WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GEORGE KNOCHE, ***Applicant***

vs.

WEISER LOCK CORPORATION,
PERMISSIBLY SELF-INSURED, ADMINISTERED BY SEDGWICK CMS,
Defendants

Adjudication Numbers: ADJ2207038 (MF); ADJ4604222
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR 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 deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 4, 2024

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

WESTERN IMAGING
STOCKWELL HARRIS

LN/pm

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's Occupation:	Parts Handler
Date of Injury:	(1) ADJ2207038: 01/15/1980-04/15/1989 (2) ADJ4604222: 01/15/1989-04/15/1989
Parts of Body Injured:	(1) Admitted hernia, disputed excretory system and internal system (2) Admitted hernia, disputed excretory system and psyche
Identity of Petitioner:	Western Imaging Service filed the petition
Timeliness:	The petition is timely filed
Verification:	The petition is properly verified
Date of Issuance of Joint Findings of Fact & Order:	October 8, 2023, served on October 11, 2023

Petitioner's Contentions: That the court erred in denying and dismissing Western Imaging Service's November 27, 2020 Petition for Determination of Medical-Legal Expense Dispute as an improper remedy when such petition was filed after the provider's lien was already dismissed by operation of law pursuant to *Labor Code* § 4903.5(a).

II
FACTS

The applicant, George Knoche, filed two cumulative trauma claims while employed as a parts handler by Weiser Lock Corporation. The first was plead during the period January 15, 1980 through April 15, 1989, and the defendant admitted the applicant's hernia claim but disputed his excretory system. The second claim was plead during the period January 15, 1989 through April 15, 1989, and the applicant's hernia was admitted, whereas his claimed excretory system and psyche were denied. The salient facts, in chronological order, are as follows.

On January 2, 2014, the applicant's attorney submitted an order form to Western Imaging Services ("Western") for the medical records of "Dr. Ana Talomo" and "Pharmacy – Kaiser Prescription Info" (Exhibit 1). On January 8, 2014, the applicant's attorney then submitted an order form to Western for the records of "Sedgwick CMS" and "Weiser Lock Corp.", as well as a request termed "EDEX", and "Secretary of State". (Exhibit 2)

On January 8, 2014 Western issued Subpoenas Duces Tecum for Sedgwick CMS (Exhibit 3), Weiser Lock Corporation (Exhibit 4), Kaiser Foundation Hospital located in Harbor City, which is actually the record location for Dr. Ana Talomo (Exhibit 5), and Kaiser Foundation Hospital located in Long Beach (Exhibit 6). Aside from two invoices, there was no evidence submitted by Western at the time of trial as to what services were provided for or resulted from the request for EDEX or the Secretary of State. Similarly, there was no evidence provided by Western as to why it issued a subpoena for all medical records from Kaiser, even though the order form requested only "Pharmacy – Kaiser Prescription Info." In reviewing the defendant's evidence and Post Trial Brief, specifically exhibits A, B, and D, at the time the order forms were submitted, the applicant and the defendant were engaged in settlement negotiations that necessitated a Medicare Set Aside ("MSA"). The parties required a list of medications that the applicant was taking at that time in order to adequately assess the value of an MSA. Thus, the applicant's attorney requested "prescription info.", which is consistent with the defendant's Subpoena Duces Tecum for "Kaiser Pharmacy" records dated two months earlier on November 8, 2023. (Exhibit C). No evidence was offered at trial as to why Western subpoenaed records from the [same] facility the defendant already had.

Regardless, between January 14, 2014 and February 12, 2014, invoices were submitted for Sedgwick CMS' records (Exhibit 7), Weiser Lock Corporation's records (Exhibit 8), Harbor City Kaiser's medical records (Exhibit 9), Long Beach Kaiser's medical records (Exhibit 10), an EDEX search (Exhibit 11), and a service associated with the Secretary of State (Exhibit 12). Western's invoices do not reflect whether the medical records secured were limited to the "Pharmacy – Kaiser Prescription Info." as requested or whether all medical records were copied.

The last date of service by Western took place on February 12, 2014.

On April 15, 2015, a Compromise and Release was fully executed (Exhibit 18), and the Joint Order Approving Compromise and Release in the amount of $79,885 with a self-administered MSA issued on April 21, 2015.

Western then chose to become a lien claimant by submitting a lien claim and paying the required activation fee on August 26, 2015, despite the last day to file such having run two weeks earlier on August 12, 2015.

The defendant contested liability for Western's services on the primary ground that the lien was filed untimely, and it then filed a Declaration of Readiness to Proceed (DOR) on October 9, 2015. Email exchanges dated October 9, 2015 and November 11, 2015 between the defendant and Western reflect the dispute between the parties. (Exhibit E) Western sought settlement whereas the defendant sought Western's agreement to forego its balance. No agreement followed. On January 20, 2016 the defendant filed a Petition for Order Taking Off-Calendar the Lien Conference that was

scheduled for March 2, 2016 on the basis that all liens were resolved and that Western's lien was barred by the statute of limitations. No Objection or Answer whatsoever was filed by Western.

