

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

ANTHONY GILLILAND, *Applicant*

vs.

WALMART, INC.;
ACE AMERICAN INSURANCE CO., as administered by SEDGWICK CMS, *Defendants*

**Adjudication Numbers: ADJ12880191; ADJ15709298
Pomona District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Lien claimant Medland Medical seeks reconsideration of the Joint Findings of Fact issued by a workers' compensation administrative law judge (WCJ) on August 12, 2024, wherein the WCJ found in pertinent part in Case No. ADJ15709298 that applicant sustained injury to the right knee while employed by defendant as a retail department manager on December 23, 2023 and in Case No. ADJ12880191 that applicant sustained injury to his left eye and claims to have sustained injury to his right knee; that lien claimant failed to appear at trial; that lien failed to submit any evidence to sustain its burden of proof; and that lien claimant failed to meet the burden of proof as to the reasonableness and necessity of the med-legal reporting and the medical treatment and billing. The WCJ ordered that lien claimant take nothing.

Lien claimant contends that its due process rights were violated when the WCJ would not allow its hearing representative to appear electronically at the lien trial on June 11, 2024.

We did not receive an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have reviewed the record, and the allegations of the Petition and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant the

Petition for Reconsideration, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and a new decision consistent with this opinion.

BACKGROUND

We will briefly review the relevant facts.

Applicant sustained an injury to his right knee while employed by defendant as a retail department manager on December 6, 2019 (Case No. ADJ15709298).

Defendant stipulated at trial on October 25, 2023, in Case No. ADJ12880191 that applicant sustained injury to his left eye while employed by defendant as a retail department manager on December 23, 2019, and claims to have sustained an injury to his right knee.

Previously, the parties entered into a Compromise and Release, which provided that applicant claimed injury to the body parts of cervical, thoracic, and lumbar spine; bilateral upper extremities; knees; neuro; and sleep on December 23, 2019. The parties also listed an "unassigned" case number for an injury of December 6, 2019 to the knees. In Paragraph 9, as relevant herein, they stipulated that applicant's "right knee issues" were due to a December 6, 2019 date of injury. The C&R was signed by applicant on January 10, 2022, and by defendant on January 12, 2022. It was filed at the WCAB on January 27, 2022.

On January 25, 2022, applicant filed an Application for Adjudication in Case No. ADJ15709298, claiming injury to his knee while employed by defendant on December 6, 2019.

On February 7, 2022, Medland Medical filed its lien in Case No. ADJ12880191 and on October 11, 2023, in Case No. ADJ15709298.

On April 7, 2022, the parties filed an Addenda to the C&R, which was only signed by applicant and his attorney, and not by defendant. The parties made no changes to the body of the C&R and did not add the number for Case No. ADJ15709298 to the body of the C&R. The only mention of ADJ15709298 is in the Addenda, which was not signed by defendant. Notably, defendant did not resolve the issue of injury to applicant's left eye by way of the C&R. An Order approving the C&R issued on August 20, 2022. Lien claimant's reporting and treatment occurred prior to the approval of the C&R on August 20, 2022.

On November 4, 2022, lien claimant's non-attorney hearing representative filed a Notice of Representation pursuant to WCAB Rule 10774.5 (Cal. Code Regs., tit 8, § 10774.5).

On February 5, 2024, we issued an “Opinion and Order Granting Reconsideration and Decision After Reconsideration,” wherein we rescinded the WCJ’s Finding of Fact of November 15, 2023, and returned the matter to the WCJ for further proceedings. At the conclusion of our Opinion, we stated that:

Thus, upon return, the cases should be consolidated, and the parties should proceed with a mandatory settlement conference, and if necessary, a trial on the issue of the reasonableness and necessity of the medical treatment and medical legal reporting that is the basis for lien claimant’s lien. As defendant has wasted substantial time in its meritless arguments as to “form” rather than proceeding to [the] “substance” of the lien, it may be prudent for defendant to enter into settlement negotiations forthwith.

On March 4, 2024, a joint request was made for a continuance of the mandatory settlement conference (MSC), and the WCJ continued the matter to March 25, 2024.

On March 25, 2024, defendant’s hearing representative requested a continuance, and the matter was set for a MSC on April 29, 2024.

On April 29, 2024, the WCJ granted a joint request for a continuance of the MSC, but the matter was set for a lien trial for June 11, 2024.

On June 11, 2024, the matter proceeded to a lien trial. The “Minutes of Hearing and Order of Consolidation” (MOH) state:

LET THE MINUTES REFLECT that this matter was scheduled for an 8:30 lien trial. It is now 10:45 a.m., and there is no representative present today on behalf of Lien Claimant Medland Medical.

LET THE MINUTES FURTHER REFLECT that Hearing Representative Ms. Carolyn Davis for Medland Medical called in this morning in an effort to proceed with the lien trial. Ms. Davis presented to the ADA coordinator, Mr. Cesar Castillo, this morning with notice of a claimed ADA accommodation. The Court did inquire with Ms. Davis as to the reason why her notice of accommodation was not filed or submitted to the ADA coordinator 14 days prior to the scheduled hearing, as is required.

