

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

SILVESTRE HERNANDEZ, *Applicant*

vs.

**NAPA AUTO PARTS; OAK RIVER INSURANCE COMPANY, administered by
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ8294635
Anaheim District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION;
NOTICE OF INTENTION TO
DISMISS PETITION FOR RECONSIDERATION**

Lien claimant Nogales Psychological Counseling, Inc., (lien claimant) seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Orders (F&O) issued on May 20, 2024, wherein the WCJ found that while employed on July 8, 2011, as a driver for defendant, applicant sustained injury arising out of and occurring in the course of employment to his head, arm, neck, wrist, diabetes, cervical spine, and psych; lien claimant is not entitled to reimbursement of medical-legal costs payable by defendant pursuant to AD Rule 9795 (Cal. Code of Regs, tit. 8, § 9795) as there was no valid medical-legal dispute at the time the charges were billed and incurred; lien claimant's second date of service is disallowed, as it was not the primary treating physician at the time services were rendered; and lien claimant never requested a second bill review for the initial date of service. The WCJ ordered that lien claimant's lien is disallowed for the first date of service as there was no valid medical-legal requested or prepared.

Lien claimant contends that treatment was denied for applicant's industrial psychiatric claim so that it is entitled to payment for the medical-legal services provided to applicant.

We received an Answer from defendant. We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ, which recommends that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant lien claimant's Petition for Reconsideration. Our order granting the Petition is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

We believe reconsideration must be granted in order to issue a notice of intention to dismiss (NIT) and to allow sufficient opportunity to further study the factual and legal issues in this case. The NIT will order lien claimant to produce documentation showing the date and time that lien claimant filed the Petition for Reconsideration at the Workers' Compensation Appeals Board (Appeals Board) or on the Electronic Adjudication Management System (EAMS), including the EAMS Batch ID and/or any other documentation that demonstrates that the petition for reconsideration was timely filed¹, and if lien claimant does not demonstrate that the petition for reconsideration was timely filed, the petition will be dismissed as untimely. Reconsideration will be granted for this purpose and for such further proceedings as we may hereinafter determine to be appropriate. Thus, we will grant lien claimant's Petition for Reconsideration and issue the NIT.

I.

Preliminarily, we note the following in our review:

On April 13, 2012, applicant's attorney filed an Application for Adjudication of Claim dated April 10, 2012, claiming applicant sustained a specific injury to his back, bilateral lower extremities, head, right elbow, sleep, internal, diabetes, and hypertension on July 8, 2011, while employed by defendant as a driver. (Court Exhibit X1, Application For Adjudication, 4/10/2012.)

On February 19, 2014, applicant's attorney amended his Application for Adjudication and added psych and heart to body parts. (Court Exhibit X2, Application For Adjudication, 2/18/2014.)

¹ WCAB Rule 10615(b) A document is deemed filed on the date it is received, if it is received prior to 5:00 p.m. on a court day. A document received after 5:00p.m. on a court day shall be deemed filed as of the next court day.

On August 7, 2015, Anne C. Welty, M.D., the panel qualified medical evaluator (QME) in psychiatry evaluated applicant. Dr. Welty stated that applicant should immediately begin intensive individual and group therapy services, psychiatric medication evaluation and regular psychiatric follow-up. (Court Exhibit X14 Psychiatric Medical-Legal Evaluation With Translator, 8/14/15, p. 33.) Further, Dr. Welty's summary states, ". . . this is a 51-year-old-man who describes psychiatric injury which occurred as a result of the events that transpired during the course of his employment with Napa Auto Parts. . . .The applicant has not undergone any type of psychiatric treatment, and he is not permanent and stationary." (Court Exhibit X14, Psychiatric Medical-Legal Evaluation with Translator, 8/14/15, p. 31.)

On June 26, 2017, Dr. Welty reevaluated applicant. Dr. Welty stated that:

Per history by the applicant, we see that applicant began a course of psychological services a few months ago and has only attended a handful of sessions. He still has not undergone any psychiatric evaluation for medication management for his severe Major Depressive Disorder with psychotic features. He still remains acutely depressed, potentially suicidal and in need of urgent and consistent mental health services. He is not permanent and stationary. His severe depressive symptoms have contributed to his low energy, poor motivation, hopelessness, and helplessness, low energy, apathy, and depression. His depression impairs his ability to advocate for himself, and to comply with his medications and medical recommendations.

