WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SERGIO ALEJANDRO ORTIZ, *Applicant*

vs.

PINDLER & PINDLER, INC.;
AMTRUST; BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ11665067
Anaheim District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Lien claimant Bell Community Medical Group seeks reconsideration of the June 18, 2021, Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a fabric cutter from October 24, 2013 to October 24, 2018, did not sustain industrial injury to his neck, hand, back, shoulders, arm, upper extremities, lower extremities, "neuro," sleep, and psyche. The WCJ found, in relevant part, that lien claimants failed to meet their burden of proving injury arising out of and in the course of employment (AOE/COE), and disallowed the lien claimants' liens, accordingly.

Lien claimant contends that the reporting of the Qualified Medical Evaluator (QME) is undisputed and establishes injury AOE/COE.

We have received Answers from codefendants Amtrust and Berkshire Hathaway Homestate Companies. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be dismissed for lack of verification, or, in the alternative, be denied. We have considered the Petition for Reconsideration, the Answers,

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[1] Commissioner Sweeney, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&O and substitute new findings that applicant sustained injury AOE/COE to the lumbar spine, bilateral shoulders, and right hand and wrist, defer the remaining body parts, find that compensation is not barred by Labor Code section 3600(a)(10),[2] and return this matter to the trial level for adjudication of the remaining issues raised and submitted for decision at trial.

FACTS

Applicant claimed injury to his neck, hand, back, shoulders, arm, upper extremities, lower extremities, "neuro," sleep, and psyche while employed as a fabric cutter by Pindler & Pindler from October 24, 2013 to October 24, 2018. Defendants denied liability for the claimed injury. The employer was insured by Amtrust and also by Berkshire Hathaway Homestate Insurance. The case in chief resolved by way of Compromise and Release, approved on October 15, 2019.

On May 12, 2021, the parties proceeded to lien trial with respect to the liens of Prime Physical Therapy, United Services Plus dba Ronco, and Bell Community Medical Group. (Minutes of Hearing (Minutes), dated May 12, 2021, at p. 2:3.) The parties placed in issue injury AOE/COE and whether compensation was barred due to a post-termination filing of the claim under section 3600(a)(10). The parties also raised collateral issues with respect to the nature of the charges alleged, service of the section 4600 election letter, and ancillary issues regarding service and composition of the liens. The parties submitted the matter on the documentary record without calling any witnesses.

On June 18, 2021, the WCJ issued the F&O, determining in relevant part that lien claimants had not met their burden of establishing injury AOE/COE. (Finding of Fact No. 2.) The Opinion on Decision explained that lien claimants failed to call applicant to testify, and that based on defendant's assertion of the affirmative defense of a post-termination claim, that lien claimants could not establish injury AOE/COE. The WCJ disallowed the three pending liens, accordingly. (Order, No. 2.)

Lien claimant's Petition avers the unrebutted reporting of QME Mark Mikhael, M.D., establishes injury AOE/COE and that defendant failed to meet its affirmative burden of establishing a post-termination claim filing. (Petition, at pp. 1-2.)

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

Defendant Amtrust's Answer (Amtrust Answer) responds that the finding of injury by a QME does not automatically prove injury AOE/COE, and that the WCJ's analysis was not limited to an assessment of the evidentiary weight of the QME reporting but extended to the lack of testimonial evidence from applicant. (Amtrust Answer, at p. 4.) Amtrust also observes that its burden of establishing that the claim was filed in contravention of section 3600(a)(10) only arises once lien claimants have established injury AOE/COE. (*Id.* at p. 5.)

Defendant Berkshire Hathaway Homestate Companies' Answer (BHHC Answer) observes that lien claimant's petition is unverified and endorses the WCJ's analysis as set forth in the Opinion on Decision. (BHHC Answer, at p. 2.)

The WCJ's Report observes that lien claimant's Petition is unverified and was not served on applicant. (Report, at p. 1.) The Report also states that notwithstanding a review of the compensable QME reporting, the court determined that "in order for lien claimant to establish their prima facie case, the applicant's testimony was necessary," and because applicant did not testify, lien claimants did not meet their evidentiary burden. (Report, at p. 3.) Accordingly, the WCJ recommends we dismiss the Petition for lack of verification and complete service or deny the petition on the merits. (*Id.* at p. 5.)

DISCUSSION

I.

