WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PABLO BORJA, *Applicant*

vs.

AMERICAN INTEGRATED SERVICES, INC.; STARR INDEMNITY AND LIABILITY COMPANY administered by GALLAGHER BASSETT, *Defendants*

Adjudication Number: ADJ14957076; ADJ14956986
Anaheim 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 and Opinion on Decision, which we adopt and incorporate, we will deny reconsideration.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> > (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
> >
> > (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under

Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on October 23, 2024 and 60 days from the date of transmission is Sunday, December 22, 2024. The next business day that is 60 days from the date of transmission is *Monday, December 23, 2024.* (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, December 23, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on October 23, 2024, and the case was transmitted to the Appeals Board on October 23, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Section 5909(b)(1) because service of the Report in compliance with Section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 23, 2024.

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 23, 2024

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

ALCALA ASSOCIATES
DIETZ, GILMOR & CHAZEN

DLM/oo

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION
&
LABOR CODE §5909(b) NOTICE OF TRANSMITTAL

I. INTRODUCTION

1. Minutes of Hearing	8/28/2024
2. Decision Date	9/19/2024
3. Petition for Reconsideration Filed:	10/11/2024
4. Identity of Petitioners	Defendant, Starr Indemnity Liability
5. Verification	No[1]
6. Timeliness	Yes

This Workers Compensation Administrative Law Judge ("WCJ") issued a Findings And Orders and Notice of Intent to Impose Sanctions with an Opinion on Decision ("Decision")[2], on September 19, 2024.

American Integrated Services Inc. (Employer) by way of Starr Indemnity Liability (Defendant) has filed an *unverified* Petition for Reconsideration ("Reconsideration Petition") dated October 11, 2024.[3]

Trial was set on the issue of a lien filed by Joyce Altman Interpreters ("Lien Claimant"), with Defendant raising the issue of injury arising out of and in the course of employment (AOE/COE). A Pre-Trial Conference Statement (PTCS) was filed by the parties on March 18, 2024.[4] The issue of AOE/COE was raised in the PTCS. Lien Claimant also raised cost and sanctions, plus penalties and interest (and referral to the audit unit), against Defendant. Defendant

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[1] Labor Code Section 5902 states that a petition for reconsideration "shall be verified upon oath in the manner required for verified pleadings in courts of record and shall contain a general statement of any evidence or other matter upon which the application relies in support thereof." A verification is more than a pro forma requirement- it helps assure the accuracy of the factual statements made in the petition and can provide evidentiary support necessary to obtain the requested relief. See *Torres v. Contra Costa Schools Insurance Group* (2014) 79 Cal Comp. Cases 1181, 1186 (significant panel decision). See *Soto v. Los Angeles Unified School District,* 2020 Cal. Wrk. Comp. P.D. LEXIS 392. The appeals board has clear discretion to dismiss a petition for reconsideration for failure to file a verification, and has done so. See *Safeway Stores, Inc. v. WCAB (Carter)* (1982) 47 CCC 455 (writ denied); *Hoiten v. WCAB (Snyder)* (1981) 46 CCC 1169 (writ denied); *Conner v. WCAB* (1980) 45 CCC 370 (writ denied); *Walsh v. WCAB* (1978) 43 CCC 1l56 (writ denied); *Guest v. Barrett Business Services, Inc.,* 2011 Cal. Wrk. Comp. P.D. LEXIS 217; *Gallardo v. WCAB* (2014) 79 CCC 473 (writ denied). It has been held that a failure to verify a petition is a mere defect in the pleading that does not deprive the board of jurisdiction. *Mullane v. IAC* (1931) 118 Cal. App. 283; *Los Angeles County Metropolitan Transit Authority v. WCAB (Hicks)* (2006) 71 CCC 641 (writ denied).

[2] EAMS Doc, ID# 78388834.

