits from being admitted into evidence at trial based upon a scanning error of the court; and (2) failed to find that it and its representative, Ms. Cosio, acted with reasonable justification.

We did not receive an Answer.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

We have reviewed the Petition for Reconsideration and the contents of the Report. Based upon our review of the record, and for the reasons stated below and in the Report, of which we adopt and incorporate parts I, II, and III A herein, we will rescind the F&O in order to make clear that Finding of Fact number 3 and orders b and c are stricken, and substitute findings that make no other substantive changes to the WCJ's decision.

FACTUAL BACKGROUND

On June 5, 2019, the matter proceeded to trial as to the following relevant issues:

1. Liens, specifically the lien of Citywide Scanning, who are claiming a balance of \$11,638.72, with \$435.73 paid.
2. Whether the services of Citywide Scanning are medical-legal expenses.
3. Reasonableness and necessity of the services provided.
4. Costs and sanctions, specifically against Citywide Scanning and their representative, Amy Cosio.

(Minutes of Hearing, June 5, 2019, p. 2:14-19.)

The WCJ entered the following into the minutes:

LET THE MINUTES REFLECT that Lien Claimant's Exhibits 1 through 7 will not be admitted into the record based upon the objection by defendant of Labor Code Section 5502(d) (3) and the lack of a response by lien claimant; Lien Claimant's Exhibit 8 will be admitted into the record as evidence of service in response to objection by defendant that they were not previously served.

(*Id.*, p. 3:22-24.)

DISCUSSION

We first address lien claimant's contention that the WCJ erroneously excluded its exhibits from admission into evidence at trial based upon a court scanning error. In this regard, we note that the record shows that the WCJ declined to admit exhibits 1 through 7 based upon defendant's section 5502(d)(3) objection without detailing lien claimant's evidence and argument in support of admission. (Minutes of Hearing, June 5, 2019, pp. 1-4.) However, the Report's summary of trial proceedings shows that lien claimant's representative, Ms. Cosio, did not assert that lien claimant provided an exhibit list at the pretrial conference in compliance with section 5502(d)(3); but argued that lien claimant was only required to file and serve copies of the exhibits before trial. (Report, p. 2.) In addition, lien claimant's Petition does not assert that it provided an exhibit list

at the pretrial conference; but argues inferentially that it provided the list based upon Ms. Cosio's lack of recollection as to any circumstances preventing her from doing so. (*Id.*, p. 6.)

These arguments contend in the alternative that lien claimant either failed to provide an exhibit list out of mistake or did in fact provide an exhibit list which was not entered into the record as a result of a court scanning error.

As to the first alternative, we observe that section 5502(d)(3) requires that evidence not disclosed in the pretrial conference statement shall be deemed inadmissible unless it was not previously available or could not have been discovered through the exercise of due diligence. (§ 5502(d)(3).) A party that has failed to disclose evidence in accordance with section 5502(d)(3) may nevertheless seek relief from the consequences of its failure by utilizing a procedure substantially similar to Code of Civil Procedure section 473. (See *Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196, 1205–1206.) Specifically, the party may seek relief “from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.” (Code of Civil Procedure section 473(b).) Such relief, however, is discretionary, not automatic. (See *Fox*, *supra*, 4 Cal.App.4th at 1205–1207.)

Here, the record does not contain a declaration of lien claimant's representative attesting to any mistake, inadvertence, surprise, or excusable neglect that could demonstrate good cause to excuse lien claimant's failure to disclose evidence by way of the exhibit list. In the absence of such a declaration, we are unable to discern grounds to grant lien claimant relief from its failure to provide the exhibit list and the WCJ's consequent decision to sustain defendant's section 5502(d)(3) objection.

As to lien claimant's alternative argument that it did in fact provide an exhibit list which was not entered into the record as a result of a court scanning error, we agree with the reasoning of the WCJ, as stated in the Report, that there is no “actual evidence that an exhibit sheet was submitted to [the] court” at the pretrial conference. (*Id.*) It follows that lien claimant's contention that the WCJ erroneously excluded its exhibits is without merit. Accordingly, we will make no substantive change to the WCJ's finding that lien claimant failed to establish its lien claim because it failed to offer admissible evidence in support thereof.

