WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BERTHA PEREZ, *Applicant*

vs.

WORLD VARIETY PRODUCE;
ZURICH NORTH AMERICA, *Defendants*

Adjudication Number: ADJ7447035
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration sought by lien claimant Monrovia Memorial Hospital (lien claimant) in order to further study the legal and factual issues.[1] We now issue our Opinion and Decision After Reconsideration.

Lien claimant seeks reconsideration of the "Findings of Fact, Order of Restitution, and Order Imposing Sanctions" (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 8, 2019. By the F&O, the WCJ found that lien claimant was unjustly enriched by a payment obtained from defendant for medical services while said payment in the process of being litigated by the parties. The WCJ thus ordered that lien claimant make restitution to defendant. The WCJ further found that lien claimant and its representative employed bad faith litigation tactics that resulted in unwarranted delays, increased litigation costs, and a waste of court resources and time in violation of Labor Code section 5813[2] and Workers' Compensation Appeals Board (WCAB) Rule 10561.[3] As a result, the WCJ ordered that lien claimant and its representative jointly and severally pay a $2,500.00 sanction to the WCAB. The WCJ also awarded costs and fees to defendant to be determined by subsequent court order.

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[1] Commissioner Deidra E. Lowe, who was on the panel that issued the previous decision in this case, no longer serves on the Appeals Board. Another panelist was appointed in her place.

[2] All further statutory references are to the Labor Code unless otherwise noted.

[3] WCAB Rule 10561 was renumbered as WCAB Rule 10421, effective January 1, 2020.

Lien claimant contends that the WCJ erred in ordering restitution because there is no evidence that it engaged in improper conduct resulting in unjust enrichment. Lien claimant also contends that the WCJ should not have ordered it to pay sanctions, costs, and fees.

We received an answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

We have considered the allegations in the Petition for Reconsideration, the answer, and the contents of the WCJ's Report with respect thereto. Based upon our review of the record, and for the reasons discussed below, we will affirm the WCJ's November 8, 2019 F&O.

BACKGROUND

Our Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued March 25, 2019 provides the following relevant factual background:

> Applicant sustained injury to her back while working for defendant as a produce packer on August 27, 2010.[4] On May 1, 2011, she underwent surgery, and lien claimant provided defendant with an invoice for $67,497.95. (Lien Claimant's Exhibit 2, Bill Operative Report, May 1, 2011.) Pursuant to the recommendations made by its bill review company, defendant paid lien claimant $15,857.48. (Lien Claimant's Exhibit 1, Explanation of Review, August 19, 2011.) On October 2, 2012, lien claimant filed its lien. (Notice and Request for Allowance of Lien, October 2, 2012.)
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> On May 6, 2015, a WCJ ordered lien claimant and defendant to forward all relevant documentation and/or evidence as to the value of the lien claimant's services to a jointly selected bill review expert, Stelzner and Kyle Consulting. (Findings and Orders, May 6, 2015, p. 2.)
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> On May 11, 2015, lien claimant served an "[e]xhibit list" on defendant and [Stelzner] and Kyle. (Proof of Service, May 11, 2015.)
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> On November 12, 2015, the jointly selected bill review expert stated that,
>
> > [lien claimant] is a long term care hospital. Pursuant to CCR 9789.22(i)(5), long term care hospitals are exempt from the inpatient hospital fee schedule and are to be 'paid on a reasonable cost basis.' As such, this provider's billing may well be exempt from the applicable fee schedules, but I note that the

[4] Applicant also claimed injury to multiple body parts through September 9, 2010 while employed in the same position (ADJ7447437). On April 2, 2013, WCJ approved a compromise and release which resolved both of applicant's claims. (Compromise and Release, April 2, 2013, Order Approving Compromise and Release, April 2, 2013.)

> provider has not submitted any evidence or documentation regarding their costs for these services.
>
> Because I do not have this type of documentation to rely on, I instead am recommending the value of the average inpatient fee schedule amount that would be paid to other hospitals in the same geographic area as MMH, for the same service on the same date of admission.
>
> Total average inpatient fee schedule allowance $11,311.49. (Findings from Stelzner and Kyle, November 12, 2015, p. 1.)

The jointly selected bill review expert indicated that a copy of the report was mailed to lien claimant at 85002 East Chapman Avenue #369, Orange, CA 92869.[5]

On March 14, 2016, the matter proceeded to a lien conference and the parties set the matter for trial. (Pre-Trial Conference Statement, March 14, 2016.) Defendant filed a petition for costs and fees in which it alleged that lien claimant did not adhere to the May 6, 2015 order and that lien claimant engaged in frivolous conduct. (Defendant's Petition for Sanctions and Costs, July 07, 2016, pp. 2-3.) Lien claimant responded to this petition and alleged that it did not object to the jointly selected expert bill reviewer's report or conduct discovery because the report was not served on their correct address. (Lien Claimant's Response to Defendant's Petition for Costs, July 5; 2016, p. 2.)