[3] EAMS Doc. ID# 54348997: Reconsideration has been sought for both ADJ 14957076 and ADJ14956986. However, the Decision concerned only ADJ l 4957076, a cumulative trauma ("CT") injury to the lumbar spine, right knee, left knee and eyes, Trial had also been set on ADJ! 4956986, a specific injury date of February I, 2019, with injury claimed only to Applicant's "eye". Lien Claimant Joyce Altman Interpreters withdrew its lien in ADJ 14956986 based on its concession that no services were provided in connection with an eye injury or medical services related to the eye.

[4] EAMS Doc. ID# 77752743

listed as exhibits in the PTCS their "Notice of Denial", as well an Answer to the Application for Adjudication of Claim filed for each injury date.

On the date of Trial, Lien Claimant argued that Defendant's denial of Applicant's claim was untimely; that the injury was presumed compensable; that Defendant had no medical records overcoming the presumption of injury; that the only medical reporting addressing the injury established injury AOE/COE; and that Defendant's continued denial of the case was in bad faith and warranted cost and sanctions (as well as penalties and interest). Lien Claimant argued that Defendant should be sanctioned for this conduct pursuant to Labor Code Section 5813.

In response, Defendant argued that its denial of the claim was timely; that the medical reporting of Mahnaz Azimzadeh, D.C. / Marina Russman M.D. ("FMR") was not substantial medical evidence because the evaluation was conducted by a chiropractor and because the FMR Report provided a medical opinion beyond the doctors' expertise.

This WCJ went over the PTCS with the parties on the Trial date,[5] and following an extensive discussion with the parties this WCJ granted the joint request to bifurcate the issue of AOE/COE.[6] It was agreed that if industrial injury was found by this Court that the parties would then proceed with a retrospective Utilization Review of the treatment requested / provided, and then be subject to Independent Bill Review.

Since Defendant maintained its denial of the case, Trial proceeded on August 28, 2024, at which time the matter was submitted on the record with no testimony taken.[7]

Lien Claimant dismissed their lien as to ADJ14956986, and did not claim injury to the "eyes" in the CT claim - ADJ14957076.

As set forth in the Decision, this Court found that Defendant did not timely deny the Applicant's CT claim and thus it was presumed compensable; that Defendant offered no evidence nor substantive arguments that overcome said presumption; that even if the injury was not presumed compensable that the medical evidence was substantial and supported a finding of injury AOE/COE; and that Defendant had engaged in bad faith conduct that warranted sanctions pursuant to Labor Code Section 5813.

Defendant avers that this Court erred in finding that a presumption of injury attached to this case; that Applicant sustained injury arising out of and in the course of employment; and that this Court erred in finding that Defendant's actions rose to the level of sanctionable conduct.

For the reasons explained below, this Court recommends the Reconsideration Petition be denied.

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[5] EAMS Doc. ID# 78318873

[6] 8/28/24 Minutes of Hearing and Summary of Evidence (MOH/SOE), Page 4, Lines 6-12: EAMS Doc. ID# 78337451; Petition Reconsideration, Page 3, Lines 1-4.

[7] EAMS ID 7833745 l

II. BASIS FOR DECISION

AOE/COE

A. INJURY PRESUMED INDUSTRIAL AND THE BURDEN OF PROOF

Applicant filed both a Workers' Compensation Claim Form (DWC-1) (Claim Form)[8] and an Application for Adjudication of Claim (Application)[9] in EAMS alleging that he sustained a cumulative trauma injury (CT) to his left eye, back and knees due to repetitive work while employed by American integrated Services Inc. (Employer).[10] Applicant also filed a proof of service reflecting service of these documents on the Employer on July 27, 2021.[11] The Application was amended on September 2, 2021, to name Starr Indemnity Liability (Defendant) as the Employer's insurance carrier.[12] Defendant was served with this amended Application on September 2, 2021.[13]

Defendant has neither made representations nor offered any evidence that disputes that the Employer was served the Claim Form on July 27, 2021; nor that Defendant was not served the amended Application for Adjudication of Claim on September 2, 2021.[14]

The filing of the claim form triggers a 90-day period for the employer to investigate and evaluate the claim. Labor Code Section 540 1; See also *Honeywell v. WCAB (Wagner)*, (2005) 70 Cal. Comp. Cases 97, 102.