Before we turn to lien claimant's contention that the WCJ should have found that it (and its representative) acted with reasonable justification in proceeding to trial, we observe that section 5813 authorizes the WCJ to impose sanctions and costs for bad faith actions or tactics “after written

application by the party seeking sanctions or upon the appeal board's own motion." (§ 5813(b).) In order for the WCJ to impose sanctions and costs on the court's own motion, the alleged offending party or attorney must be given notice—at least in the form of a Notice of Intention—and an opportunity to be heard. (Cal. Code Regs., tit. 8, former § 10561(a)(b) now § 10421(a)(b); see also Cal. Code Regs., tit. 8, former § 10349 now § 10832; see e.g. *Escamilla v. Workers' Comp. Appeals Bd.* (2008) 73 Cal. Comp. Cases 280, 282-283 (writ den.) (finding due process is satisfied when a party to a WCAB proceeding receives written notice of the WCJ's intention to impose sanctions and has an opportunity to oppose them through written objection).)

Here, the record reveals that the WCJ imposed sanctions and costs upon lien claimant without issuing a Notice of Intent or otherwise providing notice of the specific grounds upon which the court sought sanctions, reasoning that because defendant raised the issue of sanctions in the pretrial conference statement, lien claimant had adequate notice of the issue. (Report, p. 3.) However, we are unaware of any authority allowing the WCJ to impose sanctions without requisite notice on the grounds that the issue was raised separately by a party. We therefore conclude that the WCJ imposed sanctions and costs without notice and an opportunity to be heard and in violation of lien claimant's right of due process.

Having determined that the WCJ imposed sanctions and costs without providing notice and an opportunity to be heard, we nevertheless address the merits of lien claimant's argument that it proceeded to trial with reasonable justification. Here we note that while the WCJ correctly determined that lien claimant failed to offer admissible evidence to support its claim, we are unpersuaded that lien claimant acted out of bad faith or design to harass defendant in proceeding to trial without a likelihood of obtaining admission of its exhibits into evidence. More particularly, lien claimant's position that it could establish grounds for the court to overrule defendant's section 5502(d)(3) objection, though not well taken, was not by itself demonstrative of sanctionable conduct. Accordingly, we will rescind the F&O in order to make clear that Finding of Fact number 3 and orders b and c are stricken.

Accordingly, we will rescind the F&O in order to make clear that Finding of Fact number 3 and orders b and c are stricken, and substitute findings that make no other substantive changes to the WCJ's decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Orders issued on June 12, 2019 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

- (1) David Leal, while employed during the period 5/1/2009 through 5/1/2010 as a sales representative, at State College Boulevard, somewhere in California, by Marmol Export Corporation, doing business as Marmol Export USA, who was insured by Castlepoint National Insurance Co. now in liquidation and adjusted by CIGA, sustained injury arising out of and in the course of said employment to stress, anxiety, shoulders, neck, back, headaches, dizziness, insomnia, and weight loss.

- (2) Lien claimant, Citywide Scanning, failed to meet its burden of proof to establish any of element of its lien claim because it failed to offer any admissible evidence to support its lien claim or entitlement to additional payments.

- (3) All other issues are rendered moot by the above Findings.

ORDER

IT IS HEREBY ORDERED that Lien claimant, Citywide Scanning, shall take nothing further from the lien claim filed herein and its pending lien claim is disallowed.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 22, 2022

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

**CITYWIDE SCANNING SERVICE
HANNA BROPHY**

SRO/pc

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

Applicant, born [], worked as a sales representative for the employer when he sustained an admitted cumulative trauma injury to his stress and anxiety complaints, shoulders, neck, back, headaches, dizziness, insomnia, and weight loss while working during the period plead from 5/1/2009 through 5/1/2010. The employer was originally insured by Castlepoint National Insurance Co., who is now in liquidation, so the claim is being adjusted by CIGA.

