

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

EVANGELINA MEDINA, *Applicant*

vs.

**PMS INDUSTRIES, INC., PACIFIC SINTERED METALS;
BERKSHIRE HATHAWAY HOMESTATE INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ11404325
Oxnard 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, amend the WCJ's decision as recommended in the report, and otherwise affirm the decision of May 18, 2022.

In addition to the WCJ's report, we observe the following. The parties have stipulated to the value of the services provided by lien claimant pursuant to the Official Medical Fee Schedule. (April 19, 2022 Minutes of Hearing (Minutes), at 2:12.) Defendant contends it has entered into a Preferred Provider Organization (PPO) agreement with lien claimant which governs the amounts reimbursed to the lien claimant for services provided to applicant. (Ex. A, Review Analysis, dated September 29, 2018, at p. 2.) Defendant submits that the issue of the existence of the PPO contract was not listed on the pre-trial conference statement, and was raised for the first time by the lien claimant on the day of trial. (Petition for Reconsideration, dated June 6, 2022, at 3:21.) However, while the minutes reflect a general objection to the matter being submitted for decision, the record does not substantiate a specific defense objection to the issue of the PPO contract, or an assertion of surprise and a corresponding objection on that basis. (Minutes, at 2:8, 4:14.) Thus, while

defendant avers unfair surprise in its Petition, the assertion is not reflected in the contemporaneous record.

Additionally, as the party with the affirmative of the issue, it is defendant that carries the burden of proof to establish the existence and applicability of the alleged PPO contract to this dispute. (Lab. Code § 5705, “[t]he burden of proof rests upon the party or lien claimant holding the affirmative of the issue.”) Here, defendant relied on an alleged PPO contract to reduce the amounts reimbursed to lien claimant. (Ex. A, Review Analysis, dated September 29, 2018; Ex. B, Explanation of Bill Review, dated November 9, 2018.) It was thus defendant’s affirmative burden to establish the existence of a valid and enforceable PPO contract governing its reimbursement arrangement with lien claimant.

Accordingly, we agree with the WCJ that defendant’s affirmative burden of establishing the existence of a valid and applicable PPO agreement was not met herein. (Report and Recommendation on Petition for Reconsideration, p. 5.)

Defendant also asserts entitlement to credit for sums previously paid to the lien claimant, and we agree with the WCJ’s recommendation that the F&O be amended to reflect both credit for sums paid, and the resulting adjustment of the penalties assessed. (*Ibid.*)

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of May 18, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the decision of May 18, 2022 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

ORDER

1. IT IS ORDERED THAT the Defendant BERKSHIRE HATHAWAY pay the amount of \$5,418.04, less credit for sums paid, for a net principal of \$3,946.14 to the lien claimant KINETIX SURGERY CENTER.
2. IT IS FURTHER ORDERED THAT the Defendant BERKSHIRE HATHAWAY pay penalties in the amount of \$591.92 to the lien claimant KINETIX SURGERY CENTER.

3. IT IS FURTHER ORDERED THAT the Defendant BERKSHIRE HATHAWAY pay interest at the legal rate per Labor Code § 4603.2(b)(2) from the date of service of the bill of September 29, 2018 in an amount to be adjusted between the parties, with the jurisdiction of the WCAB reserved in the event of further dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 3, 2022

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

**KINETIX SURGERY CENTER
SYNAPSE LIEN UNIT
HEFLEY LAW**

SAR/abs

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

Defendant, BERKSHIRE HATHAWAY INSURANCE COMPANY, by and through their attorneys of record, has filed a timely Petition for Reconsideration challenging the Findings and Order of 18 May 2022. In it Petitioner argues that the undersigned erred in finding that there was no PPO contract in this case and in not providing credit for sums paid on this lien and for computing the penalties and interest incorrectly.

Lien claimant has filed an Answer to the Petition which contains a detailed analysis of the Explanation of Review (Exhibit A) and argues that it was defendant who first identified the issue of the PPO contract. They also argue that sanctions for frivolous conduct may apply.

It is recommended that reconsideration be denied as to the first issue and granted as to the second issues. The recommended corrected Findings and Orders are included below:

II

FACTS

The facts as alleged by defendant are essentially correct but some additional detail should be considered. Applicant, EVANGELINA MEDINA, aged 57 on the date of injury while employed by PSM INDUSTRIES / PACIFIC SINTERED METAL, insured by BERKSHIRE HATHAWAY INSURANCE COMPANY sustained injury arising out of and in the course of employment during the period of continuous trauma from 06 April 2018 to 04 May 2018. The case-in-chief was settled and the remaining issue is the lien of KINETIX SURGERY CENTER who filed the Declaration of Readiness to Proceed on the remaining balance of its lien. Defendant is correct that they paid \$1,471.90 out of a billed amount of \$78,651.24. The case was set for a lien conference in front of a judge in Los Angeles who set the case for lien trial in Oxnard. The Pretrial Conference Statement/Stipulations and Issues show the checkbox for “liens” as the issue and identifies the lien claimant properly. Additional sub-issues are listed both at the bottom of p. 3 of the form and on an addendum page. While the applicability of a PPO contract was not specifically listed on either p. 3 or the addendum, the exhibit sheet listed the 29 August 2018 bill

review which was later admitted into evidence as defense Exhibit A. The Stipulations and Issues also listed three witnesses, all bill reviewers.

This exhibit lists three reasons for the bill reduction that can be summarized as follows: (1) That the charges are for items included in other charges; (2) That the charges exceed the fee schedule and (3) That “[a] PPO reduction was made for this bill and/or the bill was repriced according to a negotiated rate.”