The 90-day period last until the claim is denied or the time runs out, and is known as the 11 delay period. 11 During the delay period the obligation to provide benefits is suspended -- the only exception is medical treatment benefits, which must be provided to a limited extent.[15] Labor Code Section 5401 obligated the Employer to provide Applicant with a claim form and information regarding his rights to workers' compensation benefits.[16]

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[8] EAMS ID 37615806
[9] EAMS ID 3 8100628
[10] EAMS ID 37615804
[11] EAMS ID 37615809
[12] EAMS ID 38100628
[13] EAMS ID 38100629
[14] The Pre-Trial Conference Statement filed by the parties does not include any notices to the Applicant that acceptance of the claim was delayed; nor any notices concerning the authorization of medical treatment; nor notices regarding Defendant's Medical Provider Network (if one does exist); and no such documents were offered as evidence at the time of Trial.
[15] Employer was required to arrange a medical evaluation with an MPN physician specifically "[w]hen the injured covered employee notifies the employer of insured employer of the injury or files a claim for workers' compensation". Regulation Section 9767.6(a).
[16] On receiving notice of an injury, Employer was required to make a definite, unequivocal tender of adequate treatment. See *Gildersleeve v. IAC (O'Neill)*, (1931) 212 Cal. 763, 212 Cal. 765). Employer was also required to specifically instruct Applicant on what to do and whom to see. If the Employer failed or refused to do so, then Employer lost its the right to control Applicant's medical care and became liable for the reasonable value of self-procured medical treatment. *Braewood Convalescent Hospital v. WCA B (Bolton)* (l 983) 48 Cal. Comp. Cases 566, 569.

Until and unless the claim is denied, Labor Code Section 5402(c) specifically required Employer to authorize the provision of medical treatment.[17]

On October 27, 2021, Applicant was evaluated at FMR Interventional Quality Pain Management (FMR)[18] by Dr. Mahnaz Azimzadeh, D.C., who issued a "Primary Treating Physician's Initial Evaluation and Report" (Report). Said Report included an Affidavit of Compliance pursuant to Regulation 10606 and Labor Code 4628. Dr. Marina Russman, MD, was also a signatory to the report.[19]

Defendant subsequently denied this claim, first by way of a "Notice Regarding Denial of Workers' Compensation Benefits" (Denial) dated May 13, 2022[20]; and then by way of an Answer to Application filed on July 20, 2022.[21]

The evidence establishes that the claim was not timely denied. Nevertheless, Defendant relies on language included in the Compromise and Release that "applicant stipulated to timely denial",[22] and avers that such language is binding on Lien Claimant and this Court. Specifically, Defendant asserts:

> "In this case, WCJ Finete's findings that the Lien Claimant could rely on a presumption of compensability due to the timing of DWC-1 and when treatment commenced ignored the Applicant 's stipulation to timely denial in the court's previously approved Compromise and Release. (See Compromise and Release Defendant's Exhibit B). Defendant included the Compromise and Release and Order Approving in its list of exhibits and specifically requested WCJ Finete to take judicial notice of the applicant's stipulation to timely denial. WCJ Finete did not address the effect of the applicant's stipulation in his findings and instead ove1iurned the court's prior Order and opened issues for trial that were previously settled. The Defendant contends that whether the relative timing of DWC-1 filing to commencement of treatment supersedes a stipulation to timely denial is an unsettled area of the law."

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[17] Defendant incorrectly asserts in its Reconsideration Petition (Page 3, lines 1-21) that sanctions were awarded because Defendant did not provide "evidence showing that it offered Applicant treatment prior to the denial of the claim" - but that language was merely addressing the Lien Claimant's contention, noted in the preceding paragraph of the Opinion on Decision, "Lien Claimant averred ". that Applicant was permitted to self-procure treatment with FMR". Sanctions were not awarded based on a denial of care.

