

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARGARET JOANNE HUNTER, *Applicant*

vs.

ACR SYSTEMS, INC.; ZENITH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ882004
Van Nuys District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Lien claimants David Silver, M.D., and David Bresler, Ph.D., L.Ac., seek reconsideration of the December 8, 2025 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that defendant satisfied both liens at rates commensurate with the Official Medical Fee Schedule ("OMFS") and that nothing additional was owed to either lien claimant.

Lien claimants contend that the issues submitted from trial concern only whether the OMFS was applicable to the treatment provided by lien claimants, and that the WCJ's determination that the defendant had actually paid lien claimants exceeded the scope of the issues submitted for decision. Lien claimants further challenge the WCJ's determination that the OMFS sets the maximum level of reimbursement for the services provided by lien claimants. Lien claimants contend the evidentiary record establishes the extraordinary circumstances necessary to justify the award of reimbursement at lien claimants' usual and customary rates.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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 discussed below, we will grant

reconsideration and affirm the WCJ's determination with respect to the applicability of the OMFS but amend the Findings of Fact to defer the issue of the amount actually paid by defendant to lien claimants.

FACTS

Applicant sustained industrial injury in the form of fibromyalgia while employed as a secretary by defendant ACR Systems on February 24, 1997.

The WCJ's Opinion on Decision offers the following background:

The matter came to trial over several years with another judge and was not submitted. The matter was reassigned to the undersigned for decision and the parties narrowed the issues with the sole issue being whether lien claimants, Drs. Bresler and Silver are entitled to payment outside and above the OFMS.

The case was originally denied when the doctors rendered treatment and eventually was found compensable. The applicant has since passed away. Lien claimants' hearing representative asserts that the doctors are entitled to their usual and customary charges as they rendered services on a denied case. Lien claimant has provided a trial brief. Defendant has provided bill reviews indicating that the charges were paid per the OFMS and as such nothing more is owed.

(Opinion on Decision, at p. 3.)

On November 12, 2025, lien claimants and defendant proceeded to lien trial and stipulated that the medical treatment provided to the applicant was reasonable and necessary. (Minutes of Hearing, dated November 12, 2025, at p. 2:9.) The parties placed in issue the liens of "David Silver, treatment \$73,793.22," and "David Bresler, treatment, \$17,682.95." (*Id.* at p. 2:12.) The parties further placed in issue whether "the Official Medical Fee Schedule [is] applicable for treatment provided by Dr. Silver and Dr. Bresler." (*Id.* at p. 2:15.) Neither party offered witness testimony, and the parties submitted the matter for decision on the documentary record.

On December 8, 2025, the WCJ issued her F&O, determining in relevant part that "Defendant has paid the liens per the OFMS and nothing additional is owed." (Finding of Fact No. 3.) The WCJ's decision addresses the question of whether the OMFS is applicable to lien claimants' charges as follows:

The undersigned has reviewed the evidence delineated by lien claimant in support of their position that the doctors are entitled to their usual and customary

charges which is excess of the OFMS by several thousand dollars. In their trial brief, the hearing representative has cited several cases in support of their assertion that the OFMS does not apply and as such their usual and customary rates apply. However, none of these cases support lien claimant's contention that they are entitled to a fee in excess of the OFMS.

(Opinion on Decision, at p. 3.)

The WCJ concludes that defendant had appropriately reimbursed lien claimants at rates per the OMFS:

Nothing in the record supports lien claimants' assertion that additional payment is owed. Lien claimant's evidence shows that the reports were perfunctory and ordinary. Further, an alleged state-of-art office does not render the services extraordinary. Defendants' evidence demonstrates that the bill reviews show that the payments were congruent with the Labor Code and no further payments are owed to either lien claimant.

(Opinion on Decision, at pp. 4-5.)

Lien claimants' Petition contends that the sole issue submitted for decision at trial was whether the OMFS applied to lien claimants' charges, and that to the extent that the WCJ's trial decision determines that defendant made actual payment, the decision exceeds the scope of the agreed upon issues submitted for trial. (Petition, at p. 4:7.) Lien claimant avers that the evidence demonstrates that defendant intended to pay lien claimant but does not establish actual payment. (*Id.* at p. 5:21.) Lien claimants further contend that because defendant had denied liability for applicant's claim at the time the services were rendered by lien claimants, lien claimants are now entitled "to their usual and customary charges, not the heavily discounted OMFS rates." (*Id.* at p. 10:18.) In support of this contention, lien claimants aver the record demonstrates the "extraordinary circumstance[s]" necessary to support the right to recovery at lien claimants' usual and customary rates. (*Id.* at p. 17:2.)