On July 8, 2016, lien claimant obtained a declaration from a bill review witness, Alex Kauffman. (Declaration of Bill Review Analysis/Testimony by Alex Kauffman, July 8, 2016, p. 2.)

On August 4, 2016, the scheduled trial date, the parties completed Minutes of Hearing, which reflect that the trial would be continued. (Minutes of Hearing, August 4, 2016.) The Minutes of Hearing reflect that defendant and "other" requested the continuance. (*Id*.) The following handwritten language also appears on the Minutes of Hearing, "L/C disputes findings of expert B/R. Will obtain declaration from expert in response to Declaration of L/C expert witness." (*Id*.)

On September 28, 2016, the WCJ took the trial off calendar for further discovery without objection. (Minutes of Hearing, September 28, 2016.) The following handwritten language appears on the Minutes of Hearing "L/C wishes to XX Bill Reviewer Depo to be set up w/i 20 days hereof." (*Id*.)

On July 25, 2017, defendant filed a petition for costs and sanctions alleging that lien claimant engaged in a bad faith tactic designed to delay proceedings because lien claimant did not depose the jointly selected bill review expert. (Petition for Costs and Sanction, July 25, 2017, p. 3.) Lien claimant responded that it decided

[5] The address for lien claimant's representative is 8502 E. Chapman Ave. #369, Orange, CA 92869.

that a deposition was not necessary. (Lien Claimant's Response to Defendant's Petition for Costs and Sanctions, August 18, 2017, p. 4.)

On August 18, 2017, the matter proceeded to trial, and the relevant issues were the lien and defendant's petition for sanctions. (Minutes of Hearing, August 18, 2017, p. 2.) The matter was submitted. (*Id*. at p. 1.)

On October 23, 2017, the WCJ vacated the order of submission and ordered that "the record be developed by lien claimant providing Stelzner and Kyle, within fifteen (15) days of service hereof, with all documentation to support its charges." (Order Vacating Submission Order, October 23, 2017, p. 1.)

Lien claimant sought removal of the WCJ's October 23, 2017 Order, and on January 9, 2018, we denied lien claimant's Petition for Removal.

On May 9, 2018, defendant filed a petition for costs, sanctions, and fees in which it alleged that lien claimant had engaged in a series of delays, violations of court orders and failures to act. (Petition for Costs and Sanctions, May 9, 2018, p. 2.)

On May 15, 2018, the parties attended a lien conference and set the matter for trial. (Pre-Trial Conference Statement, May 15, 2018.) On June 7, 2018, lien claimant withdrew its lien. (Lien Withdrawal, June 7, 2018.)

On June [14], 2018, the parties appeared for the scheduled trial. The minutes of hearing contain the following handwritten statement, "[d]efendant Zurich requests reimbursement for the $51,640.47 check issued to Monrovia Hospital on May 16, 2018 for unjust enrichment. A Petition for Reimbursement will follow. [Defendant] reserves rights for costs + sanctions." (Minutes of Hearing, June 14, 2018.) The parties completed a pre-trial conference statement and defendant described the exhibits it intended to offer at trial, which included the billing lien claimant sent to defendant, a copy of the check issued by defendant to lien claimant and defendant's explanation of review. (Pre-Trial Conference Statement, June 4, 2018, p. 7.) However, at the time of trial, the parties did not submit or admit these documents into evidence. (Minutes of Hearing, October 26, 2018, p. 2.)

On September 18, 2018, defendant filed a Petition for Restitution/Reimbursement in which it alleged that "[r]ather than provide the information to IBR as directed by the Court, the lien claimant submitted the billing again to defendant which accidentally paid it in full." (Petition for Restitution/Reimbursement, September 18, 2018, p. 1.) In its response to defendant's petition for restitution, lien claimant alleged that it sent documents to defendant and Stelzner and Kyle for additional review, and that defendant issued an explanation of review, which recommended payment in full for the services rendered. (Lien Claimant's Points and Authorities, October 16, 2018, p. 3.)

> On October 26, 2018, the matter proceeded to trial on defendant's claim for restitution and defendant's petitions for sanctions, costs and fees. (Minutes of Hearing, October 26, 2018, p. 2.) The parties did not submit any exhibits or witnesses. (*Id*.)

(Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, March 25, 2019, pp. 2-4.)

On January 3, 2019, the WCJ issued Amended Findings and Orders, ordering lien claimant to pay restitution in the sum of $51,640.00 as well as sanctions, costs and attorneys' fees under section 5813 and WCAB Rule 10561.

Lien claimant sought reconsideration of the WCJ's January 3, 2019 Amended Findings and Orders. On March 25, 2019, we granted reconsideration based upon a lack of substantial evidence to support the WCJ's findings. We explained that, because the WCJ did not admit any exhibits or testimony during the October 26, 2018 trial, we were unable to determine whether lien claimant would be unjustly enriched if it retained the disputed payment or whether sanctions were justified. We thus rescinded the WCJ's decision and returned the matter to the trial level for further proceedings.

The matter appeared again for trial on September 23, 2019, at which time the parties submitted exhibits and testimony.

On November 8, 2019, the WCJ issued the disputed F&O, finding that, pursuant to the IBR calculation issued on November 12, 2015, the reasonable value of lien claimant's services was $15,857.48, which defendant had previously paid. The WCJ also ordered that lien claimant pay defendant $51,640.00 in restitution as a result of unjust enrichment. The WCJ also found that lien claimant and its representative employed bad faith, frivolous litigation tactics in violation of section 5813 and WCAB Rule 10561 warranting sanctions in the amount of $2,500.00 payable to the WCAB. The WCJ also awarded defendant costs and fees to be determined by subsequent court order.

DISCUSSION

In its Petition for Reconsideration, lien claimant contends that the WCJ erred by 1) awarding restitution to defendant, as there is no evidence of unjust enrichment, and 2) awarding sanctions, costs, and fees, as there is no evidence that it engaged in bad faith or frivolous conduct in violation of section 5813 or WCAB Rule 10561.

I. Restitution

We first reject lien claimant's assertion that the WCJ erred in finding that defendant is entitled to restitution in this case as a result of unjust enrichment.

"Restitution is an equitable remedy which has primarily been utilized by courts to prevent unjust enrichment. Under certain circumstances it has been held that administrative tribunals such as the [WCAB] may appropriately employ equitable remedies. Such use by the Board would seem particularly justified, for example, when fraud has been charged and proven." (*American Psychometric Consultants, Inc. v. Workers' Comp. Appeals Bd.* (*Hurtado*) (1995) 36 Cal.App.4th 1626, 1645-1646 [60 Cal.Comp.Cases 559], citations omitted.)

As the Court of Appeal explained in *Hurtado,*

> Equity often leaves parties similarly innocent, similarly confused or similarly knowledgeable about the law in the positions in which they find themselves. Confusion or mistake about the law offers no comfort to either side in these disputes before the court. "[I]t is generally well settled that where a person with full knowledge of the facts voluntarily pays money under a mistake of law on a demand not legally enforceable against him, he cannot recover it in the absence of unjust enrichment, fraud, duress, or improper conduct of the payee." (66 Am.Jur.2d, § 138, p. 1070; accord, 55 Cal.Jur.3d, Restitution, § 10, p. 318.)
>
> More modern doctrine is that mistakes of law and mistakes of fact (where restitution is often ordered) should be treated alike, and it emphasizes the importance of other factors in determining whether restitution should be granted. (*First Sav. & Loan Assn. v. Bank of America* (1970) 4 Cal.App.3d 393, 395 [84 Cal.Rptr. 532].) Such factors as detrimental change of position, hardship, the implementation of some important public policy or transactional stability are considered. (Dobbs, Law of Remedies, *supra*, § 11.9, pp. 767-772.)

(*Hurtado, supra,* 36 Cal.App.4th at pp. 1646-1647.)

In this case, the WCJ found that lien claimant engaged in improper conduct leading to unjust enrichment, where it circumvented defendant's typical processes for handling disputed lien claims. Specifically, the WCJ found that lien claimant intentionally bypassed defendant's internal procedures by demanding payment from its medical review department, rather than its claims department, and that lien claimant knew or should have known that the resulting payment in full was made in error, particularly where the bill amount was still being litigated.

However, according to lien claimant, restitution is not warranted, where 1) there was "**NO** law that states lien claimants cannot" submit its bill to defendant's medical review department,

and 2) despite the ongoing litigation, defendant voluntarily paid the bill in full. (Petition, p. 10, emphasis in original.) Lien claimant contends that, as a result, there was no improper conduct that could have led to unjust enrichment. Neither argument is well taken.

