WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PATRICIA McKENZIE, ***Applicant***

vs.

COUNTY OF LOS ANGELES DEPARTMENT OF HEALTH SERVICES, permissibly self-insured, adjusted by SEDGWICK CLAIMS AND MANAGEMENT SERVICES, ***Defendants***

Adjudication Numbers: ADJ297660 (LAO 0792751); ADJ6645919
Los Angeles District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Amended Findings and Orders (F&O), issued by the workers' compensation administrative law judge (WCJ) on May 10, 2024, wherein the WCJ found in pertinent part that the WCAB retains jurisdiction over the validity and enforceability of lien settlement agreements between defendant and lien claimants Park Compounding and Pro Rx Management; that defendant did not meet its burden of showing that the settlement agreements should be set-aside based on mutual mistake of fact,[1] unilateral mistake of fact, or fraud; and that the settlement agreements between lien claimants and defendant are valid and enforceable.

Defendant contends that the WCJ lacks jurisdiction over the lien settlement agreements because the liens were not properly filed. In the alternative, defendant contends that the settlements should be declared void ab initio, or voided based on good cause, because lien claimants engaged in an improper fee splitting arrangement and/or because they were not properly licensed.

We received an answer from lien claimant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in defendant's Petition, the Answer, and the contents of the Report with respect thereto.

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[1] Defendant has waived mutual mistake of fact as an issue. (Minutes of Hearing and Summary of Evidence (MOH/SOE), April 3, 2024 trial, p. 2.)

Based on our review of the record, for the reasons stated in the WCJ's Report, which is adopted and incorporated to the extent set forth below, and for the reasons discussed below, we will deny reconsideration.

Defendant previously sought reconsideration of Findings and Orders issued by the WCJ on November 6, 2023. On January 16, 2024, the WCAB granted defendant's November 13, 2023 Petition for reconsideration, rescinded the November 6, 2023 Findings and Orders, and returned the matter to the trial level.

Following a hearing on February 7, 2024, the matter came on for trial on April 3, 2024. No additional witnesses or exhibits were offered at trial. (MOH/SOE, p. 2.) The WCJ states in the Report that both parties firmly indicated that they did not wish to further develop the record at the February 7, 2024 hearing.

The parties declined to submit any further testimonial or documentary evidence. (Amended Opinion on Decision, p. 1; Report, p. 1.) Thus, the matter stood submitted on the same record as when the November 6, 2023 Findings and Orders issued.

As discussed in our January 16, 2024 decision after reconsideration, defendant does not dispute that it entered into stipulations to pay the liens of Park Compounding and ProRx Management. (MOH/SOE April 13, 2023 trial, p. 5, Ex. 1, Ex. 2.) The WCJ found the lien settlement agreements valid and enforceable as stated in his Findings and Orders issued by the WCJ on November 6, 2023, and Ordered that the liens be paid. Although the WCAB rescinded the Findings and Orders issued on November 6, 2023, to allow development of the record and the issuance of an Opinion on Decision that complies with Labor Code[2] section 5313, defendant was put on notice that the stipulations were enforceable by the court as a stipulated agreement of the parties.

Section 5702 provides:

> The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.

(Lab. Code, § 5702.)

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

To further reiterate our January 16, 2024 decision after reconsideration, "The burden of proof rests upon the party or lien claimant holding the affirmative of the issue." (Lab. Code, § 5705.) Defendant seeks to withdraw from their stipulations and, as such, it is defendant's burden of proof. The matter was set for trial over three sessions to take evidence and testimony before the parties' stipulations were approved. When the matter came on for trial on April 3, 2024, defendant did not offer any additional evidence to meet its burden of proof that good cause existed to set-aside the stipulations and lien settlement agreements. Currently the issue before us is whether there was a valid settlement of the lien claims entered into by the parties, whether or not the underlying liens were problematic.

On May 10, 2024, the WCJ issued an Amended Findings and Orders, wherein the WCJ found that, based upon the submitted evidence, the stipulated lien settlement agreements were valid and enforceable, and ordered the sums in the agreements payable by defendant. Based on the record before us, we will not disturb the WCJ's Amended Findings and Orders.

