

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

JOSE MARTINEZ, *Applicant*

vs.

**WEST LAKE FINANCIAL SERVICES;
INTERCARE, et. al. Defendants**

**Adjudication Number: ADJ9910901
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted the petition for reconsideration filed by lien claimant, Citywide Scanning Service, Inc., wherein they seek reconsideration of the Findings and Order Notice of Intention to Impose Sanctions, Costs and Fees (F&O) issued on February 24, 2020, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.¹

The WCJ found, in pertinent part, that lien claimant was not entitled to penalties and interest, not entitled to sanctions and costs, and that lien claimant engaged in bad faith by asserting a lien for services that were, in part, provided prior to an application for adjudication being filed, and that defendant is entitled to costs and fees. The WCJ ordered lien claimant to take nothing on its claims. The WCJ further issued a notice of intent to impose sanctions of \$2,500.00 against lien claimant and award defendant costs and fees.

Lien claimant contends that the WCJ erred because the dates of service which lien claimant submitted at trial were for services performed after the application for adjudication was filed. Lien claimant further contends that the WCJ erred by ordering lien claimant to take nothing without an adequate analysis of the evidence presented and that lien claimant established its right to penalties and interest because defendant failed to properly conduct bill review.

¹ Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

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

We have considered the allegations of the Petition for Reconsideration, 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 February 24, 2020 F&O and return the matter to the trial level for further development of the record.

To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, §§ 10605(a)(1), 10615(b), 10940(a).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, § 10940(a).)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).² In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.³ Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020.

FACTS

On April 8, 2015, applicant filed an application for adjudication. Prior to filing the application, applicant's attorney requested that subpoenas issue for various records. (See Exhibit 1, Order Referral from Applicant, January 22, 2015.) Lien claimant thereafter issued multiple subpoenas. (See Exhibit 2, Subpoenas Duces Tecum, various dates.) Some of the subpoenas were issued pre-application without listing a case number in the caption. (*Ibid.*) Some of the subpoenas

² The March 16, 2020 DWC Newslines may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-18.html>.

³ The April 3, 2020 DWC Newslines regarding reopening the district offices for filing may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-29.html>.

were issued after the application was filed and properly listed a case number. (*Ibid.*) Thereafter lien claimant attempted to collect payment on all subpoenas issued.

On February 23, 2017, lien claimant filed a lien in the amount of \$2,186.32. Lien claimant attached bills to its lien filing indicating that lien claimant was demanding payment for services, which were partly performed prior to the application for adjudication being filed.

On August 4, 2017, lien claimant filed an amended lien, which again, in part, demanded payment of services provided when no application was on file.

This matter was set for lien conference on July 2, 2018. At that conference the parties completed a pre-trial conference statement (PTCS), wherein lien claimant claimed a lien balance of \$1,449.31 and listed invoices for pre-application discovery as exhibits for trial.

At the initial lien trial on August 16, 2018, the parties amended the PTCS. (PTCS, August 16, 2018.) Lien claimant claimed a balance of \$1,082.61 was owed. (*Id.* at p. 4.) Defendant claimed that it owed \$3.81 after deducting the services performed pre-application. (*Ibid.*) The WCJ ordered a party to appear for lien claimant and continued the lien trial. Lien claimant petitioned to disqualify the WCJ, which was denied on October 4, 2019.

This matter proceeded to trial on December 12, 2019, where lien claimant now claimed a balance of nothing owed on its lien. (Minutes of Hearing and Summary of Evidence (MOH/SOE), December 12, 2019, p. 2, lines 9-11.) Notwithstanding having no balance due, lien claimant proceeded to trial requesting penalties and interest on the amounts paid by defendant. (*Ibid.*) Both parties requested an order of costs and sanctions issue against the other. (*Id.* at p. 2, lines 12-13.)

The matter was submitted on a paper record only. (See generally, *id.*)

There is no evidence indicating when lien claimant mailed its invoices to defendant. (See generally, Exhibit 4, Invoices, various dates.) It appears that they may have been sent in 2016. In its petition, lien claimant alleges that defendant first sent payment on March 20, 2018. (Citywide Scanning Service, Inc.'s Response to Defendant's Petition for Costs & Sanctions & Counter Request for a Finding of Sanctionable Conduct and an Award of Costs Against Defendant, December 11, 2019, p. 2, lines 15-18.) No explanation is provided in the record for defendant's delay in payment.