We first address the issue of the verification of the Petition. Pursuant to section 5902, a petition for reconsideration "shall be verified upon oath in the manner required for verified pleadings in courts of record and shall contain a general statement of any evidence or other matters upon which the applicant relies in support thereof." (Lab. Code, § 5902.) Under Workers' Compensation Appeals Board (WCAB) Rule 10940(c), "[a] verification and a proof of service shall be attached to each petition and answer," and "[f]ailure to file a proof of service shall constitute valid ground for dismissing the petition." (Cal. Code Regs., tit. 8, § 10940(c).) However, while our Rules provide for *possible* dismissal under these circumstances, we also note that generally, the "lack of verification does not necessitate automatic dismissal of a nonconforming pleading." (*Torres v. Contra Costa Schools Ins. Group* (2014) 79 Cal.Comp.Cases 1181, 1186 (writ den.) citing *United Farm Workers v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 915; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 712, fn.3 [57

Cal.Comp.Cases 230].) Thus, while Rule 10940(c) provides the Appeals Board with the discretion to summarily dismiss or deny a petition lacking a verification, it does not require us to do so.

Here, lien claimant has neither verified its Petition, nor sought permission to file an amended, verified Petition. (See Cal. Code Regs., tit. 8, § 10964(a)-(b).) While we nonetheless review the petition on the merits, we remind lien claimant Bell Community Medical Center that it is obligated to adhere to our rules and to verify its pleadings in conformance with section 5902 and WCAB Rule 10940(c). A failure to follow our rules, including the verification of all petitions seeking reconsideration, may result in dismissal of the underlying pleadings. (Cal. Code Regs., tit. 8, § 10940(c).)

II.

Lien claimants assert a right to reimbursement for services provided to applicant in the underlying case in chief, which resolved by way of Compromise and Release on October 15, 2019, without an admission of liability from either defendant. "Where a lien claimant (rather than the injured employee) is litigating the issue of entitlement to payment for industrially-related medical treatment, the lien claimant stands in the shoes of the injured employee and the lien claimant must prove by preponderance of the evidence all of the elements necessary to the establishment of its lien." (*Kunz v. Patterson Floor Coverings, Inc.* (2002) 67 Cal.Comp.Cases 1588, 1592 (Appeals Board en banc).) Here, all parties agree that lien claimants bear the burden of establishing injury AOE/COE. And in this regard, the medical reporting in evidence is germane.

The March 25, 2019 report of orthopedic QME Dr. Mikhael diagnosed applicant as having sustained injury to the lumbar spine, bilateral shoulders, and right hand and wrist. (Ex. 25, Report of Mark Mikhael, M.D., dated March 25, 2019, at p. 9.) The QME concluded that "[i]t is within [a] reasonable degree of medical probability that the injury sustained by the examinee arose out of the course of employment due to cumulative trauma from the dates of October 24, 2013 to October 24, 2018." (*Ibid*.) Thus, the QME has identified injury AOE/COE.

In addition, treating physician Michael Bazel, M.D. has identified orthopedic injuries in his reporting of November 20, 2018, characterized as a "cumulative trauma, while working as fabric cutter." (Ex. 11, Reports of Michael Bazel, M.D., dated November 20, 2018, at p. 1.) Dr. Bazel noted that applicant's clinical findings were consistent with the history provided by applicant, while instituting both a treatment plan and work restrictions. (*Id.* at p. 2.) Dr. Bazel's

report of June 24, 2019 similarly notes applicant's complaints of orthopedic injury to the neck, right shoulder, left hand, back, bilateral legs, ankles and heels. (Ex. 12, Reports of Michael Bazel, M.D., dated June 24, 2019, at p. 2.) Dr. Bazel notes his agreement with QME Dr. Mikhael that applicant sustained industrial injury and further noted that applicant "remains temporarily partially disabled from the effects of his cumulative industrial injury." (*Id.* at p. 3.) And in a supplemental report of September 24, 2019, Dr. Bazel noted his general concurrence with the findings of the QME and applicant's ongoing temporary partial disability. (Ex. 18, Report of Michael Baze, M.D., dated September 24, 2019, at p. 3.)

Thus, both the orthopedic QME and applicant's treating physician have addressed the issue of industrial injury and characterized applicant's injuries as AOE/COE.

Notably, neither defendant offers any affirmative documentary or testimonial evidence in rebuttal to the compensable reporting of the QME or applicant's treating physician.

The WCJ's Opinion on Decision reasons that "[f]actual disputes typically require the applicant's testimony, particularly when there is an issue as to whether the asserted injury occurred in the course of employment." (Opinion on Decision, at p. 2.) The WCJ's Report concludes that "in order for lien claimant to establish their prima facie case, the applicant's testimony was necessary," and that because lien claimant failed to subpoena the appearance of applicant at trial to testify, lien claimant did not meet its affirmative burden of proving injury AOE/COE. (Report, at p. 3.)

It is well established, however, that any award, order, order or decision of the Board must be supported by substantial evidence in light of the entire record (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16]).

This standard is not met "by simply isolating evidence which supports the board and ignoring other relevant facts of record which rebut or explain that evidence." (*Garza, supra*, at p. 317.)

Moreover, the WCJ and the Appeals Board "must accept as true the intended meaning of [evidence] both uncontradicted and unimpeached." (*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660], quoted in *LeVesque, supra*, 1 Cal.3d 627, 639.)