Defendant's Answer responds that the issue submitted for decision was the applicability of the OMFS to lien claimants' charges. (Answer, at p. 2:15.) To the extent that the record demonstrated the full reimbursement of charges at rates specified by the OMFS, defendant asserts the WCJ's determination that the lien had been satisfied was both appropriate and warranted in the record. (Answer, at p. 4:15.) Defendant's Answer further contends that the record does not support the "extraordinary circumstances" necessary to a finding of entitlement to reimbursement at rates in excess of the OMFS. (*Id.* at p. 6:8.)

The WCJ's Report observes that "the issue was whether the OMFS applies to the treatment provided by Drs. Silver and Bresler," and that "[t]he answer based upon the evidence was 'yes' and as such nothing more was owed." (Report, at p. 4.) Insofar as lien claimant alleged the existence of "extraordinary circumstances" in support of their usual and customary charges, the WCJ observes that "[n]othing extraordinary exists in any of the evidence provided at trial. Lien claimant failed to meet their burden of proof to show that additional payment is to be made in this case." (*Id.* at p. 7.)

DISCUSSION

Former Labor Code¹ section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
 - (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on December 15, 2025, and 60 days from the date of transmission is February 13, 2026. This decision is issued by or on February 13, 2026, so that we have timely acted on the petition as required by section 5909(a).

¹ All further references are to the Labor Code unless otherwise noted.

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on December 15, 2025, and the case was transmitted to the Appeals Board on December 15, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on December 15, 2025.

II.

Section 5307.1 provides, in relevant part, for the adoption of an OMFS "that shall establish reasonable maximum fees paid for medical services other than physician services, drugs and pharmacy services, health care facility fees, home health care, and all other treatment, care, services, and goods described in Section 4600 and provided pursuant to this section." (Lab. Code, § 5307.1(a)(1), *italics added.*)

Administrative Director (AD) Rule 9792, subdivision (c), sets forth specific circumstances under which a medical provider may recover more than the maximum amount deemed "reasonable" under the OMFS. (Cal. Code Regs., tit. 8, § 9792(c).) AD Rule 9792(c) provides, in relevant part: "A medical provider or a licensed health care facility may be paid a fee in excess of the reasonable maximum fees if the fee is reasonable, accompanied by itemization, and justified by an explanation of extraordinary circumstances related to the unusual nature of the services rendered; however, in no event shall a physician charge in excess of his or her usual fee."² (Cal. Code Regs., tit. 8, § 9792, subd. (c).)

² AD Rule 9792(c) was promulgated under the authority of *former* Labor Code section 5307.1(b), which provided that "[n]othing in this section shall prohibit a medical provider or licensed health care facility from being paid by an employer or carrier fees in excess of those set forth on the official medical fee schedule, provided that the fee is: (1) Reasonable; (2) Accompanied by itemization and justified by an explanation of extraordinary circumstances related

Lien claimant asserts a right to reimbursement in excess of the OMFS, citing to the writ denied decisions in *Federal Mogul Corp. v. Workmens' Comp. Appeals Bd. (Whitworth)* (1973) 38 Cal.Comp.Cases (writ den.) (*Whitworth*) and *CNA Insurance Companies v. Workers' Comp. Appeals Bd. (Valdez)* (1997) 62 Cal.Comp.Cases 1145 (writ den.) (*Valdez*) for the proposition that “when medical providers treat injured workers on denied claims, they are entitled to their usual and customary charges, not the heavily discounted OMFS rates.” (Petition, at p. 10:17.) However, as we noted in *Ayala v. County of Los Angeles/King Drew Med. Ctr.* (February 25, 2014, ADJ1422645 (MON 0245005)) [2014 Cal. Wrk. Comp. P.D. LEXIS 45] (*Ayala*), “although writ denied cases are citable authority as to the holdings of the Appeals Board panel decisions for which appellate review was summarily denied, they are not binding precedent and have no stare decisis effect. (*Farmers Ins. Group of Companies v. Workers' Comp. Appeals Bd. (Sanchez)* (2002) 104 Cal.App.4th 684, 689, fn. 4 [67 Cal.Comp.Cases 1545]; *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 21, fn. 10 [64 Cal.Comp.Cases 745].)”

Defendant’s Petition directs our attention to the Workers’ Compensation Appeals Board (WCAB) panel decision³ in *Rodriguez v. Hagemann Meat Co.* (February 11, 2014, ADJ7150996) [2014 Cal. Wrk. Comp. P.D. LEXIS 37]. Therein, the panel majority determined that the OMFS set maximum reimbursement rates for lien claimant’s charges. The dissenting Commissioner’s opinion observed that former section 5307.1, subd. (b) (repealed Stats 2003 ch. 121 §§ 34), provided for fees in excess of the fee schedule where the “fee was ‘[r]easonable’ and ‘[a]ccompanied by itemization and justified by an explanation of the extraordinary circumstances

to the unusual nature of the medical services rendered. In no event shall a physician charge in excess of his or her usual fee.” (Lab. Code (2003), § 5307.1, subd. (b.) Senate Bill (SB) 228, which became effective on January 1, 2004, repealed former section 5307.1 (Stats. 2003, chap. 639, § 34) and adopted a new section 5307.1 that did not include the former language enabling medical providers to seek a fee in excess of the OMFS (Stats. 2003, chap. 639, § 35). Because AD Rule 9792 has not been amended since 1999 and thus does not reflect the changes made to section 5307.1 in 2004, multiple Appeals Board panel decisions have called into question the availability of fees in excess of OMFS for dates of service after the 2004 amendments. (See, e.g., *Ayala v. County of Los Angeles/King Drew Med. Ctr.* (February 25, 2014, ADJ1422645 (MON 0245005)) [2014 Cal. Wrk. Comp. P.D. LEXIS 45]; *Wertz v. Herbalife* (July 17, 2017, ADJ4662216 (MON 0235398), ADJ1137113 (MON 0264731)) [2017 Cal. Wrk. Comp. P.D. LEXIS 355].) However, insofar as the dates of service herein occurred both prior and subsequent to the amendments to section 5307.1, we address the issue of the parties’ respective burdens of proof in the first instance.

³ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered similar issues involving the applicability of the OMFS.

related to the unusual nature of the medical services rendered.”” Noting the similarity in language to extant AD Rule 9792(c), the dissent in *Rodriguez* averred that fees in excess of OMFS were available under the language of the statute as it existed prior to amendment in 2004. (*Id.* at p. 19.) The panel majority observed, however, that the analysis in both *Whitworth* and *Valdez* rested on a different burden of proof:

Valdez stated that, in disputed cases, defendant has the burden of showing that a treating physician's charges are excessive. (*Valdez, supra*, at p. 1147). Since that decision, however, case law has established that lien claimants have the burden of proving, by a preponderance of the evidence, that their charges are reasonable. (*Tapia v. Skill Master Staffing* (2008) 73 Cal.Comp.Cases 1338, 1339 (Appeals Board en banc); Lab. Code, §§ 3202.5, 5705; see *Kunz v. Patterson Floor Coverings, Inc.* (2002) 67 Cal.Comp.Cases 1588, 1589–1599 (Appeals Board en banc).) This contrasts with a regulation in effect when *Whitworth* issued, which was repealed January 1, 1991, and which stated that, once there was evidence that expenses were incurred under labor Code section 4600, “recovery thereof will be allowed as they appear” unless “proof of unreasonableness is entered by the party contesting the reasonableness of the charge” or “the record. . . makes manifest the unreasonableness of an expense or the expenses claimed.” (Former Cal. Code Regs., tit. 8, § 10635; see *Gould v. Workers' Comp. Appeals Bd.*, *supra*, 4 Cal.App.4th at p. 1070 (quoting repealed rule].)

(*Id.* at p. 12.)

Accordingly, the panel majority concluded that the lien claimant carried the burden of establishing the facts necessary to support the availability of fees in excess of OMFS pursuant to AD Rule 9792(c). (*Id.* at p. 13.)