(Court Exhibit X14, Psychiatric Medical-Legal Evaluation #2 with Translator, 7/6/17, p. 11.)

On July 29, 2016, applicant appointed Nogales Psychological Counseling as a secondary treating physician pursuant to Labor Code section 4600 asserting that defendant denied applicant's psyche claim and that applicant elected to treat with a non-MPN physician. (Exhibit 1, Applicant Attorney Appointment Letter, Ana L. Nogales, Ph.D., 7/29/2016.)

On August 22, 2016, Ana L. Nogales, Ph.D., evaluated applicant for the first time and issued a doctor's first report of occupational injury or illness and treatment authorization request initial report on August 22, 2016. (Exhibit 3, First Report of Ana L. Nogales, Ph.D., 8/22/2016.)

On August 30, 2016, in a letter to Nogales Psychological Counseling, and copied to applicant and his attorney, defendant denied liability after receiving the report and request for treatment from Dr. Nogales. (Exhibit E, Denial Letter, 8/30/ 2016.)

On November 21, 2016, the WCJ issued a Stipulation and Award and/or Order, which states that:

Defendant to Authorize Psych eval w/MPN Provider Dr. Yacoub. If Dr. Yacoub cannot take applicant as patient the Applicant's Attorney to select a new MPN provider in Psych. Defendant to Evaluate Psych RFAs on Medical Basis not on Denied case basis. Applicant's Attorney to set Appointment w/ Dr. Yacoub or any other MPN Psych Provider selected. (Court Exhibit X6, 11/21/2016.)

In a letter dated August 4, 2017, defendant objected to lien claimant's services.

On November 29, 2017, lien claimant filed a Notice and Request for Allowance of Lien based on documentation that medical treatment has been neglected or unreasonably refused. (Court Exhibit X7, Notice and Request For Allowance of Lien, 11/29/2017, p. 11.)

On December 21, 2017, Dr. Welty again evaluated applicant, almost eighteen months after his initial evaluation. Dr. Welty stated that:

The applicant finished a brief course of therapy services, but has not undergone a course of psychiatric evaluation and treatment, despite repeated recommendations. . . . He secured psychiatric evaluation and treatment on his own, and is being scheduled for individual and group services on his own. Although we see that there has been some minor improvement in his overall mental status, he still remains quite depressed and is in need of further consistent and effective mental health services.

(Court Exhibit X14 Psychiatric Medical-Legal Evaluation #3 With Translator, 12/21/17, p. 16.)

The case in chief was resolved by way of a Compromise & Release (C&R) approved on August 10, 2021.

On August 21, 2023, lien claimant and defendant proceeded to trial, and on October 5, 2023, the WCJ issued a decision. Following a petition for reconsideration by lien claimant, the WCJ issued an order vacating the decision on November 7, 2023.

On May 8, 2024, defendant and lien claimant again proceeded to a lien trial.

On May 20, 2024, the WCJ issued the F&O.

II.

To be timely, a petition for reconsideration must be filed and received by the Appeals Board within twenty days of the service of the final order, plus an additional five days if service of the

decision is by any method other than personal service, including by mail, upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605.)

Documents are deemed filed on the date received by the Appeals Board if they are received prior to 5:00 p.m. of a court day. (Cal. Code Regs., tit. 8, §10615(b).) If documents are received after 5:00 p.m., they are deemed filed as of the next court day. (*Id.*) This is consistent with the provisions of Government Code 11020(a), which provides that the business hours of state agencies are “from 8:00 a.m. to 5:00 p.m.” Therefore, to be timely, lien claimant’s petition would have to have been received before 5:00 p.m. on June 14, 2024.

According to the January 1, 2013 Revision of the EAMS Reference Guide and Instructional Manual for Electronic Filing E-Form Filers (Manual),² “EAMS is available” during the hours of “6:00 a.m. – 8:00 p.m.” (Manual, p. 6.) However, the mere fact that EAMS is “available” after 5:00 p.m. does not mean that documents electronically submitted between 5:00 p.m. and 8:00 p.m. on a particular day are deemed filed that day. Therefore, the question is whether lien claimant’s petition for reconsideration was electronically submitted prior to 5:00 p.m. on June 14, 2024.