Lien claimant sought removal from the December 12, 2019 order submitting the matter for decision believing, in error, that the WCJ bifurcated its petition for costs and sanctions. The WCJ

noted in her report that the issue of costs and sanctions was not bifurcated. We denied removal on February 11, 2020.

On February 20, 2020, the WCJ issued her Findings and Order, which included a notice of intent to impose sanctions and costs upon lien claimant. The WCJ found that lien claimant committed bad faith in proceeding to trial on services incurred pre-application. Lien claimant filed an objection to the notice of intent, followed by a petition for reconsideration.

DISCUSSION

1. The WCJ's Notice of Intent

To the extent that lien claimant seeks review of the WCJ's Notice of Intent, we will treat lien claimant's petition as one seeking removal and deny the petition.

A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian, supra*, 81 Cal.App.4th at p. 1075 [65 Cal.Comp.Cases at p. 655] ("interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "); *Rymer, supra*, 211 Cal.App.3d at p. 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders"); *Kaiser Foundation Hospitals (Kramer), supra*, 82 Cal.App.3d at p. 45 [43 Cal.Comp.Cases at p. 665] ("[t]he term ['final'] does not include intermediate procedural orders").) Such interlocutory decisions include pre-trial orders regarding evidence, discovery, trial setting, venue, and similar issues.

Here a notice of intent issued, which is not a final order. Accordingly, reconsideration is not proper.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10843(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10843(a).)

Here, lien claimant has not demonstrated that substantial prejudice or irreparable harm will come from the Notice of Intent. Lien claimant may wish to respond to the Notice of Intent by explaining its conduct. If an order of sanctions and costs issues, lien claimant may then seek reconsideration of such an order. Accordingly, to the extent that lien claimant seeks removal of the Notice of Intent, removal is denied.

2. The Findings of Fact

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to “ensure substantial justice in all cases.” (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

The reasons why lien claimant is not entitled to penalties and/or interest on the amounts that defendant paid are not clear in the present record. It appears that defendant paid lien claimant on multiple invoices. It further appears that such payments may have been years after the invoices were billed. No reason exists in the record establishing defendant's delay. While it is true that the parties noted at trial that no outstanding balance was due, that fact alone does not support the finding that no interest and penalties are due for the alleged late payment by defendant. Defendant offered no exhibits or testimony in evidence. The issue of penalties and interest on the amount paid by defendant warrants further development of the record.

Next, the WCJ's finding of fact as to lien claimant's bad faith requires clarification. It is based upon lien claimant “insisting on trial” on the invoices for services performed pre-application. This implies that the pre-application invoices were submitted for decision. However, lien claimant

points out that they withdrew their claim for pre-application invoices on the day of trial and only proceeded to trial on the issues of penalties, interest, sanctions, and costs. Lien claimant's argument is technically correct but misses the point. Lien claimant ignores its conduct on prior trial days, where it clearly asserted a lien for services performed pre-application. This appears to constitute bad-faith conduct. Lien claimant cannot litigate a bad-faith argument and then absolve itself of costs and/or sanctions by dropping the issue at the last minute.

The WCJ may consider the fact that lien claimant ultimately dropped the issue in determining the amount of sanctions and/or costs to award, if any. The WCJ should clarify that the finding of bad faith is based upon lien claimant's assertion of pre-application invoices during the course of litigation up to the day of trial.

Accordingly, as our Decision After Reconsideration we rescind the February 24, 2020 F&O and return the matter to the trial level for further development of the record. Our order rescinding the F&O does not affect the Notice of Intention issued concurrently with the F&O.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order issued on February 24, 2020, is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

IT IS FURTHER ORDERED that lien claimant's petition for removal of the Notice of Intention to Impose Sanctions, Costs, and Fees issued on February 24, 2020 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 5, 2024

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

**BERNAL & ROBBINS
CITYWIDE SCANNING SERVICES**

EDL/oo

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