

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

TONY CEASAR, *Applicant*

vs.

**EXPRESS MESSENGER SYSTEMS, INC.; ONTRAC;
ZURICH NORTH AMERICA, *Defendants***

**Adjudication Number: ADJ9874941
San Bernardino District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration or in the alternative removal of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on September 24, 2019. By the F&O, the WCJ found in pertinent part that certain dates of service by lien claimant, MH Express, were not properly submitted for utilization review (UR). The WCJ ordered that defendant submit these dates of service for retrospective UR.

Defendant contends that lien claimant did not meet its burden of proof to provide documentation of requests for authorization (RFAs) for the dates of service in dispute and therefore, it should not be obligated to conduct retrospective UR for these dates of service.

We did not receive an answer from lien claimant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration/Removal and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will amend Finding of Fact No. 5 to find that lien claimant did not meet its burden of proving entitlement to payment for the following dates of service: 3/27/15, and 7/29/15 through 8/19/16. The F&O will also be amended to revise the order for retrospective UR to be solely for the 5/11/15 date of service and to order that lien claimant take nothing for all other outstanding dates of service.

FACTUAL BACKGROUND

Applicant claimed injury to the back, leg, body system and excretory system on January 9, 2015 while employed as a warehouse sorter by Express Messenger System.

On March 5, 2015, defendant sent a Notice Regarding Denial of Workers' Compensation Benefits to applicant denying liability for his claim. (Defendant's Exhibit A, Notice of denial, March 5, 2015.)

On April 27, 2015, defendant sent a letter to lien claimant stating as follows in relevant part:

We are in receipt of your invoice received in our office on 4/22/15 in the amount of \$365.42 in regard to this case. Your invoice is objected to based upon the following grounds:

The defendants deny injury AOE/COE, and all charges reflect unauthorized, self-procured treatment. **Refer to Attached Denial Notice dated 3/5/15.**

All issues will be raised at the time of the hearing. Please be advised this letter shall serve as a continuing objection to any future treatment and/or service rendered to the claimant. In addition, this objection applies to any future amended (lien/invoice) filed in this matter.

(Defendant's Exhibit C-1, Objection letter to MH Express, April 27, 2015.)

A second objection letter was sent by defendant to lien claimant on November 4, 2015. (Defendant's Exhibit C-2, Objection letter to MH Express, November 4, 2015.)

Raymond Zarins, M.D. evaluated applicant as the orthopedic panel qualified medical evaluator (QME). He found that applicant's lumbar spine disability was caused in part by his January 9, 2015 claimed industrial injury. (Joint Exhibit Y-2, Report of Dr. Zarins, January 7, 2016, p. 7.) Dr. Zarins opined that applicant's high blood pressure was outside his expertise and that it would be appropriate for him to undergo an internal medicine evaluation for this condition. (Joint Exhibit Y-1, Report of Dr. Zarins, October 7, 2016, p. 2.)

Paul Grodan, M.D. evaluated applicant as the internal medicine QME. He found that applicant's hypertension was aggravated by his industrial injury. (Joint Exhibit X-1, Report of Dr. Paul Grodan, February 15, 2017, p. 21.) Dr. Grodan also opined that applicant had a sleep disorder as a result of his industrial injury. (Joint Exhibit X-2, Report of Dr. Paul Grodan, September 3, 2017, pp. 2-2.)

The case in chief resolved by way of Compromise and Release for \$74,000.00, which was approved on January 23, 2018.

The matter proceeded to a lien trial on July 23, 2019. Lien claimant asserted a lien of \$68,127.74 based on its itemized billing statement. (Minutes of Hearing and Summary of Evidence, July 23, 2019, p. 2.) The issues were stated as:

1. Defendant asserts the reasonableness of the charges and necessity of the services. If the services are considered reasonable amount of fee schedule.
2. Defendant asserts that services provided was outside of RFA and UR Determinations and that the PTP did not incorporate some of the requested services in his report, i.e., medication and DME.
3. Defendant is asserting that PTP Dr. Ahmed did not incorporate services as well as the prescriptions in his reporting.
4. Lien claimant is asserting no timely UR denials.

(Id.)

Lien claimant's itemized billing statement shows dates of service for prescriptions to applicant from 3/27/2015 through 1/23/2018. (Lien Claimant's Exhibit No. 2, MH Express Pharmacy billing statement, March 2, 2018.) The itemized billing statement contains charges for Zolpidem¹ dated 5/11/15. Lien claimant offered as an exhibit one RFA dated May 8, 2015 for medications. (Lien Claimant's Exhibit No. 4, RFA, May 8, 2015.) The RFA requested medication for diagnoses related to applicant's lumbar sprain and insomnia. *(Id.)* The medications listed on the RFA included Ambien. *(Id.)* There is a report dated May 8, 2015 from applicant's treating physician, Khalid Ahmed, M.D., recommending medications for applicant, including Ambien. (Lien Claimant's Exhibit No. 1, Reporting of Dr. Khalid Ahmed, 3/27/15 to 9/2/16, exh. pp. 16-17.)