Lien claimant, Citywide Scanning, is the Petitioner herein, and filed a timely, verified Petition for Reconsideration (hereinafter, the “Petition”) on 7/5/2019. Petitioner takes issue with the Findings and Orders and Opinion on Decision issued by the undersigned WCJ dated 6/12/2019. In that Findings and Order, the undersigned WCJ found that lien claimant, Citywide Scanning, failed to meet their burden of proof by failing to offer any admissible evidence, that lien claimant, Citywide Scanning, shall take nothing further from the lien filed herein, and that lien claimant, Citywide Scanning, and their representative, Amy Cosio, shall pay, jointly and severally, a sanction of \$1,000.00 to the general fund and costs to defendant. Petitioner takes issue with those Findings and Orders, and contends the undersigned WCJ erred in setting up a “unique trial proceeding” and excluding lien claimant’s evidence based upon a court scanning clerical error, and contends that sanctions and costs should not have been awarded based upon the lien representative’s “prudent advocacy” in demanding to proceed forward to protect the lien claimant’s rights.

II. STATEMENT OF FACTS:

This claim is an admitted cumulative trauma injury, as indicated above, that settled by way of compromise and release settlement agreement on 3/4/2015. Lien claimant, Citywide Scanning, filed their lien on 6/26/2015.

On 5/11/2018, lien claimant, Citywide Scanning, filed a declaration of readiness to proceed to a lien conference.

Several lien conferences followed that filing, and the matter was eventually set for trial at the lien conference on 2/13/2019. At that time, the parties filled out the pretrial conference statement, with both lien representative for Citywide Scanning, Amy Cosio, and defendant signing off on the pretrial conference statement. Defendant filled out an exhibit list for their proposed exhibits, but for some reason, lien claimant, Citywide Scanning, failed to include an exhibit sheet indicating the proposed exhibits to be offered at trial in that pretrial conference statement.

On 6/5/2019, the parties appeared before the undersigned WCJ for trial, with both parties indicating that they were unable to resolve their dispute. During informal discussions of the issues with the parties, defendant brought up the issue that lien claimant failed to include an exhibit sheet in the pretrial conference statement, and that defendant would be objecting to all of lien claimant's exhibits. The undersigned WCJ checked the pretrial conference statement in the court's file, and confirmed that it did not contain any exhibits listing for lien claimant, Citywide Scanning. The undersigned WCJ inquired of the lien representative for Citywide Scanning, Amy Cosio, as to whether she had filled out an exhibit list or included her exhibits anywhere in the pretrial conference statement. Ms. Cosio indicated she did not know if they did, and that she believed that they did not have to fill one out and only had to file and serve their exhibits prior to trial. The undersigned WCJ informed Ms. Cosio that her belief was incorrect, and the undersigned WCJ asked the lien representative whether she had a copy of any exhibit sheet filled out and signed by her and defendant in this case. Ms. Cosio indicated she did not have such a document. The undersigned WCJ then printed a copy of the pretrial conference statement in the court's file and provided it to Ms. Cosio. Ms. Cosio confirmed that there was no such exhibit listing in the pretrial conference statement, and that the lien representative's copy of that document was the same as the court's copy. Despite the above deficiencies, the lien representative for Citywide Scanning demanded to proceed forward to trial to litigate their lien.

After identifying the stipulations and issues of the parties, and marking all the proposed evidence offered, the matter proceeded to trial. The issue of sanctions and costs was already raised by the parties in the pretrial conference statement (*Pretrial Conference Statement*, dated 2/13/2019, page 8 per the court's pagination), so the issue was not raised sua sponte by this court. Defendant objected to all of lien claimant's evidence (*Lien Claimant's Exhibits 1 through 8*) for failure to comply with Labor Code §5502(d)(3) (*Minutes of Hearing/Summary of Evidence*, dated 6/5/2019, page 3, lines 21 to 25). Based upon defendant's objection, and the lack of response from the representative for lien claimant, defendant's objection was sustained, and all of lien claimant's exhibits were not admitted into the record. There was no evidence supplied to this court to indicate that defendant had been put on notice of what lien claimant intended to offer as evidence at trial, or even received the documents, prior to or at the lien conference. The only evidence supplied by lien claimant to indicate when defendant received notice of the proposed evidence and received the documents themselves was the proof of service indicating service of the documents on 5/16/2019 (*Lien Claimant's Exhibit 8*), or after the closure of discovery at the lien conference. Allowing the documents to be admitted based upon this chronology of events would be a denial of defendant's due process rights, as defendant had no notice or opportunity to respond to the documents.