Of paramount importance is that the Lien Conference was held on March 2, 2016, as reflected on the Minutes of Hearing (Exhibit G). Although the defendant appeared, Western did not. *Id*. The defendant motioned to have the matter taken off calendar, which was granted by the Honorable Judge Sharon Velzy. *Id*.

The matter then laid dormant until over four years, eight months later on November 27, 2020 when Western filed its Petition for Determination of Medical-Leal Expense Dispute (Petition for Determination) seeking full payment of all outstanding invoices, penalty, interest, costs, and any and all other action deemed appropriate by the court.

The matter then again went dormant until over two years later on January 26, 2023 when Western filed a DOR. The matter proceeded to trial on September 21, 2023 with a host of issues raised by both parties. The court requested a Memorandum of Points and Authorities to be filed no later than September 29, 2023. Both parties did so, and the matter was submitted.

This court issued its Joint Findings of Fact & Order dated October 8, 2023 and served on October 11, 2023, to which Western files it's timely, verified Petition for Reconsideration. Western argues that even though its lien was untimely filed and acknowledges it is barred by the statute of limitations, it has the option to file a Petition for Determination. Western furthermore argues that it falls victim to the defendant's bad faith actions in refusing to informally resolve the invoices. This court disagrees on both fronts.

III
DISCUSSION

Despite numerous issues presented at the time of trial, the parties also presented the threshold issue as to whether Western, when it chose to assert a lien, and had done so untimely, may later file a Petition for Determination upon conceding that the lien claim was time-barred.

Labor Code § 4620(a) defines a medical-legal expense as those costs and expenses incurred by or on behalf of a party for, among others, medical records. And *Labor Code* §4621, in pertinent part, allows for reimbursement for such medical-legal expenses that are reasonably, actually, and necessarily incurred. Pursuant to *Labor Code* §4903, the board then takes jurisdiction to determine and allow a lien claim for medical records.

The first issue turns on Western's filing of its "copy service lien" on August 26, 2015. *Labor Code* §4903.5(a) provides that "[a] lien claim for expenses as provided in subdivision (b) of Section 4903

shall not be filed after three years from the date the services were provided, nor more than 18 months after the date the services were provided, if the services were provided on or after July 1, 2013."

Because Western's services were last provided on February 12, 2014, Western was statutorily bound to file a lien claim and pay the activation fee no later than August 12, 2014, should they have chosen to take that route. And that is indeed what they did; Western elected to become a lien claimant.

Western could have filed a Petition for Determination pursuant to former Title 8, California Code of Regulations § 10451.1. That section became operative on October 23, 2013 and was in effect when Western provided its services in 2014. Western, however, opted to subsequently file a lien on August 26, 2015 and pursue its balance in that fashion. Having reached no agreement, the defendant filed a DOR on October 9, 2015. Further emails were exchanged that did not result in an agreement. The defendant maintained its position that Western's services were time-barred in its January 20, 2016 Petition for Order Taking Off-Calendar the Lien Conference, to which Western failed to object, respond, or answer. At the time of the March 2, 2016 lien conference, Western also failed to appear, and the defendant's motion to take the matter off calendar was granted. Of note is that Western's Points and Authorities submitted post-trial, on page four, lines six to eight "…concedes that this is true and that its lien was filed past the statute of limitations for lien filing which concluded on 08/12/2015…". Furthermore, Western's Petition for Reconsideration does not argue to the contrary.

The next issue is whether Western was permitted to file a Petition for Determination on November 27, 2020, given the time-barred lien and the failure to take any action up to and including the March 2, 2016 Lien Conference. At the time Western rendered its services over six years earlier in 2014, former Tit. 8, Cal. Code Regs. §10451.1 was in effect and afforded Western that route for seeking payment. The provider chose not to do so, having opted for the route of filing a lien claim.

Western directs the court to former Reg. §10451.1(c)(3)(D) and the renumbered and rewritten Reg. §10786. The former section provides that "[a] medical-legal provider is not required to file a claim of costs in the form of a lien in conjunction with the petition or DOR [but] if the provider elects to file such a lien, it must pay a lien filing fee, if applicable." The latter section contains no such verbiage. Western's position is that the former section allowed it to pursue both a lien claim and a Petition, and the fact that their lien is time-barred is irrelevant because its instant Petition is permissible. The rationale is flawed for two reasons. First, the fact that the Regulation was amended reflects the administrator's desire to resolve an ambiguity, i.e. the appearance that a provider can file both a lien and a Petition for Determination. In no way is it reasonable to believe that providers should be able to adjudicate their medical-legal expenses twice. It would serve to double the amount of workload on the workers' compensation system and would render the theory of res judicata meaningless. Secondly, and equally as important, Reg. §10786 was operative on January 1, 2020. Western's Petition for Determination is dated November 27, 2020. It is similarly unreasonable for

Western to believe that it maintained a dual-track option for recovery after January 1, 2020, when the Regulation expressly removed the language that they now rely upon.

