WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VINCENT DOWNEY, *Applicant*

vs.

**TECHNICOLOR, INC.;
PACIFIC EMPLOYERS INSURANCE COMPANY
administered by SEDGWICK CMS; TECHNICOLOR FILM SERVICES;
FEDERAL INSURANCE COMPANY C/O CHUBB GROUP OF INSURANCE COMPANIES;
DELUXE LABORATORIES; LIBERTY MUTUAL INSURANCE COMPANY, *Defendants***

Adjudication Number: ADJ2275429
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

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

Lien claimant David Silver, M.D., (lien claimant) seeks reconsideration of the Findings and Orders (F&O) issued on March 22, 2021, wherein the worker's compensation administrative law judge (WCJ) found in pertinent part that lien claimant failed to meet his burden to show that Liberty Mutual was noticed of the lien conference on August 15, 2016 and to show that defendant withheld material facts from the court in order to obtain a notice to dismiss lien claimant's lien. The WCJ issued no orders with respect to lien claimant's petitions for costs and sanctions.

Sua sponte, the WCJ found that on January 13, 2015, "the underlying case was unresolved and David S. Silver, M.D., was not yet a party and lacked standing to file a Petition" and that the action of filing the petition did not raise to the level of sanctions and was mere negligence; that lien claimant failed to meet and confer before filing for sanctions and costs on a discovery issue and is sanctioned $2,500.00; and that on November 9, 2017, lien claimant filed a verified petition for costs and sanctions based on the representation that there was a WCJ ruling that defendant had willfully failed to comply with its regulatory obligations, which was a material misrepresentation and is sanctioned $2,500.00. He ordered that lien claimant was to pay sanctions of $2,500.00 for failure to meet and confer and $2,500.00 for making a material misrepresentation to the court.

Lien claimant contends that it met its burden of proof on each of its petitions for costs and sanctions against defendant and that the WCJ erred in denying those requests. Lien claimant contends, further, that the WCJ abused its discretion in ordering sanctions against lien claimant.

We received a Report and Recommendation (Report) from the WCJ, wherein he recommends that the Petition for Reconsideration be denied and that the WCAB issue a notice of intent to issue further sanctions as to lien claimant for misrepresentations in the Petition.

We received an Answer from defendant Pacific Employers Insurance Company, as administered by Sedgwick.

We have considered the allegations of the Petition for Reconsideration and the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the March 22, 2021 F&O, and substitute a new F&O that finds that lien claimant did not meet its burden on its petitions for costs and sanctions of January 13, 2015, August 22, 2016, October 16, 2017, November 9, 2017, March 15, 2018, and June 11, 2018, and we will order that they are denied.

BACKGROUND

Applicant filed an Application for Adjudication claiming injury to various body parts during the time period from March 16, 2001 through August 15, 2002, while employed by defendant as a film developer/printer. As the WCJ recounted in the report:

> The case has two employers and three insurance companies: Deluxe Laboratories insured by Liberty Mutual; Technicolor insured by Employers Insurance; and, Technicolor insured by Federal Insurance. On November 4, 2014, Applicant and Technicolor insured by Pacific Employers Insurance settled its claim via compromise and release. On August 4, 2015, Federal Insurance settled its claim via compromise and release. On September 2, 2015, Deluxe Laboratories, insured by Liberty Mutual, settled its claim via compromise and release. (Report, at p. 2.)

The trial on lien claimant's July 18, 2007 lien concluded on August 13, 2018. In the Findings and Orders, the WCJ found that lien claimant "failed to show his services are compensable" and ordered that lien claimant "take nothing by way of his lien" and that the matter be taken off calendar with jurisdiction reserved. Lien claimant did not file a petition for reconsideration challenging the decision.

Through his representative Dan Escamilla of the Legal Services Bureau, lien claimant filed six petitions for costs and sanctions against defendants that are at issue in this matter.

The first petition for sanctions, dated January 13, 2015, (First Petition for Sanctions) alleged that defendant failed to serve the Legal Services Bureau with the executed Compromise and Release (C&R) when it was filed on November 4, 2014, that this failure demonstrated bad faith actions or tactics, that defendant failed to engage in good faith settlement negotiations as required, and that defendant submitted a false declaration of good faith efforts to contact lien claimant, when no such efforts had been made. (First Petition for Sanctions, at pp. 2-7.) Lien claimant requested that sanctions be awarded in the amount of $1,240. (*Id.* at p. 8.)

Lien claimant's second petition for costs and sanctions, dated August 22, 2016, (Second Petition for Sanctions) requested costs in the amount of $1,159.77 and sanctions in the amount of $2,500, against defendant Liberty Mutual, based on an allegation that Liberty Mutual failed to appear at a noticed settlement conference on August 15, 2016. (Second Petition for Sanctions, at pp. 2-5.)

Lien claimant's third petition for costs and sanctions, dated October 16, 2017, (Third Petition for Sanctions) alleged that defendant and defendant's attorney issued an improper Notice to Appear in Lieu of Subpoena, and that the Notice was issued in violation of WCAB rules and "for the sole purpose of harassing Dr. Silver." (Third Petition for Sanctions, at pp. 1-7.) The petition requested that $930 in attorney's fees and $2,500 in sanctions be assessed against defendant. (*Id*. at 7.)

Lien claimant's fourth petition, dated November 9, 2017, (Fourth Petition for Sanctions) alleged that defendant and defendant's former attorney willfully failed to serve medical reports on Lien claimant's representative, Escamilla. (Fourth Petition for Sanctions, at p. 1.) Lien claimant sought $3,875 in attorney's fees and $2,500 in sanctions. (*Id.* at 5.) This petition alleged that at a lien conference on November 7, 2017, the WCJ "ruled that Defendant had willfully failed to comply with its regulatory obligation under 8 CCR §§ 10601 and 10608, to serve all medical reports." (*Id*. at 2.)

On March 15, 2018, lien claimant filed a combined petition for sanctions and objection to the WCJ's March 7, 2018 Notice of Intention to Dismiss. (Fifth Petition for Sanctions.) It alleged that Escamilla told defendant's counsel and hearing representative that he would not appear at the March 7, 2018, hearing due to illness, but the court nevertheless issued a notice of intent to dismiss at defendant's request, because Escamilla was not present. (*Id*. at 2-3.) Lien claimant alleged that defendant's representative's failure to tell the WCJ that Escamilla was ill, and the resulting notice

of intent constituted "improper conduct" and "bad faith actions or tactics" and asked for $930 in attorney's fees and $2,500 in sanctions in response. (*Id*. at 5.)

Lien claimant's sixth petition for sanctions, dated June 11, 2018, (Sixth Petition for Sanctions) addressed the same facts and made the same allegations regarding the March 7, 2018 hearing discussed in the Fifth Petition. (Sixth Petition for Sanctions, at pp. 1-3.) It again alleged that defendant's hearing representative did not disclose to the WCJ that Escamilla was ill and asserted that the hearing representative misled the WCJ and thus violated rules 5.200[1] and 3.200[2] of the Rules of Professional conduct and section 6068(d) of the Business and Professions Code. (*Id*. at pp. 3-4.)

Defendant filed three responses to the six petitions at issue here, each of which addressed lien claimant's factual contentions and legal arguments and requested that attorney's fees, costs and sanctions be levied against lien claimant. In its "Response to Lien Claimant Petition for Sanctions and Penalties & Objections to Substitution of Attorneys," dated February 10, 2017, defendant objected to the First Petition for Sanctions, arguing that although the C&R was inadvertently not served on Escamilla, it was served on lien claimant, as required by WCAB Rule 10886.[3] (Defendant's 2/10/17 Response, at pp. 1-5.) Defendant requested attorney's fees, costs and sanctions in response to "Mr. Escamilla's frivolous and meritless filings." (*Id*., at p. 5.) Defendant's second response, dated October 30, 2017, and titled, "Defendant Objection to Legal Service Bureau/Dan Escamilla's Third Costs & Sanction Petition and Defendant Petition for Costs & Sanction against Lien Representative Dan Escamilla" objected to lien claimant's claims in his Third petition, and again requested that attorney's fees, costs and sanctions be levied against Escamilla and the Legal Services Bureau. (Defendant's 10/30/17 Response, at pp. 1-6.) Defendant's third response, filed March 2, 2018, requested an order that lien claimant and Escamilla "take nothing by their first, second, third and fourth petitions for attorney fees, costs and sanctions," that "additional attorney fees, costs and sanctions" be levied "as a result of having to defend Mr. Escamilla's frivolous and meritless filings" and that "the Court not impose attorney

[1] Effective November 1, 2018, Rule 5.200 of the Rules of Professional Conduct is now Rule 3.3(a).

[2] Effective November 1, 2019, Rule 3.200 of the Rules of Professional Conduct is now Rule 3.1(a)(1).

[3] Effective January 1, 2020, WCAB Rule 10866 is now WCAB Rule 10702. (Cal. Code Regs., tit. 8, § 10702.)

fees, cost[s] or sanctions for its conduct in defending the client against the frivolous, misleading and harassing petitions from Dan Escamilla." (Defendant's 3/2/18 Response, at pp. 1-6.)

The trial was held on November 30, 2020, and January 11, February 3, and March 15, 2021. The issues for trial were lien claimant's six petitions for costs and sanctions and defendant's claim "that the lien claimant lacks standing for a sanction petition on the grounds there was a take nothing finding and that the defendants are not liable for sanctions." (MOH of 11/30/20, at p. 2.) The WCJ admitted eight exhibits without objection and took judicial notice of prior case documents and the entire court file. (MOH of 11/30/20, at pp. 2-3.) Escamilla testified regarding the facts alleged in the petitions for costs and sanctions, and the basis for his fee requests. (Further MOH and Summary of Evidence of 1/11/21, at pp. 1-5; MOH (Further) and Summary of Evidence 3/15/21 at pp. 2-4.)

The WCJ issued the F&O and an Opinion on Decision on March 22, 2021.

DISCUSSION

I.

Labor Code section 5813[4] authorizes sanctions for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Lab. Code, § 5813(a); Cal. Code Regs., tit. 8, § 10421(a).) WCAB Rule 10421 defines such actions or tactics to "include actions or tactics that result from a willful failure to comply with a statutory or regulatory obligation, that result from a willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board, or that are done for an improper motive or are indisputably without merit." (Cal. Code Regs., tit. 8, § 10421(b).) Such actions or tactics include the filing of a legal document without reasonable justification, executing a declaration or verification to any petition, pleading or other document filed with the WCAB that contains "false or substantially false statements of fact," "statements of facts that are substantially misleading" or "substantial misrepresentations of facts," for which a reasonable excuse is not offered or the offending party has demonstrated a pattern of such conduct. (Cal. Code Regs., tit. 8, § 10421(b)(2), (b)(5)(A)(i), (b)(5)(A)(ii), (b)(5)(A)(iii), (b)(5)(B).)

Section 5813 and WCAB Rule 10421 provide the WCJ with discretion to levy sanctions on parties whose filings are indisputably without merit, for bad faith actions and tactics, and for other

[4] All further statutory references are to the Labor Code, unless otherwise stated.

misconduct. (Lab. Code, § 5813; Cal. Code. Regs., tit. 8, § 10421; *Runnion v. Workers' Comp. Appeals Bd.* (1997) 59 Cal.App.4th 277, 287 [62 Cal.Comp.Cases 1511] (*Runnion*) [WCAB may "properly sanction [attorney] for bad faith actions and for trifling with the workers' compensation proceedings"].) Sanctions may be ordered "after written application by the party seeking sanctions or upon the appeal board's own motion." (Lab. Code, § 5813(b).) Before the WCJ may impose sanctions and costs, the alleged offending party or attorney must be given notice and an opportunity to be heard. (Cal. Code Regs., tit. 8, §§ 10421(a), 10832(a)(3).) WCAB Rule 10832 provides, in relevant part, that the WCAB "may issue a notice of intention for any proper purpose, including . . . [s]anctioning a party." (Cal. Code Regs., tit. 8, § 10832(a)(3).)

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) The "essence of due process is simply notice and the opportunity to be heard." (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd*. (*McKernan*) (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986].) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties' rights to due process. (*Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584], citing *Rucker*, *supra*, at 157-158.) Due process is satisfied when the procedure that was followed ensures fundamental fairness, which includes notice that apprises the party of the pendency of the action and an opportunity to present objections. (*Arnett v. Kennedy* (1974) 416 U.S. 134 [94 S.Ct. 1633, 40 L.Ed.2d 15]; *Withrow v. Larkin* (1975) 421 U.S. 35 [95 S.Ct. 1456, 43 L.Ed.2d 712], *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568; *Fortich v. Workers Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449 [56 Cal.Comp.Cases 381]; cf. *Mays v. City of Los Angeles* (2008) 43 Cal.4th 313; *Newman v. Burgin* (1st Cir. 1991) 930 F.2d 955, 961.) In the context of an order for sanctions, due process may be satisfied when a party to a WCAB proceeding receives written notice of the WCJ's intention to impose sanctions and has an opportunity to oppose them through written objection. (See *Escamilla v. Workers' Comp. Appeals Bd.* (*Crumpton*) (2008) 73 Cal.Comp.Cases 280, 282-283 [writ den.]; Cal. Code Regs., tit. 8, § 10832(a)(3).)

Here, although sanctions against lien claimant and Escamilla were requested in each of defendant's three responses, that issue was omitted from the issues list for trial. (Defendant's

2/10/17 Response, at p. 5; Defendant's 10/30/17 Response, at pp. 4-6; Defendant's 3/2/18 Response, at pp. 5-6; MOH of 11/30/20.) Moreover, the WCJ did not issue a notice of intention (NIT) to impose sanctions on lien claimant, before ordering sanctions against lien claimant under section 5813. A sanction may be imposed by a WCJ on his own motion, provided the party receives notice and an opportunity to respond through a written objection. (See *Crumpton, supra,* 73 Cal.Comp.Cases at 282-283.) In the absence of such notice, the sanction cannot stand. (*Jameson v. Browns*, 2012 Cal. Wrk. Comp. P.D. LEXIS 137, 12.) Here, the WCJ's failure to provide notice to lien claimant of his intention to impose sanctions deprived lien claimant of due process of law, and we will rescind the sanctions orders.

Turning to the specific sanctions ordered against lien claimant, even if we were not rescinding the findings of sanctions against lien claimant, sanctions for "failure to meet and confer" are without a legal basis. The meet and confer requirement in the Code of Civil Procedure section 2019.030, cited in the WCJ's Report, is not applicable to this case. (Code Civ. Proc., § 2019.030(a) and (b).) Section 2019.030 requires that a "meet and confer declaration under Section 2016.040" be filed with a motion for a protective order, when such a motion is filed alleging that the "discovery sought is unreasonably cumulative or duplicative" or "the selected method of discovery is unduly burdensome or expensive" and requesting that the court "restrict the frequency or extent of use of a discovery method provided in Section 2019.010." (*Ibid*.) Here, there was no such discovery request pending, but rather, a petition for costs and sanctions, regarding a Notice in Lieu of Subpoena. (Third Petition for Sanctions). Thus, the "meet and confer" provision of section 2019.030 in the Code of Civil Procedure is not a valid basis for sanctions in this matter.

More importantly, section 5708 provides that:

> All hearings and investigations before the appeals board or a workers' compensation judge are governed by this division and by the rules of practice and procedures adopted by the appeals board. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. . . .
> (Lab. Code, § 5708.)

Section 5709 states that:

> 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. (Lab. Code, § 5709.)

Therefore, because the WCAB is not bound by the Code of Civil Procedure, reliance on a violation of the Code of Civil Procedure as a basis for sanctions is not appropriate.

II.

Lien claimant requested reconsideration of the WCJ's findings and orders denying the requests for costs and sanctions in each of his six petitions. (Petition, at pp. 3-16.) In evaluating lien claimant's contentions, we rely on two fundamental principles. First, under section 5813 and WCAB Rule 10421, sanctions are discretionary; under no circumstances is a WCJ required to order costs or sanctions. (Lab. Code, § 5813 (a) [the WCJ "*may* order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees and costs…" and a WCJ "*in its sole discretion*, may order additional sanctions…" (emphasis added)]; Cal. Code Regs., tit. 8, § 10421(a); *Runnion, supra,* 59 Cal.App.4th at 287; *Avance v. Workers' Compensation Appeals Bd.* (2004) 69 Cal.Comp.Cases 1, 5 ["The WCAB also reasonably exercised its discretion under section 5813 in choosing not to impose sanctions…"].) Second, the burden of proof rests upon the party or lien claimant holding the affirmative of the issue, who must prove all issues by a preponderance of the evidence. (Lab. Code, §§ 5705, 3202.5.) Relying on these principles, and as further explained below, we conclude that the WCJ did not abuse his discretion when he concluded that none of lien claimant's petitions demonstrated an adequate basis for sanctions.

Lien claimant contended, in the First Petition for Sanctions and in Part I of the Petition, that the November 4, 2014 C&R was not properly served on Escamilla. (First Petition for Sanctions, pp. 2-3; Petition, at pp. 3-5.) In response, the WCJ explained,

> Defendant's failure to immediately serve the November 4, 2014 compromise and release did not raise to the level of sanctions. Such a failure could not have been intended to delay the case because the underlying case was still unresolved. (Report, at p. 3.)

We note, too, that the C&R was properly served on lien claimant Dr. Silver, as required. (Cal. Code Regs., tit. 8, § 10702; 11/4/14 POS of the C&R, at p. 3.) The contention that sanctions should be issued against defendant for failing to serve the C&R on lien claimant's representative is without merit, because WCAB Rule 10702 contains no requirement that a lien claimant's representative be served. (*Ibid*.)

The F&O included a finding that on January 13, 2015, when lien claimant's First Petition for Sanctions was filed, the underlying case was unresolved and lien claimant "was not yet a party and lacked standing to file a Petition." In the Petition, lien claimant contended that he was a party at that time, pursuant to WCAB Rule 10305(o)(3) (Cal. Code Regs., tit. 8, § 10305(o)(3)), or, in the alternative, a lien claimant has a right to be served with a proposed C&R, even if he is not a party. (Petition, at p. 3.) In response, the WCJ explained:

> The statement regarding the lien claimant's standing as a party was made in reference to a petition for penalties being filed by a non-party and that such a petition can simply be dismissed or unfiled. However, the undersigned WCJ opined on the merits of the petition in his opinion on decision. (Report, at p. 3.)

We agree with lien claimant that he had party status on the date in question and we will therefore rescind the WCJ's finding that lien claimant was not yet a party. The WCJ correctly explained, however, that lien claimant's party status on January 13, 2015, is immaterial, because the WCJ ruled on the merits of the First Petition for Sanctions. (Report, at p. 3.) Moreover, as noted above, lien claimant was, in fact, served with the proposed C&R, as required, and thus there is no basis for sanctions.

The First Petition for Sanctions and Part I of the Petition also alleged that defendant breached its duty to make a good faith effort to contact the lien claimant prior to the submission of the C&R and failed to make good faith efforts to settle the matter. (First Petition for Sanctions, at pp. 3-6; Petition, at pp. 3-7.) In response, the WCJ found that there were no grounds for sanctions because "good faith settlement efforts were made by defendant." (Report, at p. 3.) The WCJ summarized the relevant evidence and his findings, as follows:

> Pursuant to the Compromise and Release, the defendant contacted Dr. Silver's office and contacted Legal Service Bureau. (Compromise and Release dated November 4, 2014, at page 13.) Mr. Escamilla testified that he does not speak to the receptionist about incoming calls because the calls are supposed to be documented in the case management system's notes. (Further Minutes of Hearing and Summary of Evidence dated January 11, 2021, hereinafter MOH1-11-21, at 4:13.) Mr. Escamilla later clarified his statement and testified "It is solely the decision of the person answering the phone as to put a note in Time Matters." (Minutes of Hearing (Further) and Summary of Evidence dated March 15, 2021, hereinafter MOH3-15-21, at 2:9.) Mr. Escamilla testified he did not recall the identity of his receptionist in the 90 days prior to April 2012 and has had four receptionist[s] since that time. (MOH1-11-21 at 4:12.) Therefore, Mr. Escamilla, does not have personal knowledge as to whether or not a phone call was made by Gary Paul Andre, Esquire to his office. The undersigned found the lien affidavit on

> page 13 of the November 4, 2014 compromise and release, made around of the time of the call, more credible then Mr. Escamilla's belief that lack of a note in his case management software is proof a phone call was not made.
>
> Furthermore, Exhibit I is a letter dated November 21, 2012 to Mr. Escamilla requesting a demand. Mr. Escamilla testified that he recalled making a demand prior to receiving the November 21, 2012 letter and that he interpreted the letter to mean that Defendants were unwilling to engage in good faith settlement negotiations. (MOH1-11-21 at 4:24-5:2.) It appears that Lien Claimant and Defendant were negotiating and it was Dr. Silver's decision to terminate negotiations on the grounds his first demand was not accepted.
> (Report, at pp. 3-4.)

As the party with the affirmative of the issue, lien claimant carried the burden of proof to establish by a preponderance of the evidence that its claims of wrongdoing by defendant were true. (Lab. Code, §§ 5705, 3202.5.) Here, the evidence cited by the WCJ demonstrates that lien claimant failed to prove that defendant breached its duty to make a good faith effort to contact lien claimant prior to the submission of the C&R and failed to prove that defendant did not make good faith settlement efforts. (Report, at pp. 3-4.) Thus, the record supports the WCJ's findings. Accordingly, we agree with the WCJ that lien claimant's affirmative burden was not met and that no sanctions were warranted pursuant to the First Petition for Sanctions.

In lien claimant's Second Petition for Sanctions, and in part II of its Petition, lien claimant contended that defendant should be sanctioned for failure to appear at the August 15, 2016 noticed settlement conference. (Second Petition for Sanctions, at pp. 2-5; Petition, at pp. 7-8.) In response, the WCJ concluded that lien claimant "did not meet its burden to show Liberty Mutual received notice…of the lien conference on August 15, 2016." (Report, at p. 4.) The WCJ explained,

> …The minutes of hearing dated April 5, 2016, EAMS Doc ID 59958954, was for a lien conference that was continued to August 15, 2016. The minutes state "notice to Δ". Since notice was designated [to] a party, the board would not have sent notice. The communications section in EAMS confirms no board notice was sent. It is possible that neither defendant sent notice because there were two defendants at the lien conference on April 5, 2016 and notice to Δ was ambiguous. Dr. Silver did not enter a Notice of Lien Conference served by a party into evidence.
>
> …Here, Mr. Escamilla … requested defendant be sanction[ed] because he received notice from the board and did not appear. Mr. Escamilla knew, or could have looked in his case management system to confirm no notice was received before he made the statement.
> (Report, at pp. 5-6.)

We agree. The record includes no adequate evidence that defendant was noticed for the August 15, 2016 lien conference. A party cannot be sanctioned for failure to appear at a lien conference or a hearing for which it received no notice. (Cal. Code. Regs., tit. 8, §§ 10873(a)(4) [Notice of a lien conference must be served on the parties]; 10880(b) ["Where a… defendant served with notice of a lien trial fails to appear…the workers' compensation judge may" dismiss the lien claim after issuing an NIT, hearing the evidence and determining the matter after noticing all parties, or deferring the issue of the lien]; 10750(a) ["Notice shall be served on all parties…"]; 10421(a) [Before issuing an order for sanctions, "the alleged offending party or attorney must be given notice and an opportunity to be heard"].) As the record contained no adequate evidence that defendant was served with notice of the lien conference, the WCJ correctly concluded that lien claimant's Second Petition for Sanctions failed to establish any basis for sanctions.