Accordingly, we deny defendant's Petition for reconsideration of the Amended Findings and Orders issued on May 10, 2024.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Amended Findings and Orders issued by the WCJ on May 10, 2024 is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 29, 2024

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

PRORX MANAGEMENT
SICM GROUP
TOBIN LUCKS

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

This is the second Petition for Reconsideration on this case. In the first Petition, defendant sought reconsideration when the undersigned found in favor of lien claimants on a dispute over the enforceability of an agreement to resolve two lien claims. A panel of the Appeals Board issued an Opinion and Order stating that the prior decision was unclear and discussing the facts necessary to establish the burden of proof in the case. The case was remanded back to the undersigned who set the matter for hearing. At the hearing the parties declined to develop the record. At the retrial, the parties declined to submit any further testimonial or documentary evidence. The undersigned then issued another Findings & Order, this time dated 10 May 2024. The undersigned provided a more detailed discussion in the Opinion on Decision to meet the criticisms in the Decision and Order of the Appeals Board and again found in favor of the lien claimant.

Defendant, COUNTY OF LOS ANGELES, DEPT OF HEALTH SERVICES c/o SEDGWICK CLAIMS MANAGEMENT SERVICE, by and through their attorneys of record, has now filed another Petition for Reconsideration challenging the second Findings and Order of 10 May 2024. This time, Petitioner argues that the settlement between the lien claimants and defendant was unenforceable, arguing that the lien claimant never perfected their liens. They also argue, alternatively, that the liens settlements are voidable at defendant's option for fraud. Specifically, they argue that the lack of compliance with Labor Code §§ 4906.05 and 4906.8 forms the basis for that fraud as they cannot have known of the violation without the documents being filed. They also argue that both PARK COMPOUNDING and PRO RX MANAGEMENT illegally dispensed medication. They also argue that the fee provided to SICM constituted illegal fee splitting between a medical provider and a non-medical entity.

PARK COMPOUNDING & PRO RX MANAGEMENT have filed an Answer which argues that defendant knew that lien claimant complied with the declaration requirements of Labor Code § 4906.05 and that lack of compliance with Labor Code § 4906.8 cannot form the basis for the denial of a lien.

Lien claimant also counters that the medications were legally dispensed and that the billing was only for the medications mailed to the applicant, not the medications provided by Dr Latteri

in person. They also argue that the fees charged by SICM were legal under Business and Professions Code § 650.

It is recommended that reconsideration be denied.

II
FACTS

APPLICANT, PATRICIA McKENZIE, aged 50 on the first date of injury, while employed as a health facility nurse at Commerce, California by the COUNTY OF LOS ANGELES DEPT OF HEALTH SERVICES, sustained injury arising out of and in the course of said employment on 01 December 2000 and 21 March 2008 to her neck, hernia, back and shoulders.

The applicant's case-in-chief in in case number ADJ297660 was resolved by Stipulation with Request for Award which was approved on 12 August 2009 at the Los Angeles Board. In ADJ6645919 another Stipulation with Request for Award was approved on 22 February 2012 at the Long Beach Board. In the latter case, the applicant filed a Petition to Reopen on 12 March 2013 which was dismissed on 06 May 2015.

The lien of PARK COMPOUNDING was filed on 14 December 2012 in ADJ297660 and included the $ 100.00 filing fee. The lien log in EAMS shows this lien to be unresolved. The lien of PRO-RX was filed on 14 January 2016 in ADJ6645919 and included the $ 150.00 filing fee. The lien log in EAMS shows this lien to be "[d]ismissed pursuant to 4903.05(c.)
On or about 14 January 2021, the two lien claimants entered into an agreement assigning all the rights of PARK COMPOUNDING to SICM GROUP, the owner of the other lien claimant PRO-RX. Included in this agreement was a declaration under penalty of perjury that PARK COMPOUNDING had ceased doing business pursuant to Labor Code section 4903.8 (a.) See Joint Exhibit X.

On 06 December 2021, the SICM GROUP filed a Declaration of Readiness to Proceed (DOR) in both cases and the matter was set for the Oxnard Lien Conference Calendar on 28 February 2022. The Minutes for that day reflect that the lien claimant provided defendant with additional documentation and that the defendant needed time to review. The matter was continued to 19 April 2022 at which the parties came to an agreement to settle. The documentation of that agreement consisted of two letter agreements both of which were signed by both parties, the defense attorney signing for the defendant. (See Lien Claimant's Exhibits 1 & 2.) Both agreements

were dated 19 April 2022 so one can infer that both documents were signed and exchanged via email or fax on the date of hearing as all lien conferences were (and still are) held by teleconference. The agreements both indicated that the defendant had 30 days to pay, or the lien claimants would have the right to rescind the contract. No provision was made for the defendant to have the right to rescind the agreement.