At trial, the parties stipulated to eliminate issues (1) and (2) by agreeing that the proper fee-schedule value of the lien would be \$5,418.04. This left the issue of whether the bill was subject to a PPO contract to be the remaining issue for trial.

At the morning session of the trial, some of both sides’ exhibits failed to appear in FileNet during the morning session. Furthermore, there was some discussion as to whether there even was a PPO contract. The undersigned gave both sides the opportunity to upload their remaining exhibits during the lunch break, including the PPO contract, if they could find it. After the lunch break, Lien Claimant’s Exhibits 1 through 5 and Defendant’s A, B & C appeared. For some unknown technical reason, Defense Exhibit “D” did not appear with the other exhibits.

At this point in the proceedings, the undersigned indicated that the Court would delay the submission in order to allow for EAMS to upload Exhibit “D” into FileNet. The lien claimant agreed to this procedure so long as lien claimant was given the opportunity to object to the document. The undersigned gave the submission date as 19 April 2022 but indicated that the submission date might be changed if the document appeared in FileNet. Defendant also requested that they wanted to have the opportunity to bring an unidentified witness and submit an unidentified document in order to prove the existence of a PPO contract. The undersigned denied that request. See Minutes of Hearing at p. 4.

The next day, on 20 April 2022, the proposed Defense Exhibit D appeared in FileNet. The undersigned issued a Notice of Intention to Admit Exhibit D into evidence with a due date of ten days after the NOI date and a new submission date of 18 May 2022. There were no objections to the additional exhibit so the undersigned issued a Findings and Order on the submission date of 18 May 2022. During the time between trial of 19 April 2022 and the present, no one has actually offered this judge a specific document evidencing the existence of a PPO contract.

The Findings & Order found in favor of lien claimant and awarded the stipulated amount.

Unfortunately, the undersigned appears to have mistaken the stipulated amount for the recovery and failed to allow credit for the \$1,471.90 paid on the original bill. Therefore, the net recovery would \$ 3946.14 and the penalties would be \$591.92 and the interest would be adjusted between the parties as in the prior Findings & Order.

III DISCUSSION

This is one of those rare Petitions for Reconsideration where the jurisdictional language at the beginning of the Petition citing Labor Code § 5903 may well prove dispositive. In the Petition, defendant cites this case as being one where the undersigned allegedly acted in excess of his authority under Labor Code § 5903 (a); where the evidence does not justify the findings of fact under Labor Code § 5903(b) and where the findings of fact do not support the order, decision or award under Labor Code § 5903(e.) However, petitioner does not cite Labor Code § 5903(d) which may allow for reconsideration where “the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at hearing.” Now it may be that such evidence was not newly discovered or that reasonable diligence may have been wanting. Yet, it is important to consider no specific document purporting to be a PPO contract was identified in the Petition for Reconsideration. In the days that followed the trial, since 19 April 2022, there has been no production of such a document to the trial judge and no reference to it such that the judge would know that such a document exists.

Without a reference to such a document, indicating the title, the parties and the signatories there is nothing to convince a judge that such a document exists, or that it can at least be found. There can only be a duty to develop the record if there is a reasonable prospect that such a document may be found. Since a trial judge is a fact-finder, in the absence of such identifying information, the trial judge must therefore infer that the document does not exist.

Furthermore, we are not given any reason why the document is still unavailable. This is important in considering the “due diligence” clauses in Labor Code § 5903(d.)

Now the other aspect of petitioner’s argument is that it misstates the burden of proof. The existence of a PPO contract is a defense, not an element of lien claimant’s case. If defendant seeks to invoke Labor Code § 5304, defendant must prove the existence of the PPO contract in order to obtain the benefits of that contract. Once the existence of the PPO contract is established, the

undersigned must inspect the document in order to determine if the contract is between “the persons or institutions rendering such treatment and the employer or insurer.” The party seeking to use the PPO contract has the burden to prove the elements of Labor Code § 5304. Once that is established, the payment under the contract is no longer under the jurisdiction of the WCAB and the matter would be handled by the Superior Court.

Here, there is no document to inspect. Therefore defendant has failed to sustain its burden of proof.

Lastly, the undersigned did err in equating the stipulation of the parties as to the fee schedule amount with the recovery of the lien claimant. With this in mind, the undersigned recommends the following amended sections for inclusion in the Findings and Orders:

1. IT IS ORDERED THAT the Defendant BERKSHIRE HATHAWAY pay the amount of \$5,418.04, less credit for sums paid for a net principal of \$3,946.14 to the lien claimant KINETIX SURGERY CENTER.
2. IT IS FURTHER ORDERED THAT the Defendant BERKSHIRE HATHAWAY pay penalties in the amount of \$591.92 to the lien claimant KINETIX SURGERY CENTER in penalties.

Lastly, Lien claimant’s Answer to the Petition for Reconsideration contains detailed analysis of Defense Exhibit A and requests sanctions for frivolous conduct, citing *Tito Torres vs. AJC Sandblasting* (en banc, 2012) 77 CCC 1113. The undersigned offers no recommendation on this issue as there was no Petition for sanctions at the time of trial and the undersigned will not offer an unqualified opinion should such a petition be filed or the matter is remanded on the issue.

IV RECOMMENDATION

It is recommended that the Petition for Reconsideration be granted to allow for credit for the sums paid to the lien claimant and for the amount of the penalty to be adjusted down. Otherwise, it is recommended that reconsideration be denied.

Respectfully submitted,

ROGER A. TOLMAN, JR.
Workers’ Compensation Judge