[18] Lien Claimant Exhibit 2: EAMS ID 42676838

[19] The evaluation and treatment on October 27, 2021, took place approximately 90 days after the Employer was served with the Claim Form. Defendant presented no evidence that it offered Applicant medical treatment or notified Applicant of the existence of a valid Medical Provider Network (MPN) prior to Applicant commencing treatment at FMR, nor objected to the treatment provided at FMR. Based on the evidence presented, Defendant has no defense for not authorizing medical treatment before the exam on October 27, 2021. This reflects an impermissible denial of medical treatment, and thus, to the extent that Defendant may or may not have a Medical Provider Network, Applicant was permitted to self-procure treatment with FMR.

[20] Defendant Exhibit A: EAMS ID 48528646

[21] EAMS ID 42338464

[22] Reconsideration Petition Page 2, Lines 9- 12.

This Court does not believe this is an "unsettled area of the law", and to the extent that Applicant and Defendant "stipulated" that the claim was timely denied the facts of the case reflect otherwise.

The law is well settled that even where the parties stipulate to certain facts, the board is not necessarily bound and may base its decision on the evidence presented at the hearing. The evidence in the present matter establishes that the injury was not timely denied and this Court was not bound by any stipulation between Applicant and Defendant. *Turner Gas Co, v. WCAB*, (1975) 47 Cal. App. 3d 286, 29, 40 Cal. Comp. Cases 253 (Appellate Court); *Bekins Moving & Storage v. WCAB*, (1980) 45 Cal. Comp. Cases 256 (Appellate Court).

The Order Approving C&R was issued on August 18, 2022. This Court takes judicial notice that the lien of Joyce Altman Interpreters was filed on July 31, 2023. Therefore, Lien Claimant was not even a patty in the case at the time that Defendant and Applicant entered into the settlement. Like other parties, a lien claimant is entitled to due process of law in pursuing a lien claim, (*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Ed. (Pinkney)*, (1994) 26 Cal.App.4th 789 [32 Cal. Rptr, 2d 293, 59 Cal. Comp. Cases 461].)

On Page 6 of the Petition for Reconsideration, Defendant argues that two cases *Charlis Insurance v. WCAB (Hardin)*, 75 Cal. Comp. Cases 891 (W/O - 2010) and *Taormina v. City of Salinas*, 2010 Cal Wrk, Comp. P.D. LEXIS 608 (NPD-2010) give conflicting opinions regarding the effect of a stipulation on non-parties, and thus the issue of whether Lien Claimant was bound by the stipulation between Applicant and Defendant is not well-settled.

In *Hardin*, the Appeals Board ruled that a carrier seeking contribution was not bound under doctrine of res judicata by a prior stipulation with applicant regarding the date of applicant's injury since the carrier against whom contribution was being sought was not party to the stipulation. The *Hardin* decision does not support Defendant's contentions.

In *Taormina*,[23] the dispute concerned whether an excess carrier was bound by an earlier findings and award. In *Taormina*, there was an Award with a specific finding as to the date of injury. Despite the excess carrier having received proper notice of the settlement, and having participated in proceedings, and having been given opportunity to submit evidence regarding its dispute over applicant's date of injury, it did not raise its dispute until more than 5 year after the date of injury. In the present matter, we have neither a specific finding by a judge as to the timeliness of Defendant's denial, nor are we beyond 5 years from the date of injury.

Defendant does not cite any cases that involve lien claimants, Since Lien Claimant was not a party to the settlement it is not bound by the language in the settlement between applicant and the employer regarding ordinary benefits. See *State of California v. WCAB (Butterworth)*, (1980) 101 Cal.App.3d 673, 677 [45 Cal. Comp. Cases 166]. See also *Gillett v. Los Angeles Unified School District*, 2010 Cal. Wrk. Comp. P.D. Lexis 44 ["the parties' stipulations settling the case-in-chief are not binding on lien claimant … A stipulation is only binding on the parties to that

[23] Per the Court in Taormina: "It is also pointed out that despite National Union's argument to the contrary, the stipulated A ward is not an exhibit. It is a pleading contained in the legal file which does not require authentication and of which the court may take judicial notice."