At some point the defendant refused to pay the agreements. The details of this fact are set forth in the original Response (Answer) to the Petition for Reconsideration dated 22 November 2023 filed by the lien claimants. This document states that after the expiration of the 30 days to pay, the lien claimants called the defense adjuster on 09 June 2022 by telephone and that the adjuster stated that "they do not pay for compound medications." No written denial or objection to the settlement agreements was served until the preparation of the Stipulations and Issues on 08 December 2022. No attempt appears to have been made to rescind the agreement in writing until the Stipulations and Issues were prepared on 08 December 2022.

A lien trial was held in person in Oxnard before the undersigned on 13 April 2023 and on 04 October 2023. At trial, the defendant called Sergio Ibarra, the hearing representative for the lien claimants, to testify under Evidence Code § 776.

The defense attorney then cross-examined Mr. Ibarra who testified that as to PRO RX MANAGEMENT, he testified that Dr. Latteri purchased the pharmaceuticals and that he dispensed them. PRO RX MANAGEMENT then would bill for Dr. Latteri's services and receive a collection fee. The rest goes to Dr. Latteri. He testified that PRO RX MANAGEMENT was not a licensed pharmacy but a management company and that Dr. Latteri owned the drugs at the time they were dispensed.

With respect to the lien of PARK COMPOUNDING, Mr. Ibarra testified that he initially had no interest in PARK COMPOUNDING except to represent them. However, on 14 January 2021 he received an assignment of their lien which appears in Exhibit X. The medications from PARK COMPOUNDING was also dispensed by Dr. Latteri but was delivered by mail.

The undersigned found in favor of both lien claimants and the defendant filed its first Petition for Reconsideration and lien claimants filed an answer, both of which appear in the record.

On 16 January 2024, the Appeals Board issued an Opinion and Order that returned the matter to the undersigned. The panel noted:

> "Here, defendant seeks to withdraw from their stipulations and as such, it is defendant's burden of proof. With respect to whether the stipulations were based on mutual mistake of fact, we note that defendant did not present evidence that a mutual mistake of fact existed at the time the parties entered into the stipulations. ¶ However, the 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. [citations omitted]"

When the defendant decided not to submit any further evidence at the second trial, the undersigned then issued a more complete Opinion on Decision based on the same evidence. This Petition for Reconsideration followed.

III
DISCUSSION

The above-quoted language of the Appeals Board resulted in some level of debate among the judge and the parties. The undersigned took it as an invitation to allow defendant to develop the record on the issue of mistake. As noted by the Appeals Board, there is a paucity of information that would support mistake in this case as there was no evidence, testimonial or written, that either the original defense attorney who entered into the two lien settlement agreements or the adjuster or claims manager were somehow mistaken as to the terms of the agreement or the surrounding facts.

By contrast, defense counsel took the above-quoted language as only a criticism of the Opinion on Decision and that all that the undersigned need do is re-write the Opinion on Decision.

In response to this question, the defense attorney chose not to develop the record and the undersigned re-wrote the Opinion on Decision to include all the issues in contention. Consequently, we are left with the conclusion that, as stated by the Appeals Board in response the last Petition for Reconsideration that, "defendant did not present evidence that a mutual mistake of fact existed at the time the parties entered into the stipulations." Thus, it would seem that the issue of mistake of fact is closed. Be that as it may, the undersigned included it in the Amended Opinion on Decision and the issue is discussed in detail in the last Report and Recommendation.

Be that as it may, defendant includes mistake of fact in its Petition by arguing that they did not know about the issues surrounding the Labor Code §§ 4906.05 and 4906.8 declarations until

the day of trial. However, the defendant cannot use its lack of investigation as a shield. While the lien log in EAMS shows a dismissal under Labor Code § 4906.05, in point of fact, the parties discussed this issue before another judge and settled the lien anyway. With respect to the alleged Labor Code § 4906.8 violation, this was disproven at trial by reference to Joint Exhibit X which was also available to defendant as it was filed in EAMS FileNet on 15 January 2021, well before the settlement date of 04 January 2023. Since there is no testimony on this issue and since these documents were readily available to defendant, there is insufficient evidence supporting mistake of fact over whether there was an illegal assignment.