Here, Case Events in the Electronic Adjudication System (EAMS) shows an EAMS batch date for the Petition for Reconsideration as June 14, 2024 at “18:31” (i.e. 6:31 p.m.). The record in FileNet in EAMS shows a “received date” or filing date of June 17, 2024 at “8:00 AM” for the Petition for Reconsideration. The proof of service for the F&O shows an issue date of May 20, 2024, and June 14, 2024 is 25 days after May 20, 2024. June 14, 2024 was a Friday.

As discussed above, the EAMS record available to us indicates that the petition was e-filed after 5:00 p.m. However, once a document is e-filed in EAMS, the submitting party receives a Batch ID page with an ID number and the date and time it was submitted. (Manual, p. 14.) The party is instructed to save the page as confirmation of the date and time the document was submitted. (Manual, pp. 14-15, 18.) According to the Manual, an electronically submitted document is filed when it is successfully processed into EAMS. (Manual, p. 15.)

Here, discrepancies exist within the record as to when the Petition for Reconsideration was actually filed. Decisions by the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) (*Hamilton*); *Hernandez v. Staff Leasing* (2011) 76 Cal.Comp.Cases 343 (Appeals Board Significant Panel Decision) (clarifying that *Hamilton* applies to a record created and maintained

² http://www.dir.ca.gov/dwc/eams/EAMS_ElectronicFilingEFormFilersGuide.pdf

in EAMS.)

III.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing “the whole subject matter [to be] reopened for further consideration and determination” (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of “[throwing] the entire record open for review.” (*State Comp. Ins. Fund v. Industrial Acc. Com (George)* (1954) 125 Cal. App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal. 2d 360, 364.) “[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of statutory authority limitation none will be implied.”; see generally Lab. Code § 5803 [“The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . .At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.”].)

“The WCAB. . . is a constitutional court; hence its final decisions are given res judicata effect.” (*Azadigian v. Workers Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen’s Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) 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]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a “threshold” issue that is fundamental to the claim for benefits. Interlocutory

procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Labor Code section 5901 states in relevant part that:

No cause of action arising out of any final order, decision or award made and Filed by the appeals board or a workers' compensation judge shall accrue in any Court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. . . .

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

IV.

Accordingly, we grant reconsideration of lien claimant's petition and issue a notice of intention to dismiss lien claimant's petition as untimely unless lien claimant produces documents showing the date and time that lien claimant filed the petition for reconsideration at the Appeals Board or in EAMS, including the EAMS Batch ID and/or any other documentation that demonstrates that the petition for reconsideration was timely filed on June 14, 2024. These documents must be filed within ten (10) days, plus an additional five (5) days for mailing, of the service of this notice (Cal. Code Regs., tit. 8, § 10605(a)(1)-(a)(3)) and must only be filed in EAMS.

We also order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

If lien claimant fails to file verified proof of timely filing that conforms to our order, the pending petition will be dismissed as untimely. If lien claimant demonstrates timely filing of the

petition on June 14, 2024, the petition will be considered filed as of that date. (See Cal. Code Regs., tit. 8, § 10617.)

While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquires as to the use of our mediation program can be addressed to WCABmediation@dir.ca.gov.

For the foregoing reasons,

IT IS ORDERED that lien claimant's Petition for Reconsideration of the Findings and Award and Findings and Order issued on June 14, 2024 is **GRANTED**.

IT IS FURTHER ORDERED and **NOTICE IS HEREBY GIVEN**, that lien claimant shall produce documents showing the date and time that lien claimant filed the Petition for Reconsideration at the Workers' Compensation Appeals Board or in the Electronic Adjudication Management System (EAMS), including the EAMS Batch ID and/or any other documentation that demonstrates that the Petition for Reconsideration was timely filed on or before June 14, 2024. Otherwise, the pending Petition for Reconsideration will be dismissed as untimely. These documents shall be filed be e-filed in EAMS. These documents must be received, i.e., filed, within ten (10) days, plus an additional five (5) days for mailing, of the service of this order. (Cal. Code Regs., tit. 8, § 10605.) Any response to this Notice of Intention must be verified and the production of any documents shall be made under penalty of perjury.

IT IS FURTHER ORDERED that a final decision after reconsideration are **DEFERRED** pending further review of the merits of the Petition and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 13, 2024

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

**R AND R SERVICES
HALLETT EMERICK WELLS & SAREEN**

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*