stipulation … Applicant and defendant may not stipulate away lien claimant's right to reimbursement"]; *Estrada v. Aitken Equipment and Repair*, 2011 Cal. Wrk. Comp P.O. Lexis 430 ["we note that with respect to the stipulations referred to by defendant in their petition, and which formed the basis of the February 3, 2010 stipulated Award, EDD was not a party to these stipulations, and therefore is not bound by them"]; *Beacham v. Parking*, 2009 Cal. Wrk. Comp. P.O. Lexis 340 ["lien claimant is not bound by applicant's stipulation"]; *Lara v. Daughters of Mary & Joseph*, 2023 Cal. Wrk. Comp. P.D. Lexis 83 ["Dental Trauma Center is not bound by Applicant's stipulation within the Compromise and Release agreeing that Applicant did not sustain injury to psyche and TMJ"]; *Hardin v. County of Alameda*; 2010 Cal. Wrk. Comp. P.D. Lexis 187 (citing *Greenwald v. Carey Distribution Company*, (1981) 46 Cal. Comp. Cases 703 (Appeals Board en bane)) wherein it was affirmed that a stipulation between two parties is not binding on a third party.

Defendant also argues that Lien Claimant did not raise the issue of presumed compensability under Labor Code Section 5402(b)(1) until the date of Trial, causing "surprise" that did not afford Defendant a reasonable opportunity to review the records for relevance.[24]

The appeals board has stated that Labor Code Section 5708 provides the WCJ with authority to conduct hearings in a manner "best calculated to ascertain the substantial rights of the parties, 11 and that this includes discretion in setting forth issues for trial, including issues not previously identified by the parties. The appeals board added, however, that if the opposing party can demonstrate prejudice by not having had notice of that issue at the MSC, the WCJ must take appropriate steps to remedy the prejudice. And the Appellate Court has held that a statutory presumption may be raised at the time of Trial.[25]

This Court was within its authority to permit this issue to be issued at Trial and Defendant does not show any actual prejudice by this issue being raised at the time of Trial.

Defendant was well aware at the time of Trial that Lien Claimant was raising the issue that the injury was presumed compensable. Defendant listed its Notice of Denial, its Answer to Application, and the settlement documents as exhibits in the PTCS. On the record, Defendant did not object to this issue being raised but rather asked that judicial notice be taken of the settlement and Order Approving C&R - documents it had already listed in the PTCS; Defendant did not seek leave to offer additional exhibits, did not seek to call any witnesses, rested on the present record *and did not object to submission for decision based on the present record*. This Court has agreed to take judicial notice of the settlement documents offered by Defendant.

In *Northstar at Tahoe v. WCAB (Garcia), (2003)* 68 Cal Comp, Cases 275 (writ denied), citing *Gee v. WCAB*, (2002) 67 Cal Comp. Cases 236, 240, the Appeals Board stated that 11the application of the presumption of compensability in Section 5402, similar to Section 4062.9, is mandatory once the basis for it has been established by the pleadings, stipulations, judicial notice, or evidence. In that case, the appeals board held that the Labor Code Section 5402 presumption

[24] Petition Reconsideration, Page 9, Line 24 to Page 10, Line 14.

[25] *Davis v. Interim Healthcare* (2000) 65 Cal Comp. Cases 1039, 1043-44 (appeals board en bane). In *Gee v, WCAB* (2002) 67 Cal Comp. Cases 236, the Court of Appeal disapproved of Davis to the extent that a statutory presumption had to be raised as a separate issue.

could be raised for the first time at trial and remanded the case to the WCJ to consider whether Section 5402 could be applied to the case. See also *Cervantes v. United Airlines Inflight Services*, 2014 Cal. Wrk. Comp. P.D, LEXIS 49; *Pronto Express & Services, Inc. v. WCAB (Quintanilla)* (2018) 83 Cal Comp. Cases 898 (writ denied).

The Order Approving C&R contains no language that there is a bona fide dispute of injury AOE/COE. It does not include any language that the Court has adopted the stipulation regarding the timeliness of the denial.

