WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VERNEEDA WILSON, *Applicant*

vs.

COUNTY OF LOS ANGELES, Permissibly Self Insured;
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ1428798 (LAO 0798724)
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will grant reconsideration, amend the WCJ's decision as recommended in the report, and otherwise affirm the decision of March 20, 2024.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of March 20, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of March 20, 2024 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

5. Lien claimant is owed a penalty of $217.82.

6. Lien claimant is owed interest in the amount of $ 4,277.31

ORDERS

2. **IT IS FURTHER ORDERED THAT** the defendant pay lien claimant Dr. Silver a penalty in the amount of an additional $ 217.82.

3. **IT IS FURTHER ORDERED THAT** the defendant pay lien claimant Dr. Silver interest in the amount of $ 4,277.31.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 3, 2024

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

LEGAL SERVICE BUREAU
MICHAEL BARNARD LAW OFFICES

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Lien Claimant, DR. DAVID SILVER, by and through his attorney of record, has filed a timely Petition for Reconsideration challenging the Findings & Order dated 20 March 2024. In it, lien claimant challenges the decision for two reasons: First, he challenges correct rates of penalties and interest arguing that the undersigned applied the incorrect statute. Second, Petitioner challenges the denial of costs and sanctions under Labor Code § 5813.

Defendant has filed a timely Answer to the Petition for Reconsideration which argues that the interest under Labor Code § 4603.2 are limited by Government Code § 970.1 and Article XV § 1 of the California Constitution to 7%. Defendant also argues that an award of sanctions in this case would not be based on sanctionable conduct and would cause a pernicious result.

It is recommended that Reconsideration be granted as to part of the first issue and denied as to the second issue.

II

FACTS

VERNEEDA WILSON aged 45 years on the date of injury sustained an injury arising out of and in the course of her employment on 15 August 2000 to her low back, lumbar spine, neck, cervical spine and left shoulder while working as a clinic nurse in Torrance, California for the COUNTY OF LOS ANGELES. Her case-in-chief was resolved by way of Stipulated Award on 11 October 2022 approved by Judge Phillips of the Los Angeles Board. After that date, the other liens were resolved leaving the lien of Dr. Silver as the last remaining lien.

The case was set for lien trial in three sessions, the first and last of which were on the record. The first two sessions were continued due to a controversy that was taken to the Appeals Board on cross-petitions for Removal and that are, at this point, moot and need not be discussed here.

At the last of the three trial sessions, the matter was submitted on the documentary record. Interestingly, at this last session, the defendant served and offered into evidence a new review of

Dr. Silver's bill. Mr. Escamilla's reaction to this document was notable. He was pleased and stated that if the document were presented to him earlier in the litigation, no trial would have been necessary. The document was admitted as Defense Exhibit "P" and lien claimant did not object to its admissibility. After the trial, the undersigned issued a decision finding in favor of the lien claimant based on Exhibit P mentioned above to compute the principal amount of the recovery. However, the undersigned based the interest rate on Labor Code § 4622 instead of either Labor Code § 4603.2 or Government Code § 970.1(c.)

At trial, the parties had inconsistent positions. They seemed to agree that both Labor Code § 4622 and Labor Code § 4603.2 applied. However, in the pretrial conference statement, the defendant also argued that Government Code § 970.1(c) should apply instead. The undersigned rejected Government Code § 970.1(c) and followed Labor Code § 4622. With respect to the issue of sanctions, lien claimant sought sanctions for two things: First, for delay in defendant seeking a continuance when defendant's witness was ill. Second, for at first relying on Exhibits B though M to audit lien claimant's bills instead of Exhibit P, which was prepared much later on 12 July 2023 and served on

lien claimant and filed with the Court on the last day of trial on 15 February 2024.

III

DISCUSSION

With respect to the first issue, it would appear that lien claimant is correct and that the undersigned used the wrong Labor Code section. The undersigned used Labor Code § 4622 instead of Labor Code § 4603.2. The Findings and Order needs to be corrected to provide for a 15% penalty under Labor Code § 4603.2 instead of the 10% under Labor Code § 4622. It is clear that the undersigned erred in using the penalty rate for medical – legal services for a bill involving medical treatment issues. However, the issue of the interest rate requires further discussion.

When discussing interest rates in judgments, it is important to distinguish between pre-judgment interest and post-judgment interest. Pre-judgment interest rates are those rates that follow from either a specific statute or by an agreement. To obtain pre-judgment interest the party seeking them must show that they are entitled to the interest by showing the factual elements required by the statute or by proving the existence of a contract. By contrast, post-judgment interest is regulated by Article XV Section 1 of the California Constitution; Code of Civil

Procedure § 685.010 and by Government Code § 970.1. The constitutional provision states in relevant part:

> "The rate of interest upon a judgment rendered in any court of this state shall be set by the Legislature at not more than 10% per annum. Such rate may be variable and based upon interest rates charged by federal agencies or economic indicators, or both. In the absence of the setting of such rate by the Legislature, the rate of interest on any judgment rendered in any court of the state shall be 7 percent per annum. The provisions of this section shall supersede all provisions of this Constitution and laws enacted thereunder in conflict therewith."