The only explanation given by Ms. Davis was she was not feeling well today, and she did acknowledge to The Court that she understood submitting her accommodation today, June 11, 2024, on the date of the scheduled lien trial, was not in timely compliance with the rule.

The Court did inquire with the ADA coordinator to confirm and was advised by Mr. Castillo that he did, in fact, receive notice of the accommodation just this morning.

Therefore, the request made by Ms. Davis to participate in the lien trial virtually by phone was denied.

LET THE MINUTES FURTHER REFLECT that The Court, again, gave the parties an opportunity to discuss the issues as a means to determine if this matter could be resolved, and ultimately The Court was advised they are not able to settle the lien. The Court did inquire with Ms. Davis over the phone whether there was another representative on behalf of Medland Medical who could be present physically to complete the lien trial. Ms. Davis requested some time to confer to determine if she could get a hearing representative to appear at the Pomona Board today.

When The Court followed up with the parties on that issue, Ms. Davis indicated to The Court that she was not feeling well and that she had called her daughter to come give her assistance. It was at that point that Ms. Davis was told to leave the call, the conference call was terminated, and Ms. Davis was advised to take care of what she needed to do to care for herself. There will be no further participation today by the lien claimant.

There have been no in-person appearances today on behalf of the lien claimant, and the issue of a continuance was addressed with the parties. Defense representative Mr. McNeely, since he has appeared here multiple times, did not request a continuance and wanted to proceed with the lien trial today, and that request was granted by The Court.

The issues in Case Number ADJ15709298, were listed as follows:

1. Reasonableness and necessity of the med-legal of Medland Medical.
2. Reasonableness and necessity of the medical treatment and billing of Medland Medical.
3. Defense raises Labor Code Section 5813, sanctions against Medland Medical. The WCJ deferred the issue of sanctions without prejudice.
4. Defense raises Labor Code Section 4903.5, contending the lien claim was not filed timely in ADJ15709298.
5. Defense contends the medical report is not substantial medical evidence.
6. Defense contends the med-legal services occurred prior to knowledge of the December 6, 2019, injury.

The issues in Case Number ADJ12880191 were listed as follows:

1. Reasonableness and necessity of the med-legal of Medland Medical.
2. Reasonableness and necessity of the medical treatment and billing of Medland Medical.
3. Defense raises Labor Code Section 5813, sanctions against Medland Medical. The WCJ deferred the issue of sanctions without prejudice.
4. Defense contends the medical report is not substantial medical evidence.

DISCUSSION

I.

Former Labor Code¹ 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 September 18, 2024 and 60 days from the date of transmission is Sunday, November 17, 2024. The next business day that is 60 days from the date of transmission is Monday, November 18, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Monday, November 18, 2024, so that we have timely acted on the petition as required by 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

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

² 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.

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 September 18, 2024, and the case was transmitted to the Appeals Board on September 18, 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).

II.

We begin by observing that all parties, and the WCJ, are bound by the WCAB Rules, and only the Appeals Board may establish adjudication procedures. (Lab. Code, § 5503(b) [“The appeals board shall establish uniform court procedures and uniform forms for all other proceedings of the appeals board.”] In her decision to proceed to trial without lien claimant’s representative, the WCJ referred to a “14 day rule” as a basis to deny lien claimant’s representative’s request to appear electronically. Our review of our Rules reveals that there is no such “14 day rule.” Under WCAB Rules 10815 and 10816 (Cal. Code Regs., tit. 8, §§ 10815, 10816), hearings may take place electronically and parties may appear electronically. If a WCJ determines that there is good cause, such as illness, a WCJ may allow a party to appear electronically even if the request is made on the day of trial and especially when, as here, the requesting party has diligently appeared at the proceedings. To the extent that the WCJ relied on a “14 day rule,” her decision is without merit because the so called “14 day rule” is an underground regulation and not enforceable. (*Rea v. Workers’ Comp. Appeals Bd. (Milbauer)* (2005) [127 CalApp.4th 625 [70 Cal.Comp.Cases 312].) As set forth in *Milbauer*, enforcement of rules that are not properly adopted by way of the rule-making process in sections 5307 and 5307.4 violates due process.

“All defendants and lien claimants shall appear at all lien trials, either *in person* or by attorney or *non-attorney representative*. . . .” (Cal. Code Regs., tit. 8, § 10880(a).) On June 11, 2024, Ms. Davis called into the conference line the morning of the lien trial and spoke with the WCJ and with defendant’s attorney. Thus, the WCJ’s conclusion that lien claimant made no appearance whatsoever seems disingenuous. Rather than denying lien claimant’s lien in its entirety, the WCJ could have issued a Notice of Intent (NIT) and provided Ms. Davis with an

opportunity to present evidence as to her reasons for her inability to participate in person at the hearing on June 11, 2024.

Pursuant to WCAB Rule 10832:

(a) The Workers' Compensation Appeals Board may issue a notice of intention for any proper purpose, including but not limited to:

(1) Allowing, disallowing or dismissing a lien;

(Cal. Code Regs., tit. 8, § 10832.)