Labor Code Section 3202.5 states, "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.) Labor Code section 5705 states, "The burden of proof rests upon the party or lien claimant holding the affirmative of the issue." (Lab. Code, § 5705.)

In meeting this burden of proof in such a situation, the lien claimant stands in shoes of the injured worker. (*Kunz v. Patterson Floor Coverings, Inc.* (2002) 67 Cal. Comp. Cases 1588, 1592 (Appeals Board en banc.)

Defendant argues in its Reconsideration Petition. "The burden of proof was with Lien Claimant's representative, who was under the burden to prove every element necessary to demonstrate AOE/COE."

However, when the claim is untimely denied, there is a presumption of injury and it is defendant who holds the affirmative on the issue. The effect of a presumption affecting the burden of proof is "to impose upon the pa1ty against whom it operates the burden of proof as to the nonexistence of the presumed fact." See *SCJF v. WCAB*, (1995) 60 Cal. Comp. Cases 717 (Comt of Appeal); Evidence Code Section 606.

In addition to violating Labor Code Sections 5401 and 5402(c), Defendant's Denial was untimely pursuant to Labor Code Section 5402(6)(1) - thus the injury was presumed compensable and at Trial the burden rested on Defendant to overcome the presumption of industrial injury.

Further, any argument by Defendant as to the timeliness of its denial does not address Defendant's complete lack of evidence to counter the reporting filed by Lien Claimant.

B. <u>SUBSTANTIAL MEDICAL EVIDENCE OF INDUSTRIAL INJURY</u>

Defendant also argues that the medical reporting which this Court considered in finding injury AOE/COE is not substantial medical evidence.

Defendant's Denial reflects that the claim was "being denied because on (sic) lack of legal, medical, and factual evidence to support a work injury that arose out of employment in the course of employment on or around CT period 2/1/19-1/27/21 for the named insured (American Integrated Services)".

However, said Denial was issued after Applicant commenced treatment at FMR. Defendant has not offered any evidence reflecting that it objected to the findings of Dr. Azimzadeh /Dr.

Russman, commenced the medical-legal (read: QME) process, deposed Applicant, or even produced a job description that contested the Report from FMR.

Specifically, the Report includes a history of injury reflecting the following:

> Mr. Pablo B**o**rja states that while working for AIS as labor, he developed pain symptoms in his lower back, knees, and left eye due to repetitive work duties ... His job involved the demolition of buildings using heavy machinery. He will use jackhammers, sledgehammers, hand saws, and blow torches to perform his job. He will also use other hand tools. He will load and unload heavy debris. The patient's duties included, but were not limited to, repetitive bending, grasping, gripping, kneeling, prolonged strenuous activity, pulling, pushing, squatting, standing, stooping, turning, twisting, walking, work at or over shoulder level and awkward positions ... The patient states that around the mid part of 2020, he began to notice pain in his lower back and knees which he attributes to the heavy labor involved in his duties as a demolition worker.

This same Report reflects that Applicant has been employed in the capacity of laborer for the Employer since the year 2016.

The Report documents an examination of Applicant's lumbar spine and bilateral knees, with a diagnosis that included a sprain of the lumbar spine, right knee and left knee. The doctors reported that these symptoms were industrially-related. Applicant was found to be temporarily totally disabled (TTD) with need for medical treatment. Specific courses of medical treatment were recommended.

This WCJ found that the Report is substantial medical evidence on the issue of AOE/COE, documenting Applicant's 4+ years of performing physical labor for the Employer and Applicant's attribution of his symptoms to the demolition work he performed. There is no evidence disputing this history of employment or injury.

Defendant offered no medical report that contradicts the conclusions reached by FMR.

Accordingly, in addition to the injury being presumed compensable, the finding of injury AOE/COE is supported by the medical record.