As to lien claimant's first argument, restitution is a remedy based in *equity*, rather than "law." Thus, the fact that there was no law or code section forbidding lien claimant from submitting its bill to defendant's medical review, rather than claims, department does not shield it from restitution, as this doctrine requires us to analyze its conduct in terms of fairness, or equity.

As for lien claimant's second argument, the fact that defendant paid the bill in full despite the ongoing litigation is not the only factor that we consider in determining whether restitution is warranted. The courts have emphasized "the importance of other factors in determining whether restitution should be granted." (*Hurtado*, *supra,* 36 Cal.App.4th at p. 1646; accord *Bridges v. Cal-Pacific Leasing Co*. (1971) 16 Cal.App.3d 118, 124; *First Sav. & Loan Assn. v. Bank of America* (1970) 4 Cal.App.3d 393, 395.) The other factors to be considered include, but are not limited to, unjust enrichment, improper conduct of the payee, detrimental change of position, and hardship. (*Hurtado* at p. 1647.) Although the employer in *Hurtado* was not entitled to restitution, the court gave particular note to the facts that the employer had paid the claimants' medical liens *after negotiating reductions* in the payments and *without protest*. The court further noted that this method of payment was "apparently 'business as usual' for all parties concerned." (*Id.* at p. 1646.)

Unlike the situation in *Hurtado*, lien claimant's bill in this case was *not* paid without protest; indeed, at the time of payment, the bill was highly disputed by defendant and in the process of being litigated. (Transcript of Proceedings, September 23, 2019.) Oddly enough, it is perhaps lien claimant that best describes the parties' ongoing disagreement over the bill amount, stating in its Petition:

> [T]he filing of its lien was based on a dispute over the proper reimbursement for the services rendered. The fact that this issue has been litigated before the WCAB with multiple trial dates, decisions, reconsiderations, and re-reviews at the trial level suggest *obvious disagreement over what is believed to be owed in this regard.*

(Petition, p. 12, emphasis added.)

Moreover, the evidence shows that the method of payment in this case was anything but "business as usual" between the parties. As explained by the WCJ, according to the credible testimony of the expert claims examiner assigned to the case, Marcos Adrian Ferrando, lien

claimant submitted its bill to defendant's medical review department, rather than the claims department. (Report, p. 12.)[6] Mr. Ferrando explained that, in doing so, lien claimant circumvented defendant's "usual and customary" practice for handling disputed bills, which resulted in the unauthorized payment. (Transcript of Proceedings, September 23, 2019, pp. 46, 50.) Furthermore, according to Mr. Ferrando, demanding payment from defendant's medical review department was a known tactic used by lien claimant to obtain overpayments. (*Id.* at pp. 53-54.)

Thus, unlike the circumstances in *Hurtado*, the evidence shows that lien claimant was aware, or should have been aware, of the customary practices for submitting disputed bills to defendant, and that it had circumvented that process, resulting in an unauthorized, erroneous payment in full. We therefore agree with the WCJ that the evidence supports a finding that lien claimant engaged in improper conduct resulting in unjust enrichment, and that restitution was warranted.

We wish to briefly address two other defenses to unjust enrichment asserted by lien claimant. First, lien claimant contends that it was not unjustly enriched by the payment, where the November 12, 2015 IBR calculation used by the WCJ in issuing the award was not an "accurate reflection" of the reimbursement rate for the services rendered. However, if lien claimant wished to object to the IBR expert's calculation, it should have done so, rather than withdraw its lien, which effectively precluded additional litigation thereof. Lien claimant also contends that the $51,640.47 payment was "entirely commensurate" with what it was owed, factoring in penalties and interest for defendant's failure to pay the bill in a "timely manner." (Petition, pp. 11-12.) However, lien claimant did not demonstrate that its bill was untimely paid, nor did the WCJ make such a finding; thus, penalties and interest for untimely payment are irrelevant here. Additionally, whether lien claimant may have been entitled to a "commensurate" payment under a different, entirely hypothetical set of facts is not a convincing defense to unjust enrichment or an excuse for its improper conduct in this case.

Based on the foregoing, we uphold the WCJ's decision to award restitution.

[6] We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

II. Sanctions, Costs, and Fees

Lien claimant also contends that the WCJ should not have ordered it to pay sanctions, costs, or attorney fees. We disagree.

As noted above, after we rescinded the WCJ's January 3, 2019 decision for lack of substantial evidence, the court admitted exhibits and testimony during trial on September 23, 2019. (Transcript of Proceedings, September 23, 2019 [admitted exhibits: Def. Exhs. B, C; Lien Claimant Exh. 8; Joint Exh. Z].) Upon review, we conclude that this evidence supports the WCJ's decision to issue sanctions and to award costs and fees to defendant.