The record contains no other RFAs for medications. There are seven RFAs dating from May 8, 2015 to July 28, 2017 for an ISO brace, interferential unit and supplies for the interferential unit. (Lien Claimant's Exhibit No. 10, RFAs from 5-8-15 to 7-28-17.) These RFAs appear to be

¹ Zolpidem is the generic name of a sedative-hypnotic medication that is used for the treatment of insomnia, which is marketed under certain brand names including Ambien. (Evid. Code, § 452(h); <https://www.fda.gov/drugs/drugsafety/ucm334041.htm#q1>.)

in relation to the lien of Reliable Medical Supply.²

The WCJ issued the resulting F&O as outlined above. Certain dates of service by lien claimant were found to have been satisfied. Other outstanding dates of service were found not to have been properly submitted to UR. Defendant was ordered in the F&O to conduct retrospective UR for the following dates of service for lien claimant: “3/27/15 thru 4/18/16, 5/10/16 (oxycodone), 5/18/16, 6/28/16, 7/11/16, 7/26/16 thru 8/19/16.”

DISCUSSION

Labor Code section 4600 requires the employer to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600(a).)³ Employers are required to establish a UR process for treatment requests received from physicians. (Lab. Code, § 4610; *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230, 236.) However, section 4610 provides in pertinent part as follows:

(l) Utilization review of a treatment recommendation shall not be required while the employer is disputing liability for injury or treatment of the condition for which treatment is recommended pursuant to Section 4062.

(m) If utilization review is deferred pursuant to subdivision (l), and it is finally determined that the employer is liable for treatment of the condition for which treatment is recommended, the time for the employer to conduct retrospective utilization review in accordance with paragraph (2) of subdivision (i) shall begin on the date the determination of the employer’s liability becomes final, and the time for the employer to conduct prospective utilization review shall commence from the date of the employer’s receipt of a treatment recommendation after the determination of the employer’s liability.

(Lab. Code, § 4610(l)-(m); see also Cal. Code Regs., tit. 8, § 9792.9.1(b)(1) [outlining process for deferring UR of a medical treatment request made on an RFA].)

The burden of proof rests on the party with the affirmative of the issue. (Lab. Code, § 5705.) “All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence.” (Lab. Code, § 3202.5; see also *Torres v. AJC Sandblasting*

² The lien of Reliable Medical Supply was also at issue at the July 23, 2019 trial. The WCJ in the F&O found that Reliable Medical Supply did not sustain its burden of proof on its lien and was ordered to take nothing. This finding of fact and related order were not challenged by Reliable Medical Supply. This order will be retained in the amended decision.

³ All further statutory references are to the Labor Code unless otherwise stated.

(2012) 77 Cal.Comp.Cases 1113, 1117 (Appeals Board en banc) (*Torres*) [lien claimant holds the burden of proof to prove all elements to establish its claim].) When a lien claimant is litigating the issue of entitlement to payment for industrially-related medical treatment, the lien claimant stands in the shoes of the injured employee and must prove by a preponderance of the evidence all of the elements necessary to the establishment of its lien. (*Kunz v. Patterson Floor Company, Inc. (Kunz)* (2002) 67 Cal.Comp.Cases 1588 (Appeals Board en banc); see also *Tapia v. Skill Master Staffing* (2008) 73 Cal.Comp.Cases 1338 (Appeals Board en banc) [holding that a lien claimant has the affirmative burden of proving that its charges are reasonable and must carry this burden by a preponderance of the evidence].) As relevant to this matter, this necessitates showing RFAs for the services lien claimant provided to applicant.

Applicant's claim was initially denied by defendant. Per section 4610(1), defendant was not obligated to conduct UR of RFAs for services provided by lien claimant while it was disputing liability for applicant's injury. Once it was determined that defendant was liable for treatment, it became obligated to conduct retrospective UR. However, lien claimant has only produced one RFA dated May 8, 2015 for the remaining disputed dates of service.

Lien claimant did not meet its burden of proving entitlement to payment for the disputed dates of service, with the (possible) exception of the 5/11/15 date of service, which must still be submitted by defendant for retrospective UR. Therefore, we will amend the F&O to find that lien claimant did not meet its burden of proof to show entitlement to payment for dates of service 3/27/15, and 7/29/15 through 8/19/16, and order that lien claimant take nothing for these dates of service. The F&O will also be amended to revise the order for retrospective UR to be solely for lien claimant's 5/11/15 date of service. We include the original order regarding the lien of Reliable Medical Supply in the amended decision for the sake of clarity.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on September 24, 2019 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. Lien claimant, MH Express, has not sustained its burden of proof to show entitlement to payment for the outstanding dates of service: 3/27/15, 7/29/15 through 4/18/16, 5/10/16 (oxycodone), 5/18/16, 6/28/16, 7/11/16, 7/26/16 through 8/19/16. Services for 5/11/15 were not properly submitted to utilization review as required.

* * *

ORDERS

IT IS ORDERED that Lien Claimant, Reliable Medical Supply, take nothing further by reason of their lien filed herein on 12/17/18.

IT IS FURTHER ORDERED that Lien Claimant, MH Express, take nothing further for dates of service 3/27/15, and from 7/29/15 through 1/23/18.

IT IS FURTHER ORDERED that Defendant submit MH Express' unpaid outstanding date of service 5/11/15 for retrospective utilization review within 30 days of the service of this Opinion. Upon receipt of retrospective Utilization Review, Defendant has 60 days to issue payment for any non-disputed charges. Following issuance of EOR addressing same, and if any further dispute exists, Lien Claimant, MH Express, may pursue remedies consistent with the law.

Jurisdiction reserved as to any disputes consistent with the law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 11, 2021

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

**MAXIMUM MEDICAL IRVINE
MH EXPRESS
QUINTAIROS PRIETO WOOD & BOYER
RELIABLE MEDICAL SUPPLY
ZA MANAGEMENT**

AI/pc

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