In its Reconsideration Petition, Defendant again argues that the medical reporting should not be relied upon because the reporting "did not include any medical records and also expressed an opinion upon causation that was clearly not within the medical specialty of the provider-namely, complaints related to the Applicant 's left eye."[26]

This issue was discussed with Defendant in considerable detail before going on the record. Defendant's focus on the "Primary Treating Physician's Initial Evaluation and Report" dated October 27, 2021,[27] being signed by Dr. Mahnaz Azimzadeh, D.C., was misplaced. The report was

[26] Reconsideration Petition Page 4, Lines 16-28.
[27] Lien Claimant Exhibit 2: EAMS ID# 51375590

also signed by Dr. Marina Russman, MD. The only diagnosis that concerned the left eye was "ocular pain"; and the doctor specifically was "requesting authorization for an ophthalmologist consultation and to treat the symptoms of eye pain".

Further, as discussed with Defendant, Lien Claimant was not pursuing a lien in relation to Applicant 's specific eye injury from 2019, and the Applicant's eyes were not raised as an issue for Trial in the CT claim. There was no finding of injury to the eye by this Court. This Court explained to the defense counsel that it was the treating doctor's obligation to note Applicant's complaints of pain to his left eye, that the doctor recommending a consultation with an ophthalmologist did not invalidate the opinions regarding injury to orthopedic body parts; and that Lien Claimant was only trying to recover for services connected to Applicant's orthopedic injuries.

Defendant claims that its arguments "were productive, in part, because they resulted in a dismissal of the lien against the applicant 's specific injury claim."[28] Even assuming arguendo that this is correct, it does not address why Defendant maintained complete denial of the CT claim or the orthopedic body parts . (It also ignores the Lien Claimant's dismissal of its lien in the specific injury case because it provided no services related to that date of injury.)

Defendant also argues that the medical reporting from FMR is not substantial medical evidence because the doctors did not review any medical records: "Dr. Mahnaz, to meet the requirements of Section 10682, should have listed all medical reports relied upon. Dr. Mahnaz's report merely stated, "Pursuant to Title 8, California Code 9784, the patient's previous medical records were requested for review from the employer. The records provided were reviewed and incorporated in full within my report. "[29] Yet the Defendant does not cite a single medical record that it provided to FMR; or cite to a single medical record that conflicts with the history or injury provided by Applicant to FMR or conflicts with the medical analysis and opinions set forth in the Report.

Unless Defendant has evidence that it provided FMR with medical records and that said records were not incorporated into the FMR Report (and that said medical records in some fashion point to a non-industrial mechanism of injury) the arguments being proferred by Defendant are rudderless.

Additionally, the report in question based its opinion on causation on Applicant's "history of injury, present complaints, mechanism of injury and today's clinical findings"[30] - the report did not represent that the doctor was relying on past medical reporting to reach a conclusion regarding AOE/COE.

SANCTIONS

Despite having no medical or factual evidence to contravene the reporting of Drs. Azimzadeh and Dr. Russman the Defendant maintained a denial of the claim.

[28] Recon sideration Petition Page 5, Lines 8-14.
[29] Reconsideration Petition Page 5, Lines 1-4.
[30] Lien Claimant Exhibit 2, Page 6 of 8: EAMS ID 51375590

Defendant was aware prior to proceeding to Trial that it did not have evidence showing that it offered Applicant treatment prior to the denial of the claim; that its denial was issued more than 90 days after the employer received the claim form; and that it had no medical evidence to contradict the reporting from FMR. See *Tito Torres v. AJC Sandblasting*, (2012 en banc) 77 Cal. Comp. Cases 113.

Defendant cites the case of *Rodriguez v. WCAB*, (1994) 59 Cal. Comp. Cases 857, 862-863, presumably for support that a denial can be timely "even though the denial letter was sent more than eight months after the claim was received." However, in Rodriguez, the evidence established that the defendru1t did deny the claim within 90 days of receipt of the claim form.[31] The Rodriguez case does not support Defendant's contentions on reconsideration. The Reconsideration Petition does not make any representations that the Defendant decided to deny the claim within 90 days of receipt of the claim form.