In the Third Petition for Sanctions, and part III of the Petition, lien claimant argued that sanctions should be issued because defendant served "an invalid and frivolous…Notice in Lieu of Subpoena." (Third Petition for Sanctions, at pp. 3-4; Petition, at pp. 9-11.) In response, the WCJ found that lien claimant "did not meet his burden to show defendant's issuance of a notice in lieu of subpoena was done in bad faith." (Report, at p. 6.) The WCJ explained,

> The Issuance of a Notice in Lieu of Subpoena is a legitimate discovery action not limited by the Labor Code. . . . It is not evidence that the Notice in Lieu of Subpoena was filed for the sole purpose of harassing Dr. Silver.
> (Report, at p. 6.)

We agree with the WCJ that there is insufficient evidence in the record to support lien claimant's contention that the Notice in Lieu of Subpoena was frivolous or filed for the purposes of harassment. We also point out that WCAB Rule 10642 specifically permits "[a] notice to appear or produce in accordance with Code of Civil Procedure section 1987 . . . in proceedings before the Workers' Compensation Appeals Board." (Cal. Code Regs., tit. 8, § 10642.) We discern no error in the WCJ's determination that sanctions were not warranted.

In response to the lien claimant's Fourth Petition for Sanctions, as well as part IV of its Petition, wherein sanctions were requested for delayed provision of medical records, the WCJ found that "defendant's delay in serving medical reports on Dr. Silver did not raise to the level of sanctions." (Fourth Petition for Sanctions; Petition, at pp. 11-13; Report, at p. 7.) The WCJ found that "Defendant's argument that he required a court order to serve medical reports" was not frivolous. (Report, at p. 7.) The WCJ explained, that "Mr. Escamilla shows a great deal of

independence in prosecuting the liens of David Silver, M.D." and thus, Escamilla's actions "can reasonabl[y] lead to "Defendants thinking …[Silver's] liens had been assigned to Legal Service Bureau, which would mean an order is required." (*Ibid*.) Although lien claimant alleged that the WCJ found that defendant willfully failed to comply with regulatory requirements to serve all medical reports, in fact, the record shows that the WCJ made no such finding, but rather, simply ordered defendant "to serve all medicals" in their possession to lien claimant. (MOH of 11/7/17, at p. 2.) Moreover, the record demonstrates that the medical records in question were timely provided by defendant to lien claimant, after the WCJ ordered defendant to provide them. (1/5/18, Defendant's Letter to Escamilla; MOH of 11/7/17, at p. 2.) The WCJ found, further, that "Defendant's response to the petition for sanctions states there was confusion about the need for an order" and that "there are multiple defendants and Dr. Silver failed to show the demand was sent to a specific defendant." (*Ibid*.) We agree with the WCJ that, given the factual scenario here, there was no basis for sanctions against defendant for delayed provision of medical records.

In lien claimant's Fifth and Sixth Petitions for Sanctions and parts V and VI of its Petition, lien claimant contended that defendant's representative, Miller, failed to tell the WCJ on March 6, 2018 that Escamilla was ill, which constituted "improper conduct" and "bad faith actions or tactics," and violated rules 5-200 and 3.200 of the Rules of Professional conduct and section 6068(d) of the Business and Professions Code. (Fifth Petition for Sanctions; Sixth Petition for Sanctions Petition, at pp. 13-15.) In response, the WCJ noted that the burden of proof rests on the party holding the affirmative of an issue and concluded that "Silver failed to show Tyler Miller willfully withheld information from the court." (Report, at pp. 7-8; Lab. Code, § 5705.) The WCJ is correct. As he explained,

> It is Dr. Silver's contention that Tyler Miller failing to disclose to the Court that his opposing representative had contacted him on March 6, 2018 to advise him that he was ill and unable to attend the hearing on March 7, 2018 and this caused a notice of intent to dismiss issue. To support this contention, Dr. Silver submitted an email dated March 6, 2018 at 6:51 P.M. (Exhibit 7.) Pursuant to EAMS, the March 7, 2018 lien conference was at 8:30 A.M. Since the email was sent after business hours and the conference was first thing in the morning, the court finds it unlikely, less than 50%, Defendant was aware Dr. Silver's representative had good cause not to appear. Dr. Silver failed to meet his burden of proof.
> (Report, at pp. 7-8.)

