

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

ENRIQUE BARBA, *Applicant*

vs.

**PRIME WATERPROOFING and ROOFING and
STATE COMPENSATION INSURANCE FUND, *Defendants***

Adjudication Number: ADJ6914622

Oxnard District Office

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Sleep Treatment Clinics of California (lien claimant) seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on October 11, 2023, wherein the WCJ found in pertinent part that the self-procured treatment furnished by lien claimant was not reasonably necessary to cure or relieve from the effects of applicant's industrial injury; the WCJ ordered that the lien be disallowed.

Lien claimant contends that the report from Joseph Schames, D.M.D. should be dealt with as a treatment report, not a medical-legal report; that lien claimant's exhibits comply with the requirements of Appeals Board rule 10682; that "... lien claimant's reporting, at a minimum, would be considered an implicit finding of injury" (Petition p. 5); and that, "The case should be decided on the merits and not procedural defects." (Petition, p. 6.)

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant (Enrique Barba) claimed injury to his back, lower extremities, psyche, and body systems while employed by defendant as a supervisor on December 8, 2008. (See August 17, 2009 Application for Adjudication of Claim.)

Applicant was admitted into the Olympia Medical Center and underwent an L5-S1 level fusion surgery on October 24, 2011. (Def. Exh. B, Olympia Medical Center, treatment/surgery report, pp. 2 - 36.) He was discharged on October 27, 2011. (Def. Exh. B, p. 1, discharge summary.)

The injury claim was initially settled by Stipulations with Request for Award indicating applicant sustained injury to his lumbar spine, lower extremities, psyche, internal body system, and in the form of a hernia, hypertension, sleep disorder, irritable bowel syndrome, and GERD; a WCJ issued the Award on March 18, 2019. The parties subsequently submitted a Compromise and Release stating that applicant claimed injury to his lumbar spine, lower extremities, psyche, internal body system, nervous system, heart, internal organs, abdomen/groin, and in the form of a hernia, gastritis/GERD, and opioid induced constipation; a WCJ issued the Order Approving Compromise and Release on February 18, 2020.

Lien claimant and defendant proceeded to a lien trial September 14, 2023. They stipulated that applicant sustained injury arising out of and occurring in the course of employment to various body parts and in the form of sleep disorder. The issues submitted for decision were, “Lien of Sleep Treatment Center inclusive of the necessity of the treatment and date of service for the treatment provided and also the reasonableness of the charges.” (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 14, 2023, p.2.)

DISCUSSION

Pursuant to Labor Code section 4600, an employer will provide medical treatment that is reasonably required to cure or relieve an injured worker from the effects of the worker’s injury. (Lab. Code, § 4600 (a).) “The burden of proof rests upon the party or lien claimant holding 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; *Hand Rehabilitation Center v. Workers’ Comp. Appeals Bd. (Obernier)* (1995) 34 Cal.App.4th 1204, 1212-1213 [60 Cal.Comp.Cases 289, 291-292].)

The treatment at issue in this matter included a Consultation Report for Treatment of the Objectively Documented Sleep Disorder (L.C. Exh. 4, Joseph Schames, D.M.D., October 25,

2011, p. 1 [EAMS p. 3], original in upper case) and an Oral Sleep Appliance that was identified as part of the Treatment Plan in the report. (L.C. Exh. 4, p. 5 [EAMS p. 7].) Lien claimant's exhibit 4 includes documents in addition to the report from Dr. Schames. The Notice and Request For Allowance of Lien [EAMS pp. 16 – 18] is dated October 24, 2011, and was signed by Dr. Schames on October 28, 2011. The ADA Dental Claim Form states that the Procedure Date was "10 24 2011" [EAMS pp. 20 - 21]. The Patient Brief History indicates six procedures were performed and/or provided (including Oral Sleep Appliance/Device Custom) on "10-24-2011" [EAMS p. 22].

It is important to note that, as stated above, applicant underwent an L5-S1 lumbar fusion surgery on October 24, 2011. (Def. Exh. B.) Based thereon, the WCJ concluded:

Defendant's Exhibit A and B are an anesthesia report and a discharge summary documenting that applicant was hospitalized from 10/24/2011 through 10/27/2011. Thus, any examination by Dr. Schames did not take place on the date of his report.

(Opinion on Decision, p. 2; see also Report, p. 2.)

Having reviewed the record we agree with the WCJ's conclusion that Dr. Schames did not examine applicant on October 24, 2011, the date of applicant's lumbar spine surgery. Also, the six procedures allegedly performed and/or provided could not have occurred on that date. Further, there is no evidence in the record that applicant ever received, or in turn utilized an Oral Sleep Appliance as contended by lien claimant. The only treatment notes in evidence are dated October 16, 2009, February 21, 2011, and March 28, 2011. (See L.C. Exhs. 3 and 7.) These records do not appear to be related in any way to the lien at issue herein.

Therefore, based on the inconsistencies in the record, and the absence of evidence that applicant received the treatment/medical equipment as asserted by lien claimant, we agree with the WCJ that lien claimant did not meet its burden of proof regarding its claim that it provided applicant medical treatment that was reasonably required to cure or relieve him from the effects of his work injury. Since lien claimant did not meet its burden of proof on this threshold issue, the arguments it makes in the Petition do not raise any issues relevant to the F&O. Thus, we also agree with the WCJ's Order that the lien be disallowed and his recommendation that the Petition be denied.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that lien claimant's Petition for Reconsideration of the Findings and Order issued by the WCJ on October 11, 2023, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 29, 2023

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

**SLEEP TREATMENT CLINICS OF CA
LAW OFFICE OF SAAM AHMADINIA, APC
STATE COMPENSATION INSURANCE FUND, LEGAL**

TLH/mc

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