In its Reconsideration Petition (at Pages 10 & 11) Defendant also argues that this Court's analysis "avoids addressing other facts that cut against his conclusion of presumed compensability." Defendant's argument is that the Claim Form was served by mail, and thus the time to deny the claim was not October 27, 2021 (as cited in the Opinion on Decision) but rather October 30, 2021. This Court concedes that these dates (10/27/2021 vs. 10/30/2021) could be relevant if Defendant had in fact denied the claim between October 27, 2021, and October 30, 2021. But Defendant acknowledges, "Here, there was a denial letter issued and introduced into evidence by Defendant dated May 13, 2022."[32] Further, this argument by Defendant has little bearing on the issues decided because either the claim was denied by the date of the examination by FMR on October 27, 2021, or the claim was on delay status on that date - so that in either event Applicant was within his right to assert medical control and undergo an examination and treatment with a doctor of his own choosing.

Defendant's arguments that the FMR Report was not substantial medical evidence because the exam was conducted by a chiropractor, or because the reporting references Applicant's claim of injury to the eye(s) were found by this Court to be frivolous.

In its Reconsideration Petition (at Page 12, Lines 10 - 25) Defendant argues that the FMR Report is not substantial medical evidence because the doctor relied on statements from Applicant that constitute impermissible and "prejudicial" "hearsay", since Applicant did not testify. The FMR

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[31] Per the decision in *Rodriguez*: "On March 29, 1 993, a Monday and the 96th day following petitioner's December 23, 1992, submission of his completed "DWC 1" claim form to (the employer), (applicant's) attorney received a written notification from (the employer's) insurer (respondent Hartford Insurance Company, hereinafter Hartford) that his claim" is denied because based our [*sic*] initial investigation we have determined to deny your alleged injury. " This notice was dated March 22, 1993, and was mailed from Hartford's office in Sacramento, California, to the office of (applicant's) attorney in Modesto, California. (Applicant), (the employer), and Hartford agree that March 22, 1993, was the 89th day following petitioner's December 23, 1 992, filing of his "DWC I " claim form with (the employer)" . . . "The board did not err in determining that petitioner's claim was rejected within the 90-day period, The fact that the letter was dated March 22 (the 89th day) was evidence that the rejection of petitioner's claim occurred on or prior to that date."

[32] Reconsideration Petition Page 1 1, Lines 7-18

Report was listed as an exhibit in the PTCS and was entered into evidence without objection.[33] Nothing prevented the Defendant from calling Applicant as a witness.

Pursuant to Regulation 10682, the appeals board favors the production of medical evidence in the form of written reports. The injured worker's statements made in medical report may be used to prove disputed facts, See *Perez v. Three Js Trucking, Inc.*, 2019 Cal. Wrk. Comp. P.D. LEXIS 528 (medical report used to prove issue of employment); See also Labor Code Section 5709 ("No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division. No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure")

This Court found that not only must Defendant's arguments fail, but that Defendant's positions are without legal or factual support. Defendant's ongoing denial of this claim -- and proceeding to Trial on the issue of AOE/COE -- was wholly without merit; and constituted bad faith actions / tactics within the meaning of Labor Code Section 5813 and Regulation 10421. See *Hanford Joint Union High School Dist. v. WCAB*, (2001) 66 Cal. Comp. Cases 915.

While this Court found that Defendant has engaged in sanctionable conduct, Defendant was and continues to be afforded an opportunity to respond in writing to address the sanction amount of $ 1500,00.

III. RECOMMENDATION

The Petitions for Reconsideration should both be denied, with the matter remanded to this lower Court for further proceedings concerning the monetary sanction to be imposed on Defendant.

IV. LABOR CODE §5909(b) NOTICE OF TRANSMITTAL

This case was transmitted to the Reconsideration Unit on 10/23/2024.

The parties are advised that based on a Transmittal date of 10/23/2024 that action by the Reconsideration Unit is due by 12/23/2024.

DATED AT ANAHEIM, CALIFORNIA

DATE: 10/23/2024

JAMES P. FINETE
WORKERS' COMPENSATION JUDGE

[33] 8/28/24 MOH/SOE, Page 3, Lines 1 - 1 3 : EAMS ID 78337451