In turn, representative for lien claimant, Ms. Cosio, objected to all of defendant's exhibits (*Defendant's Exhibits A through E*), for failure to

previously serve the documents on lien claimant. Based upon that objection, the undersigned WCJ sustained the objection to *Defendant's Exhibits A, B, and E* (*Minutes of Hearing/Summary of Evidence*, dated 6/5/2019, page 4, lines 11 to 13). The undersigned WCJ, however, overruled the objection to *Defendant's Exhibits C and D*, for different reasons as indicated (*Minutes of Hearing/Summary of Evidence*, dated 6/5/2019, page 4, lines 14 to 17). As neither party offered any witnesses, the matter stood submitted for decision on that date.

On 6/12/2019, the undersigned WCJ issued the Findings and Orders and Opinion on Decision. In that Findings and Order, the undersigned WCJ found that lien claimant, Citywide Scanning, failed to meet their burden of proof by failing to offer any admissible evidence, that lien claimant, Citywide Scanning, shall take nothing further from the lien filed herein, and that lien claimant, Citywide Scanning, and their representative, Amy Cosio, shall pay, jointly and severally, a sanction of \$1,000.00 to the general fund and costs to defendant. The undersigned WCJ gave defendant ten days, plus five for mailing, to submitted a breakdown of their actual costs incurred in preparing for and attending the trial, for the court to consider in ordering additional costs.

On 7/2/2019, after not receiving any such costs breakdown or request from defendant, the undersigned WCJ issued an Order Denying any additional costs to defendant.

On 7/5/2019, Petitioner filed the instant Petition. Petitioner contends, as indicated above, that the undersigned WCJ erred in setting up a "unique trial proceeding" and excluding lien claimant's evidence based upon a court scanning clerical error, and contends that sanctions and costs should not have been awarded based upon the lien representative's "prudent advocacy" in demanding to proceed forward to protect the lien claimant's rights. In support of their Petition, Petitioner attached a declaration from the same lien representative present at the lien conference and lien trial, Amy Cosio, indicating her perspective of how the events transpired at trial, and attached an "Exhibit List From Court File on 2/13/2019". That exhibit list is not part of this court's file, was not provided to the court on 2/13/2019, and is not signed by either defendant or the representative for lien claimant.

No response to the Petition has been received from defendant to date.

III. DISCUSSION:

A. Lien claimant's, Citywide Scanning, proposed exhibits were properly excluded from the record pursuant to Labor Code §5502(d)(3):

Petitioner makes several accusations and allegations that are not supported by the record or the law, in addition to citing to a multitude of other legal

principles that have no bearing on the present issue. Each of Petitioner's accusations and allegations will be discussed, in turn.

Firstly, Petitioner contends that "Petitioner can not fully ascertain its substantive rights relating to the proceedings in this matter as the EAMS filenet does not contain the documentary exhibits and exhibit sheet that the Petitioner filed with the Oxnard district office of the WCAB on or about May 16, 2019 prior to the time of trial in this matter yet were not admitted into evidence based upon a unique trial proceeding conducted by the WCLJ regarding the exhibits of the petitioner" (*Petition*, page 6, lines 11 to 16). There is nothing "unique" about the undersigned WCJ's trial proceedings, as the undersigned WCJ simply followed the law. The undersigned WCJ hopes that following the law is not a unique idea for any WCJ. Petitioner's ignorance of that law does not make the undersigned WCJ's adherence to that law "unique".

Secondly, Petitioner further demonstrates their unfamiliarity with the law when Petitioner contends "[t]he terminating sanction of exclusion of admission into evidence is not supported at law on this record" (*Petition*, page 6, lines 21 to 22). The mandate that evidence not listed and disclosed on the pretrial conference statement at the time of the conference shall not be admitted into evidence is contained in Labor Code §5502(d)(3), which was cited by the undersigned WCJ in the Opinion on Decision. That section, in case Petitioner is not aware, states that "[e]vidence not *disclosed* or obtained thereafter *shall not be admissible* unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." (Labor Code §5502(d)(3), emphasis added). In addition, CCR §10770.1(f) states the procedures for all lien conferences where the liens are not resolved, indicating:

"For any lien claim(s) or lien issue(s) not fully resolved at the lien conference by an order signed by a workers' compensation judge, the defendant(s) and lien claimant(s) *shall prepare*, sign, and file with the workers' compensation judge a pretrial conference statement, which *shall include*: (1) all stipulations; (2) the specific issues in dispute; (3) *all documentary evidence that might be offered at the lien trial*; and (4) all witnesses who might testify at the lien trial. The right to present any issue, *documentary evidence*, or witness *not listed* in the pretrial conference statement *shall be deemed waived*, absent a showing of good cause." (CCR §10770.1(f), emphasis added)

The above mandatory procedures are not "unique" to the undersigned WCJ, are not "unique" to the Oxnard WCAB, and are not optional to a lien claimant who believes they do not apply them. The undersigned WCJ followed these mandatory procedures in excluding the proposed evidence offered by lien claimant, Citywide Scanning.

Thirdly, Petitioner makes a completely speculative assumption that not only was lien claimant's exhibit list submitted to this court at the time of the lien conference, but that it was the court that failed to properly scan the pretrial conference sheet filled out by the parties. Petitioner claims that the exhibit sheet was "lost or misplaced through no fault of Citywide and due to circumstances entirely beyond Citywide's control" (*Petition*, page 7, lines 15 to 16) and that lien claimant was denied their right to a trial due to the court's "administrative error in the scanning of the pretrial conference statement" (*Petition*, page 7, lines 21 to 22). This accusation is completely baseless, and is contradicted by the Petitioner's own declaration and supporting evidence submitted along with the Petition. The declaration submitted with the Petition and signed by Ms. Cosio does not state, with any degree of certainty, that she provided this court with an exhibit sheet and attached it to the pretrial conference statement at the lien conference on 2/13/2019. Ms. Cosio simply states that she always did it in the past, and that she could "not recall any unusual circumstances that would have warranted not submitting the previously prepared exhibit list for this case as a part of the PTCS" (Declaration attached to the *Petition*, page 1, paragraph 3). Ms. Cosio is not saying that she did submit an exhibit sheet to the court, she is just saying that she cannot recall anything that would have prevented her from doing so. That is not actual evidence that an exhibit sheet was submitted to this court and attached to the pretrial conference statement.

In addition, Petitioner includes an exhibits sheet attached to the Petition that was, purportedly, filled out at or prior to the lien conference on 2/13/2019. There is no evidence that this document was ever provided to the court, and, more importantly, no evidence that this document was ever submitted to and signed by defendant at the conference. In fact, the signature blocks for both lien claimant and defendant are conspicuously blank, thus leading to the conclusion that this document was never presented to defendant or this court. The undersigned WCJ inquired of Ms. Cosio, at the time of the lien trial on 6/5/2019, as to whether she had an exhibit sheet that was presented to defendant and signed by the parties, but may have mistakenly not been given to the court. Ms. Cosio indicated that she did not have such a document, and Petitioner failed to include such a document as an attachment to the Petition. This court cannot say, therefore, whether lien claimant ever attempted to disclose to defendant their proposed exhibits at or before the lien conference of 2/13/2019 and whether any such document was ever submitted to this court, despite Petitioner's assumptions to the contrary.

And Finally, Petitioner contends that "Petitioner is unaware of any statute permitting the WCALJ to issue an Order not admitting, or marking for identification, the exhibits of the petitioner that were filed with the WCAB and should have been contained in EAMS file net at the time of trial" (*Petition*, page 8, lines 3 to 5). Firstly, the undersigned WCJ did mark all of lien claimant's evidence for identification, and that is reflected in the Minutes of Hearing/Summary of Evidence dated 6/5/2019 on 3. Secondly, this court has no

record of ever receiving any of lien claimant's exhibits prior to the day of the trial. Thirdly, and most importantly, the undersigned WCJ has already cited, per the above, the law that allows the undersigned WCJ to not admit any evidence that was not listed on the pretrial conference statement at the time of the settlement conference. This is clearly and explicitly stated in Labor Code §5502(d)(3) and CCR §10770.1(f). Petitioner's ignorance of the law is not an excuse to ignore that law.

Based upon all of the above, the undersigned WCJ believes that this is not a basis to request reconsideration and the Petition should be denied.