We agree. The evidence supports the WCJ's conclusion that lien claimant did not meet its burden of proof in its Fifth or Sixth Petitions for Sanctions. Contrary to lien claimant's contentions, there

was no basis for sanctions for bad faith actions or tactics, pursuant to section 5813, and no basis for finding that defendant violated the prohibition on misleading a judicial officer in section 6068(d) of the Business and Professions Code and rule 5-200 of the Rules of Professional conduct, nor the prohibition in Rule 3.200 of the Rules of Professional Conduct against "bring[ing] an action… without probable cause and for the purpose of harassing or maliciously injuring any person."

Accordingly, for the reasons indicated in the Report and discussed above, we agree with the WCJ's decision that no sanctions against defendant are warranted. (Report at pp. 3-8.) Thus, we will deny the First, Second, Third, Fourth, Fifth, and Sixth petitions for costs and sanctions.

III.

The WCJ recommended that we issue a notice of intent to issue further sanctions against lien claimant, for a material misrepresentation in the Petition for Reconsideration. (Report, at pp. 4-6 and 9.) Lien claimant alleged that defendant Liberty Mutual received "Board notice of the August 15, 2016 Lien Conference." (Petition, at pp. 7-8.) The WCJ found that lien claimant did not meet his burden to show that such notice had been provided. (Report, at pp. 4-6.) The WCJ explained that sanctions may be ordered, "for misrepresentation of the facts or misstatement of the law" or violation of an attorney's duty of candor. (*Id*., at p. 5, citing Lab. Code, § 5902; *Lucena v. Diablo Autobody* (2000) 65 Cal.Comp.Cases 1425 (significant panel decision); Rules Prof. Conduct, rule 5-200; Bus. & Prof. Code, § 6068(d); and Cal. Code Regs., tit. 8, § 10421(b).) The WCJ explained that Escamilla's "statement in the petition that the parties received Board notice is the basis for a request for sanctions and a material misrepresentation." (*Id*., at p. 6.)

We decline to impose sanctions at this time. The WCJ may impose sanctions, after an NIT is issued and due process is satisfied, if he determines that any of lien claimant's conduct constituted a sanctionable bad faith action. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421(b)(5)(A)(i) and (ii).)

Accordingly, as our Decision After Reconsideration, we will rescind the March 22, 2021 F&O and substitute new findings and orders that lien claimant's petitions for costs and sanctions are denied.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on March 22, 2021 by the WCJ are **RESCINDED** and **SUBSTITUTED** with new Findings and Orders as provided below:

FINDINGS OF FACT

1. Applicant Vincent John Downey, while employed during the period March 16, 2001 to August 15, 2002, as a film developer/printer, Occupational Group No. 230, at North Hollywood and Hollywood, California, by Technicolor, Inc., Consolidated Film Industries and Deluxe Labs, claims to have sustained injury arising out of and in the course of employment to headaches, back, neck, arms, and internal.

2. At the time of injury, the employer's workers' compensation carriers were Pacific Insurance administered by Sedgwick from March 16, 2001 to December 15, 2003 and Federal Insurance/Liberty for Deluxe Lab.

3. Lien claimant David S. Silver, M.D., failed to meet his burden of proof regarding each of his six petitions for costs and sanctions, dated January 13, 2015, August 22, 2016, October 16, 2017, November 9, 2017, March 15, 2018 and June 11, 2018, and thus no adequate basis for sanctions against defendant has been proven, and no such sanctions shall be ordered.

ORDER

IT IS ORDERED THAT the six petitions for costs and sanctions filed by lien claimant on January 13, 2015, August 22, 2016, October 16, 2017, November 9, 2017, March 15, 2018 and June 11, 2018, are denied.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 16, 2024

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

DAVID SILVER, M.D.
LEGAL SERVICE BUREAU
PEARLMAN, BROWN AND WAX
COST FIRST CORP

MB/*ara*

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