We agree with that assessment and further observe that insofar as both *Tapia* and *Kunz* are en banc decisions, those decisions are binding authority on all subsequent panels and WCJs. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).)

Thus, we turn to the issue of whether lien claimants herein have met their affirmative burden of demonstrating, to a preponderance of the evidence, the existence of “extraordinary circumstances related to the unusual nature of the services rendered,” justifying the award of fees in excess of the OMFS. (Cal. Code Regs., tit. 8, § 9792, subd. (c).)

Lien claimants assert that the defendant's 12-year delay in payment of lien claimants' billing "demonstrates that both doctors treated on what was effectively a denied claim." (Petition, at p. 11:11.) However, we are not persuaded that a delay in payment to a medical provider is tantamount to a denial of compensability in the first instance. The submitted evidence does not reflect a claim denial notice, nor did lien claimants interpose witness testimony supporting a compensability dispute at the time the services were rendered. Nor does the record demonstrate how even a considerable delay in payment establishes the existence of the "extraordinary circumstances" related to the provision of "unusual services" as set forth in AD Rule 9792. We further agree with the WCJ that the educational background and professional accomplishments of lien claimants herein, although laudable, do not otherwise establish the existence of the type of extraordinary circumstances that would justify a departure from the OMFS. (Petition, at p. 17:25; Report, at p. 7.) And although the parties have stipulated that services provided by lien claimants were medically necessary, the evidentiary record does not reflect that the services were unusual services necessitated by or related to extraordinary circumstances.

A medical lien claimant has the burden of proving all the elements necessary for the establishment of its lien, and it must carry this burden by a preponderance of the evidence. (Lab. Code, § 5705 ["[t]he burden of proof rests upon the party or lien claimant holding the affirmative of the issue."]); Lab. Code, § 3202.5 ["[a]ll parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence."]; *Zenith Ins. Co. v. Workers' Comp. Appeals Bd. (Capi)* (2006) 138 Cal.App.4th 373, 376–377 [71 Cal.Comp.Cases 374, 376–377]; *Tapia v. Skill Master Staffing, supra*, 73 Cal.Comp.Cases at pp. 1342–1343; *Kunz v. Patterson Floor Covering, supra*, 67 Cal.Comp.Cases at p. 1592.)

Following our complete review of the record occasioned by lien claimants' petition, we agree with the WCJ's conclusion that lien claimants have not met their affirmative burden of establishing the existence of "extraordinary circumstances related to the unusual nature of the services rendered," justifying the award of fees exceeding OMFS. (Cal. Code Regs, tit. 8, § 9792, subd. (c).) We therefore concur with the WCJ's determination that the OMFS is applicable to the charges for services asserted by lien claimants.

However, insofar as lien claimants' Petition raises colorable issues as to whether the payments at OMFS rates were *actually issued* by defendant and/or received by lien claimants, we

will defer the issue and return the matter to the trial level to allow the parties to adjust this issue informally, with jurisdiction reserved to the WCJ in the event of further dispute.

In summary, to the extent that lien claimants' usual and customary charges might be permissible under AD Rule 9792(c), we concur with the WCJ's determination that the record does not support the "extraordinary circumstances related to the unusual nature of the services rendered" necessary to justify fees in excess of the OMFS. Accordingly, we will affirm the WCJ's determination that the OMFS is applicable to lien claimants' charges herein. However, insofar as lien claimants' Petition raises a colorable dispute as to actual receipt of the OMFS reimbursement of its liens, an issue not submitted for decision from trial, we will rescind the WCJ's Findings of Fact that "defendant has paid the liens per the OMFS" and defer the issue. Upon return of this matter to the trial level, the parties may informally adjust issues attendant to the payment and receipt of the reimbursement at OMFS rates, with jurisdiction reserved to the WCJ in the event of further dispute.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of December 8, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of December 8, 2025 is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

...

3. The Official Medical Fee Schedule is applicable to the charges arising out of the treatment provided by David Silver, M.D., and David Bresler, Ph.D., L.Ac.
4. The issue of defendant's payments to lien claimants is deferred, to be adjusted informally by the parties, with jurisdiction reserved to the WCJ in the event of further dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 2, 2026

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

**LEGAL SERVICE BUREAU (DAN ESCAMILLA)
MEDICAL COST REVIEW, INC.**

SAR/abs

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