Section 5813 authorizes the WCJ to impose sanctions and costs for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Lab. Code, § 5813(a).) In addition, the WCJ may, in their discretion, order additional sanctions not to exceed $2,500.00. (*Ibid*.) Further, WCAB Rule 10421 (formerly WCAB Rule 10561) provides that,

> (b) Bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay 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. Violations subject to the provisions of Labor Code section 5813 shall include but are not limited to the following:
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> * * *
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> (4) Failing to comply with...any award or order of the Workers' Compensation Appeals Board, including an order of discovery, which is not pending on reconsideration, removal or appellate review and which is not subject to a timely petition for reconsideration, removal or appellate review, unless that failure results from mistake, inadvertence, surprise or excusable neglect.
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> * * *
>
> (6) Bringing a claim, conducting a defense or asserting a position: (A) That is: (i) Indisputably without merit; (ii) Done solely or primarily for the purpose of harassing or maliciously injuring any person; and/or (iii) Done solely or primarily for the purpose of causing unnecessary delay or a needless increase in the cost of litigation; and (B) Where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct.

(Cal. Code Regs., tit. 8, § 10421.)

Here, the WCJ found that sanctions should issue as a result of lien claimant's willful failure to comply with the court's May 6, 2015 Findings and Order requiring it to forward all documentation showing the value of its services for IBR for roughly three years.

However, lien claimant contends that it complied with the WCJ's order less than a week after it was issued, stating:

> On May 11, 2015, Lien Claimant submitted documents pursuant to the Order to the Defendants and to Stelzner & Kyle for the bill review. (Please see Proof of Service; EAMS Doc ID 14814701.)

(Petition, p. 2.)

Yet, upon review, the May 11, 2015 proof of service simply notes that lien claimant served an "exhibit list" upon Stelzner and Kyle; no list of exhibits was attached. (Lien Claimant Exh. 8.) Additionally, the IBR report issued on November 12, 2015, states "[T]he provider *has not submitted any evidence or documentation* regarding their costs for these services." (Joint Exh. Z, p. 1, emphasis added.) During trial, the bill review expert who issued the IBR report, Robert Jiminez, confirmed that this was the case, stating:

> Q: Have you received a package of exhibits from Monrovia on our about 5/11/15? If you can consult your file.
>
> A: One more time with the date.
>
> Q: 5/11/15.
>
> A: No.

(Transcript of Proceedings, September 23, 2019, p. 22.)

Mr. Jiminez also testified that lien claimant did not provide Stelzner and Kyle with documents until September 15, 2016 and March 12, 2018, and that these documents still lacked information necessary to fully analyze the costs of the services rendered. (Transcript of Proceedings, September 23, 2019, pp. 25-27.) Thus, the record supports the WCJ's finding that lien claimant violated the court's May 6, 2015 Findings and Order, which is a sanctionable offense under section 5813 and WCAB Rule 10421(b)(4).

The record also demonstrates that lien claimant employed bad faith tactics causing unnecessary delay and increased litigation costs, both of which were injurious to defendant and resulted in a waste of the court's time and resources. Specifically, the record shows that, in addition

to prolonged noncompliance with a court order, lien claimant circumvented defendant's routine procedures for managing disputed claims by demanding payment from its medical review department, rather than its claims department; that lien claimant knew or should have known that this was a manipulative tactic used to obtain overpayments from defendant; and that full payment of its bill was made in error, given that the payment amount was in the process of being litigated. These tactics not only created confusion for defendant internally, but also clearly motivated defendant to submit additional filings, such as its petition for costs and sanctions for bad faith tactics and its petition for reimbursement, which cost it time and money. Lastly, lien claimant has failed to establish any good faith basis or reasonable justification for its actions.

Based on the foregoing, we uphold the WCJ's finding that lien claimant engaged in multiple violations of section 5813 and WCAB Rule 10421, and that the record supports the WCJ's decision to impose sanctions in the amount of $2,500.00 and to award defendant fees and costs as a result. Jurisdiction is reserved to the WCJ to determine the reasonable amount of fees and costs owed to defendant via subsequent order.

Based on the foregoing, the WCJ's November 8, 2019 F&O is affirmed.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the F&O issued by the WCJ on November 8, 2019 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 20, 2024

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

INNOVATIVE MEDICAL MANAGEMENT
MONROVIA MEMORIAL HOSPITAL
STOCKWELL, HARRIS, WOOLVERTON & HELPHREY

AH/*cs*

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