Pursuant to WCAB Rule 10880:

(b) Where a lien claimant or defendant served with notice of a lien trial fails to appear either in person or by attorney or non-attorney representative, the workers' compensation judge may:

(1) Dismiss the lien claim after issuing a 10-day notice of intention to dismiss with or without prejudice, or

(2) Hear the evidence and, after service of the minutes of hearing and summary of evidence that shall include a 10-day notice of intention to submit, make such decision as is just and proper, or

(3) Defer the issue of the lien and submit the case on the remaining issues.

(c) If the workers' compensation judge defers a lien issue, upon the issuance of a decision on the remaining issues, the workers' compensation judge shall:

(1) Issue a 10-day notice of intention to order payment of the lien in full or in part, or

(2) Issue a 10-day notice of intention to disallow the lien, or

(3) Continue the lien issue to a lien conference.

(Cal. Code Regs., tit. 8, § 10880.)

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both 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].) It is one of the most basic tenets of jurisprudence that a party must be provided notice and an opportunity to be heard before its case is dismissed. (See, e.g., *San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986] [essence of due process is notice and opportunity to be heard]; *Molina v. Lopez* (December 4, 2017, ADJ7464285) 2017 Cal. Wrk. Comp. P.D. LEXIS 568, *19.) As noted above, prior to dismissing a case, a notice of intention (NIT) to dismiss must be issued. (Cal. Code Regs., tit. 8, §§ 10832,

10875(b), 10880, 10888.) The NIT must clearly state the reason(s) for dismissal, so as to provide the parties with adequate notice and a meaningful opportunity to respond. The basis for the NIT must also be supported by the evidence. (See, e.g., *Terrazas v. S & S Foods, LLC* (March 27, 2023, ADJ14315608) 2023 Cal. Wrk. Comp. P.D. LEXIS 77, *6-8 [NIT contained language “too vague to constitute proper notice or to ensure due process.”].) If an NIT is issued in violation of due process, the corresponding order issued thereafter is invalid.

Here, lien claimant’s representative appeared at all the noticed hearings and in contrast to defendant, had not sought a continuance. Yet, the WCJ excused her from the hearing, and instead of continuing the lien trial to another date, the WCJ proceeded even though lien claimant was not present. Thus, lien claimant’s due process rights were violated in multiple ways: by the WCJ’s reliance on an “unofficial” rule, by the WCJ’s failure to issue an NIT, and by the WCJ’s intentional choice to proceed without lien claimant.

Furthermore, when the WCJ found in the August 12, 2024 Findings of Fact that lien claimant did not submit evidence, it was a clear error. According to the Minutes of Hearing from the October 19, 2023 trial, lien claimant’s Exhibits 1-9 were identified and admitted into evidence. Exhibits 1-9 consist of medical bills by Medland Medical, the report of the treating physician, and other medical reports, therefore it is disingenuous at best for the WCJ to assert that lien claimant failed to submit any evidence in support of the lien claim it filed.

It is clear that the WCJ disregarded the lien claimant’s evidence. A WCJ is required to “. . . make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order, or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (Lab. Code, §§ 5502, 5313; Cal. Code Regs., tit. 8, § 10761; see also *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Bd. en banc).) The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*), citing *Evans v. Workmen’s Comp.* Appeals Bd. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

Here, we returned this case to the WCJ on February 5, 2024 with clear instructions to address the evidence in the record of proceedings, but based on the Findings of Fact issued on August 12, 2024, the WCJ once again disregarded lien claimant's evidence. Since there is no discussion regarding the evidence we cannot determine why lien claimant failed to meet its burden. Yet again, upon return, *the WCJ must consider the admitted evidence and explain whether lien claimant meets its burden to show that the medical treatment and medical-legal reporting was reasonable and necessary.* Lien claimant should also be given the opportunity to appear on the record and the opportunity to submit additional evidence if needed.

III.

Pursuant to WCAB Rule 10628, when a party is represented, service is generally required only upon a party's representative and not upon the party itself, and the WCAB is required to serve all parties of record with any final order, decision or award issued by it on a disputed issue after submission. (Cal. Code Regs., tit. 8, §§ 10625(a), 10628(a).) Pursuant to WCAB Rule 10628(d), "[i]f the Workers' Compensation Appeals Board electronically serves a document, the proof of electronic service shall be made by endorsement on the document, setting forth the fact of electronic service on the persons or entities listed on the official address record as required by rules 10400 and 10401 and the date of electronic service." (Cal. Code Regs., tit. 8, § 10628(d).)

Here, petitioner asserts that the WCJ failed to serve the lien claimant and lien claimant's hearing representative with the Joint Findings of Fact issued on August 12, 2024. A review of the proof of service confirms that this is indeed the case, and this failure to serve the decision properly is yet another violation of due process by the WCJ.

Accordingly, we grant lien claimant's Petition for Reconsideration, rescind the Joint Findings of Fact, and return this matter to the WCJ.

For the foregoing reasons,

IT IS ORDERED that lien claimant's Petition for Reconsideration of the August 12, 2024 Joint Findings of Fact is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that Joint Findings of Fact issued by the WCJ on August 12, 2024 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 18, 2024

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

**TESTAN LAW
MEDLAND MEDICAL**

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*