Government Code § 970.1 subsection (c) provides that unless another statute provides a different interest rate, interest on a tax or fee judgment against a public entity shall accrue at a rate equal to the weekly average one-year constant maturity United States Treasury yield at the time of the judgment plus 2 percent but shall not exceed 7 percent per annum." Code of Civil Procedure § 685.010 provides for a rate of "10 percent per annum on the principal amount of a money judgment remaining unsatisfied."

Now the above authorities only apply to post-judgment interest, that is to say the interest to be applied to the principal sum of the money judgement after the date the judgment is issued. It does not, generally speaking, apply to the pre-judgment interest which is the interest provided in the judgment itself, unless the contract or statute itself incorporates Code of Civil Procedure § 685.010 and/or Government Code section 970.1 by reference.

In this case, the dispute involves pre-judgment interest and there is no evidence of any contract applying to these medical bills. Consequently, we must look to the statutory rights to prejudgment interest. In this case, the statute in question would be Labor Code § 4603.2. Subsection (b) (2) of this Labor Code section provides for interest payable "at the same rate as judgments in civil actions." While lien claimant cites the wrong code section, this rate is provided in Code of Civil Procedure § 685.010, that is, ten percent.

Now at this point we need to examine defendant's argument that Government Code § 970.1 subsection (c) stands as an exception to the 10 % amount and limits the recovery to 7%. Now, while reasonable minds may differ, the problem with this argument is that this would violate the "plain meaning rule" of statutory construction. Subsection (c) of Government Code § 970.1 plainly applies only to post-judgment interest. Also, the plain meaning of section 970.1 appears to apply only to a tax or fee judgment. Since this is not a tax or fee judgment the 7% limitation would not apply. Thus, Code of Civil Procedure § 685.010, which provides for 10 percent as the statutory

rate for civil judgments as a general principal, would be the rate that should apply. This works out to 10% simple interest for $ 484.13 of the principal for 19.205 years and 10% simple interest for $ 968.26 of the principal for 19.033 years. The interest for the lesser amount of the principal works out to $ 1,413.90 and the interest for the greater portion of the principal works out to $ 2,863.41. Thus, the total interest at 10% would be $ 4,277.31.

The next issue is whether lien claimant is entitled to compound interest. Interestingly, review of all the above code sections discloses no support for any compound interest. This is bolstered by the fact that in order for a requirement for compound interest to have meaning, the statute would have to mandate what formula for compounding would be used. If interest is compound in a contract, one would know whether it is compounded daily, weekly, or monthly. There are even contracts that provide for continuous compounding. The more often it compounds, the greater the amount of interest recovered.

In the absence of anything to the contrary, the interest awarded will be simple interest, not compounded. See also Westbrook vs. Fairchild (Ct.App, 1992) 7 Cal.App 4th 889 at 897 - 898; 9 Cal.Rptr 2d 277 which supports this view in interpreting Code of Civil Procedure § 685.010.

In sum, the undersigned erred and the penalty should be 15% with respect to the treatment entries and 10% with respect to the medical-legal entries. However, the interest would be simple, not compounded.

On the issue of Sanctions, the undersigned did not see a need for sanctions. The sanctions provision in workers compensation law, Labor Code § 5813 was originally based on Code of Civil Procedure § 128.5. Now while these two code sections have evolved apart from each other, the key to interpreting either of them is to keep in mind that the original version of section 5813 was based on Code of Civil Procedure § 128.5. In civil practice, sanctions under this code section are not mere discovery sanctions but must be the "result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." See Labor Code § 5813 and similar language in Code of Civil Procedure § 128.5. The modern version of section 128.5 also contains more detail, including a definition of "frivolous" which is defined as, "totally or completely without merit or for the sole purpose of harassing an opposing party."

Here, the defendant chose to obtain a new audit of the bill. One may surmise that he did so in order to meet with concerns of his own or due to concerns expressed by his own witness. It may even be that he obtained the new audit in response to his opponent's criticism. In any

event, defendant had reason to doubt the EOR's contained in Exhibits B through M so he solicited Exhibit P.

Lien claimant tries to argue that Exhibits B through M are evidence of bad faith on the part of defendant and that Exhibit P proves the point. These documents do not show bad faith, they show a difference of opinion. The topic of medical billing is a very complex subject and requires special training or education. There are colleges that provide classes and certifications in medical billing. Differences of opinion on this subject often occur and they do not necessarily result from bad faith or frivolous conduct.

Also, as noted in the Answer to the Petition for Reconsideration filed by defendant, the award of sanctions under these circumstances would indeed have a chilling effect on parties changing their position to a more moderate one. Thus, public policy would disfavor the award of sanctions where a party corrects its position. Counsel must remain free to change positions so as to avoid presenting incorrect facts or legal theories to the court. Being sanctioned for changing positions to a more moderate position would have a pernicious effect on litigation. Sanctions under section 5813 would be inappropriate in this case.

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be granted to correct the penalty and the interest rate and otherwise denied as to the issue of sanctions. It is recommended that the following Findings and Orders be corrected:

Findings of Fact:

5. Lien claimant is owed a penalty of $ 217.82
6. Lien claimant is owed interest in the amount of $ 4,277.31

Respectfully submitted,

ROGER A. TOLMAN, JR.
Workers' Compensation Judge