Here, the medical reporting in evidence is uniform in its endorsement of industrial injury. Defendants offer no substantive factual, medical, or medical-legal challenge to the assessment of injury AOE/COE reached by the evaluating and treating physicians in this matter. While the Compromise and Release agreement asserts that employer witnesses could testify as to whether applicant timely reported an injury (Compromise and Release, dated October 15, 2019, at p. 7), the issue of injury AOE/COE was specifically raised and submitted for decision in these supplemental proceedings, and defendants declined to interpose witness testimony to rebut the medical and medical-legal reporting. (Minutes, at p. 2:10.)

Given the lack of countervailing factual evidence or substantive legal argument with respect to the issue of whether applicant sustained industrial injury, we accept as true the intended meaning of the uncontradicted medical evidence. (*McAllister, supra*, 69 Cal.2d 408, 413; *Lamb, supra*, 11 Cal.3d 274, 281.)

Accordingly, based on our review of the entire record, and based on substantial medical evidence of both the QME and applicant's treating physicians, we will rescind the F&O and substitute a finding that lien claimants have met their burden of establishing injury AOE/COE.

III.

Defendants further contend that compensation is barred pursuant to section 3600(a)(10) because applicant's claim was filed after his employment was terminated. (Minutes, at p. 2:16.) Section 3600(a)(10) provides:

> Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:
>
> > (A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.
> >
> > (B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.

> (C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.
>
> (D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff.

(Lab. Code, § 3600(a)(10).)

The burden of proving that compensation is barred under section 3600(a)(10) rests with the party asserting the defense. (Lab. Code, § 5705.) Here, defendants have the affirmative of the issue and thus must sustain their burden of proof. (Lab. Code, § 3600(a)(10).) Accordingly, defendants must establish that the claim for compensation was filed after a notice of termination or layoff, including voluntary layoff, and that the claim is for an injury occurring prior to the time of notice of termination or layoff. (Lab. Code, §§ 3600(a)(10), 5705.) Defendant must meet this burden by a preponderance of the evidence, and this requires "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth." (Lab. Code, § 3202.5.)

Here, defendants have failed to carry their burden because they offer no evidence responsive to whether or when applicant was terminated. The record reflects no notice of termination or layoff. Defendants interpose no witness testimony to confirm that applicant's employment was ever terminated, or when. While defendant Berkshire Hathaway's Notice of Denial of Claim letter rejects liability for a purported lack of evidence, it also notes that "this claim was filed post termination," without further explanation or reference to a date of separation. (Ex. B, Notice of Denial, dated January 25, 2019, at p. 1.) Defendant offers no additional excerpts from applicant's personnel file referencing a layoff, termination, or separation date, and solicited no witness testimony regarding a termination or layoff either from the employer or from applicant himself.

In the absence of threshold evidence of a termination or layoff, defendants have not sustained their burden of establishing that applicant's "claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff…." (Lab. Code, §§ 3600(a)(10), 3202.5, 5705.) Because defendants have not met their affirmative burden of establishing a post-termination filing of the claim, compensation is not barred under section 3600(a)(10). Accordingly, and in addition

to our finding of injury AOE/COE, we will enter an additional finding of fact that compensation is not barred under section 3600(a)(10).

In summary and following our independent review of the entire evidentiary record, we conclude that the medical reporting in evidence provides sufficient evidence of industrial injury to support a finding of injury AOE/COE. We also conclude that defendant has not met its evidentiary burden of establishing that applicant's claim was filed after notice of termination or layoff. Accordingly, we will rescind the F&O and substitute new Findings of Fact that applicant's injury arose out of and in the course of employment, and that compensation is not barred under section 3600(a)(10). We will then return this matter to the trial level for further proceedings and decision by the WCJ.

Notwithstanding our findings of industrial injury not otherwise barred by section 3600(a)(10), we continue to encourage the parties to meet and confer in an effort to reach an amicable resolution to the outstanding liens in this matter.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 18, 2021 is **RESCINDED**, with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant Sergio Alejandro Ortiz, while employed from October 24, 2013, to October 24, 2018, as a fabric cutter, at Moorpark, California, by Pindler & Pindler, Inc., sustained injury arising out of and in the course of employment to his lumbar spine, bilateral shoulders, and right hand and wrist.
2. The body parts of neck, arm, upper extremities, lower extremities, neurological system, sleep, and psyche are deferred.
3. Compensation is not barred by Labor Code section 3600(a)(10).
4. All other issues are deferred.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 29, 2025

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

BELL COMMUNITY MEDICAL GROUP
INNOVATIVE MEDICAL MANAGEMENT
UNITED SERVICES PLUS
MEDICAL COST REVIEW
DORMAN & SUAREZ, LLP

SAR/abs

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