With respect to the other issues, as noted in both the last Report & Recommendation and in the Opinion and Order, a party may be excused from a settlement for "good cause." The Appeals Board notes that "good case" may include, "mutual mistake of fact, duress, fraud, undue influence, and procedural irregularities. [citations omitted.]" Here, there is no allegation of duress or undue influence so the undersigned will focus on the two remaining arguments of defense: Fraud and procedural irregularities.

To establish fraud, defendant has to show that there was a (1) misrepresentation; (2) That the party making the representation knows it is untrue; (3) That the party intended to deceive; (4) That the victim justifiably relies on the representation and (5) damages. See also, Restatement 2d of Contracts §§ 162 – 164.

Here, the defendant claims that the fee of 15 to 20% taken out of the recovery of the lien is somehow a "kickback" or a "joint venture" requiring disclosure. The defendant describes this arrangement as "unlawful." However, review of defendant's authorities shows that these assertions were not proven at trial. See pp. 19 – 24 of the prior Petition for Reconsideration and compare the Minutes of Hearing and Summary of Evidence for the two parts of the trial.

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[D]efendant also argues that the fraud involves the fact that the two lien claimants were not pharmacies and that the drugs involved were "dispensed" by Dr. Latteri, a lien claimant who already settled his lien. Defendant argues that either the lien claimants were illegally acting as a pharmacy or that Dr. Latteri was the original provider. However, this issue was not sufficiently explored at trial. Lien claimants deny that they ever possessed the drugs and that they were

dispensed by Dr. Latteri however, there is no evidence as to whether Dr. Latteri owned (as contrasted with merely possessed) these drugs so there is insufficient evidence to show that either of the lien claimants did anything wrong.

Defendant also argues on reconsideration that there was illegal "fee splitting" between Dr. Latteri and ProRx. However, the facts detailed in the Petition for Reconsideration were not established at either trial so this assertion cannot form the basis for a defense of fraud.

Thus, no misrepresentation appears to be proven here. Additionally, after hearing the testimony of the lien claimant, there appears to be no support for the second and third elements of fraud either. Thus, no fraud has been shown on these facts.

With respect to the "procedural irregularities" cited by the Appeals Board as a possible reason for excuse from these contracts, defendant argues that the asserted lack of Labor Code §§ 4906.05 (c)(2) and (c)(3) declarations support a finding that defendant should be excused from the settlements. However, this argument must be read in conjunction with Restatement 2d of Contracts §§ 178 and 185. In the Restatement, the violation of statute is weighed against several factors, including the strength of the policy, the likelihood that the refusal to enforce the contract term would further that policy, the seriousness of the misconduct and the extent to which it was deliberate. Also, the directness of the connection between the misconduct and the contract term is considered.

Here, the lien claimant PRO RX MANAGEMENT disclosed the problem at the two conferences and the parties discussed these problems at the lien conference of 19 April 2022. The lien claimant admitted that they failed to file the Labor Code §§ 4906.05 Declaration but were able to prove that the did serve it on defendant. While the statute does seem to require the filing of this document, the parties knowingly chose to balance the risks of the possible outcomes and settled the two liens.

Additionally, the public policy argument does not automatically make the contract void. At most, it is made voidable or the Court will be empowered to make reformation of the contract. See Restatement 2d of Contracts §§ 178 through 185, especially section 185 which involves licensure and similar regulations. In this case, there is no reason to allow defendant to back out of the agreements. While they may have had good reason never to have entered into the settlements and may have won at trial on this jurisdictional issue, by settling the two liens they have waived this argument and submitted to the jurisdiction of the Board through the settlement. In other words,

the parties are Bound by the settlement (or at least they were bound for 30 days by the terms of the agreement) after which the Board has the power to interpret the settlement.

Also, there is also a public policy constitutional provision that guides workers compensation cases: That our procedures be expeditious, inexpensive and without encumbrance of any kind. Cal. Constit Article 14 § 4. Here, if a defendant is allowed to back out of a settlement because they correctly determine afterwards that they could have won the case had they taken it to trial, there would be very little incentive for parties to settle and the workers compensation judges would be inundated with lien litigation. This will increase litigation and delay both lien litigation and cases-in chief.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

ROGER A. TOLMAN, JR.
Workers' Compensation Judge