By way of analogy, the en banc decision of *Martinez v. Terrazas* (2013) 78 CCC 444 provides insight. In that case the WCAB was presented with an issue as to whether a photocopy provider could avoid paying the lien activation fee by withdrawing its lien and filing a petition for costs. The Board, in a unanimous decision, held that it was improper for the provider to do so, and it delved into a thorough discussion supporting its decision that is relevant to the matter herein.

The Board stated that "[t]he Legislature established an extensive statutory scheme for claimed medical-legal expenses." It then concluded that the photocopy provider's services were medical-legal costs because:

> "[p]ursuant to section 4620(a), "a medical-legal expense means any costs and expenses incurred by or on behalf of any party, … which expenses may include … *medical records*, … for the purpose of proving or disproving a contested claim." (Italics added). Copy service costs incurred to obtain medical records are therefore medical-legal expenses."

The case at hand involves copy service costs, the vast majority of which are for medical records, and as such, are classified as a medical-legal expense.

The Board in *Martinez* turned to the legislative intent when the Legislature dealt with a daunting backlog of liens. The Board quoted the Senate Floor Analysis as follows:

> "Lien Reforms. The current lien system in workers' compensation is out of control. … There are presently hundreds of thousands of backlogged liens, possibly in excess of a million, and many of these are related to long-since closed cases.
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> ***
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> "[One example of] lien abuse is [that] it has become common for third parties to purchase old receivables from providers, who often billed at (higher) usual and customary rates but were properly paid according to established fee schedules. These third parties then file liens in an effort to leverage settlements. Another example of lien abuse involves a provider filing a lien for excessive amounts after being paid, again with the hope of obtaining a settlement. Nuisance-value settlements are rampant because the workers' compensation courts simply don't have time for these minor matters when crucial right to benefits issues are the priority cases.
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> ***

Although the direct issue in *Martinez* involved a lien activation fee and whether the provider could circumvent the fee by filing a Petition for Costs, the public policy behind the Board's decision rings true in this matter when it decided that:

> …the Legislature's purposes were to overhaul a "lien system [that] is out of control," to diminish the burden on the workers' compensation system of "hundreds of thousands of backlogged liens," and to curtail "lien abuse." These legislative purposes would be frustrated if individuals and entities who would otherwise have to pay lien filing and activation fees could avoid them by the simple stratagem of filing a petition for costs. If such a maneuver were countenanced, it would not ameliorate the problems the Legislature was attempting to address. Instead, it would merely shift those problems from liens to petitions for costs.

Allowing Western to file a lien, lose on that theory by operation of law, and then avoid the statute of limitations by the simple stratagem of filing a petition for determination does not ameliorate the problems that the Legislature intended to fix, but rather would only shift the problems from liens to petitions on a file that has been long-since closed. Western takes the position that it did not lose on its lien claim because it was never litigated. The argument lacks merit. Western filed a lien, engaged in discussions with the defendant, failed to attend the lien conference, and then took no action until late 2020. They had notice and opportunity to be heard, but they did not respond to the defendant's petition to take the lien conference off calendar, and they did not attend the lien conference. It would be an absurdity for Western to be able to shirk its obligations with respect to attending court- mandated hearings, only to then be allowed to resurrect its collection efforts over four years later by way of a Petition for Determination. To allow Western the opportunity to file a Petition for Determination almost seven years post-services, when it chose to file a lien and then chose to not participate in the WCAB's hearing, would thwart any concept of finality and would allow any similarly situated provider where its lien was dismissed to now file a petition under an alternative theory and seek to revive and re-litigate its invoices. The Legislature's intent, and the reasoning behind the *Martinez* decision would be of little value if Western were allowed to proceed. Additionally, again, the irony is that Western relies on the former Regulation §10451.1 to surmise that it can file both a lien and a Petition for Determination, but it then also cites the current Regulation § 10786 that redacts such language that was in effect at the time Western filed its Petition.

Turning to the final issue, Western argues that it is victimized by defendant's bad faith tactics and delays, that the defendant failed to deal in good faith, that Western "…tried to file a Lien for Defendant to cooperate", and that "Defendant found a loop hole with which to continue its bad faith dealings with Provider". Western deflects the true issue here. There was no evidence presented of bad faith by the defendant, or even any apparent evidence of such. In fact, the timeline suggests that Western presents itself with unclean hands by failing to object to the Defendant's DOR dated October 9, 2015, by failing to respond to the defendant's petition to take the lien conference off calendar dated January 20, 2016, and by failing to attend the lien conference on

March 2, 2016. In fact, Western took no action until November 27, 2020 when it filed its Petition for Determination. And even then, it took Western over another two years to file a DOR to bring this matter to trial. The fact that defendant objected to the untimely lien and has objected to the services on substantive grounds does not amount to bad faith. Asserting an affirmative statute of limitations defense is not a bad faith tactic based upon a loophole. Western's arguments that the WCAB must essentially save it from being victimized is misplaced and unfounded.

IV
RECOMMENDATION

It is respectfully recommended that Western Imaging Service's Petition for Reconsideration dated November 6, 2023 be denied.

Date: November 8, 2023

Todd T. Kelly
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE