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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

BOB BORBECK,

Applicant,

vs.

**ACE BUILDING MAINTENANCE; ZURICH
NORTH AMERICA,**

Defendants.

**Case Nos. ADJ8753985;
ADJ8753959
(Santa Rosa District Office)**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the Joint Findings and Order (F&O) issued on September 21, 2015, by the workers' compensation administrative law judge (WCJ). In the F&O, the WCJ found, in pertinent part, that applicant received unemployment compensation benefits from the Employment Development Department (EDD) during the period of September 8, 2012, through August 29, 2013, which were duplicative of temporary disability benefits received by applicant in his workers' compensation case and that defendant settled this matter by Compromise and Release (C&R) with knowledge of the lien of EDD, which was not resolved as part of the C&R. Thus, the WCJ ordered defendant to pay EDD \$33,921.68 in satisfaction of its lien.

Defendant contends that it provided notice of the payment of benefits pursuant to Labor Code¹ section 4904 and because any overpayment by EDD was created by EDD, defendant should not be held liable for the lien.

We have not received an answer from either applicant or EDD. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have reviewed the record and have considered the allegations of the Petition for Reconsideration and the contents of the WCJ's Report. Based on our review of the record and for the

¹ All future references are to the Labor Code unless noted.

1 reasons stated in the WCJ's Report, which we adopt and incorporate, and for the reasons discussed
2 below, we will deny defendant's Petition for Reconsideration.

3
4 I.

5 In this case, the parties do not dispute that there is an overlap in payment of temporary disability
6 benefits and EDD benefits. Defendant's sole contention is that defendant is not liable to EDD for the
7 duplicate payments by EDD because defendant provided sufficient notice to EDD of the commencement
8 of benefits as required by section 4904.

9 EDD mailed a Notice of Lien Claim on October 25, 2012. (Exhibit 2.) The adjuster then faxed
10 the notice back to EDD with a hand-written note on the top of the notice that said: "paying benefits on
11 another file for his shoulder." (*Ibid.*) It does not appear that either defendant or EDD communicated
12 any further regarding benefit payments.

13 On March 23, 2015, defendant presented a C&R for approval on a walk-through basis.² The
14 parties were on notice of EDD's lien, but did not resolve the lien as part of the C&R. The parties did not
15 set EDD's lien for hearing prior to the approval of the C&R. The C&R specifically states: "Defendant to
16 pay, adjust, or litigate liens on file related to industrial medical care or disability with all defenses
17 reserved. No new or additional liability is assumed by operation of this provision."

18 II.

19 Section 4904 requires that: "When the Employment Development Department has served an
20 insurer or employer with a lien claim, the insurer or employer shall notify the Employment Development
21 Department, in writing, as soon as possible, but in no event later than 15 working days after commencing
22 disability indemnity payments." Whether the adjuster's note to EDD was sufficient notice pursuant to
23 section 4904 is arguable. In order to avoid any confusion in the future, we would encourage defendant to
24 provide EDD with all of the information requested by EDD in the notice of lien, including what
25 payments are being made, for what period, and for what weekly rate. We would also encourage EDD to

26 ² Defendant served the C&R upon EDD on March 18, 2013. We would note that defendant failed to properly serve EDD with
27 the C&R ten working days prior to its submission for approval. (See § 4904(a).) However, EDD has not raised this as an
issue and wherever possible it is preferred to resolve issues on the merits rather than technical error.

1 respond upon receipt of what could be minimally construed as constructive notice of payment of benefits.
2 However, as discussed below, we need not decide whether defendant provided proper notice to EDD
3 pursuant to section 4904 because in this case defendant is liable for EDD's lien regardless of whether
4 notice was provided.

5 Even if defendant provided sufficient notice to EDD of the commencement of temporary
6 disability benefits, defendant is still liable for EDD's lien because defendant was aware of EDD's lien
7 and did not address the lien when it submitted the C&R to the WCJ for approval on a walk-through basis.
8 When settling a case, the parties must address all liens that can attach to the settlement funds. If the
9 parties have not resolved a known lien of EDD as part of a C&R agreement, only two scenarios can
10 happen: either, EDD's lien is set for hearing and determination prior to the approval of the C&R
11 (§ 4904(c),) or the lien is deferred and defendant accepts liability for whatever amount is subsequently
12 determined as EDD's lien. (§ 4904(e).) Section 4904(e) states:

13 (e) The appeals board shall not be prohibited from approving a compromise and
14 release agreement on all other issues and deferring to subsequent proceedings
15 the determination of a lien claimant's entitlement to reimbursement **if the
defendant in any of these proceedings agrees to pay the amount
subsequently determined to be due under the lien claim.**

16 (§ 4904(e) (emphasis added).)

17 By not resolving EDD's lien as part of the C&R agreement or prior to the C&R's approval and by
18 deferring EDD's lien for subsequent trial and by expressly agreeing to pay, adjust, or litigate liens on file,
19 defendant agreed to pay any amount of EDD's lien subsequently found due.

20 Defendant argues that it should not be liable for EDD's lien because defendant gave EDD proper
21 notice that temporary disability was being paid. Defendant's argument solely focuses on defendant's
22 liability for payment to EDD and ignores any liability that applicant might have to repay EDD from the
23 C&R settlement fund. A C&R settlement addresses both the liability of defendant as well as applicant to
24 EDD. If defendant had properly given notice to EDD of the commencement of benefits, defendant
25 would not have been liable to EDD for the duplication of benefits. Instead applicant would have been
26 liable and EDD's lien could have attached against applicant's settlement under the C&R. However,
27 defendant has now paid out applicant's entire settlement under the C&R without resolving EDD's lien.

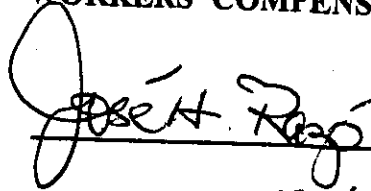
1 Defendant cannot settle around a known lien, pay out all settlement funds to which the lien might attach,
2 and then request that the lien claimant take nothing. Such conduct deprives a lien claimant to its right to
3 due process. Defendant is liable to EDD for the amount of its lien that was subsequently determined to
4 be due. (§ 4904(e).)

5 Accordingly, we deny defendant's Petition for Reconsideration.

6 For the foregoing reasons,

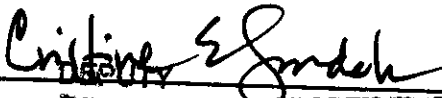
7 **IT IS ORDERED** that defendant's Petition for Reconsideration of the Joint Findings and Order
8 issued on September 21, 2015, by the WCJ is **DENIED**.

9 **WORKERS' COMPENSATION APPEALS BOARD**

10 

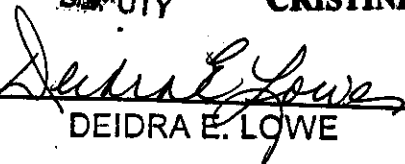
11 _____
12 **JOSÉ H. RAZO**

13 I CONCUR,

14 

15 _____
16 **DEPUTY**

CRISTINE E. GONDAK

17 

18 _____
19 **DEIDRA E. LOWE**



20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21 **DEC 02 2015**

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

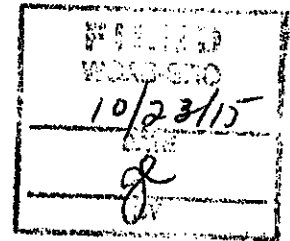
24 **BOB BORBECK**
25 **DELFINO GREEN & GREEN**
26 **EMPLOYMENT DEVELOPMENT DEPARTMENT**
GRANCELL, STANDER, REUBENS, THOMAS AND KINSEY



27 **EDL:mm**

BORBECK, Bob

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



**ADJ8753959
ADJ8753985**

BOB BORBECK

vs. ACE BUILDING MAINTENANCE

**JAMES R. JOHNSON
Workers' Compensation Judge**

**Dates of Injury:
ADJ8753959 CT-August 23, 2012
ADJ8753985 February 24, 2012**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

On March 23, 2015, defendant's attorney's requested a "walk through" for approval of a Compromise and Release. The applicant and defendant were both represented by attorneys. The Compromise and Release agreement provided for settlement of the applicant's February 24, 2012 injuries to his shoulders, upper extremities, and knees (ADJ8753985) and settlement of applicant's claim of cumulative injury through August 23, 2012 to his circulatory system and nervous system (ADJ8753959). The settlement provided for defendant to pay applicant the sum of \$35,000, less credit for permanent disability advances, and less attorney's fees. In paragraph 8 of the Compromise and Release, defendant agreed to "pay, adjust or litigate liens on file related to industrial medical care or disability with all defenses reserved. No new or additional liability is assumed by operation of this provision".

At the March 23, 2015 "walk through" hearing, the WCJ approved the Compromise and Release and served the parties with an Order Approving Compromise and Release. At that time there existed in the file a lien claim from the Employment Development Department (EDD), dated

January 27, 2014, for reimbursement of unemployment compensation disability benefits paid to the applicant for the period August 31, 2012 through August 29, 2013, at the compensation rate of \$667 per week, in the total sum of \$34,684. The Compromise and Release agreement indicated that applicant was paid temporary disability indemnity for the period September 8, 2012 through September 6, 2014, in the total sum of \$86,315.28. (See, Compromise and Release at paragraph 6).

On April 6, 2015, EDD filed a Declaration of Readiness to Proceed to a Lien Conference. On April 13, 2015, defendant objected to the Declaration of Readiness to Proceed on the grounds that EDD was attempting to assert a lien for benefits paid on a denied claim against alleged duplicate payments the carrier made on an admitted orthopedic claim and that EDD has not produced evidence in support of the causal nexus between the injury alleged and the applicant's employment duties. Defendant further alleged that the applicant made material representations to the carrier and to State Disability resulting in the duplicate payments. Defendant asserted that EDD should seek recovery from the applicant and should be barred from seeking recovery from defendant.

On June 8, 2015, these cases came to calendar for a Lien Conference. At the hearing EDD and the defendant filed a Pre-Trial Conference Statement.

On June 30, 2015, the case returned to calendar for a two-hour Lien Trial. At the trial judicial notice was taken of the Compromise and Release, the Order Approving Compromise and Release, and of the Minutes of Hearing and Notice of Intention to Dismiss Liens, previously filed and served June 8, 2015. Based upon a review of the electronic file, it did not appear that there had been any written objection filed to the Notice of Intention to Dismiss Lien Claims and it was therefore ordered that the lien claims of the 4600 Group, Anthem Blue Cross, and Med-Legal Photocopy be dismissed.

At the Lien Trial, EDD and the defendant , Zurich North America, stipulated that Bob Borbeck, born February 28, 1958, while allegedly employed on February 24, 2012 and during the cumulative period through August 23, 2012, as an operations manager by Able Building Maintenance, insured by Zurich North America, sustained injury arising out of and in the course of employment to his shoulder, upper extremities and knees and claims to have sustained injury arising out of and in the course of employment to his heart and stress.

At the trial the parties further stipulated that the applicant has been paid temporary total disability indemnity for the period September 8, 2012 through September 6, 2014, at the compensation rate of \$829.97 per week, and permanent disability for the period May 1, 2012 through June 25, 2012, at the compensation rate of \$230 per week.

The parties framed the issues to be decided as: injury arising out of and in the course of employment to the applicant's heart and stress; parts of body injured; and, lien claim of the Employment Development Department for state disability paid to the injured worker for the period August 31, 2012 through August 29, 2013, at \$667 per week, in the total sum of \$34,684.

All of the offered exhibits were accepted into evidence. After oral argument presented by the representative of each of the above parties, the case was then submitted for decision.

On September 21, 2015, the parties were served with a Joint Findings and Order by which it was determined, in part, that defendant made continuing payments of temporary total disability to the applicant while the applicant was receiving unemployment compensation disability benefits from EDD for the same period; pursuant to the Order Approving Compromise and Release filed March 23, 2015, defendant agreed to pay the applicant a settlement of \$35,000 less credit for permanent disability advances and attorney's fees, with knowledge of EDD's lien claim for reimbursement of unemployment compensation disability paid to the applicant from August 31,

2012 through August 29, 2013 in the total sum of \$34,684; and , defendant is liable for reimbursement to EDD for applicant's receipt of duplicate payments of temporary disability and unemployment compensation disability indemnity in the total sum of \$33,921.68.

On October 9, 2015, defendant filed a Petition for Reconsideration on the grounds that by the order, decision, and award the Appeals Board acted without or in excess of its powers; the evidence does not justify the findings of fact; and, the findings of fact do not support the order, decision or award.

There has been no response to the Petition for Reconsideration filed by EDD.

It is further noted that the Petition for Reconsideration does not show service on the applicant or the applicant's attorney.

II

DISCUSSION

Labor Code section 5905 requires that a copy of the Petition for Reconsideration shall be served forthwith upon all adverse parties by the person petitioning for reconsideration. Defendant's failure to serve the Petition for Reconsideration on the applicant and applicant's attorney violates the provisions of Labor Code section 5905 and constitutes grounds for dismissal of the Petition for Reconsideration.

In the Petition for Reconsideration, the defendant contends that EDD's failure to terminate payments after notice provided by defendant caused the period of duplicate payments. Defendant contends that the Garcia case is distinguishable and that the trial judge did not address the notice provided by defendant to EDD nor its impact on the outcome. Defendant contends that the trial judge imputed "some affirmative duty" of the defendant to investigate further or force EDD to discontinue payments. Defendant argues that terminating payments of temporary disability

indemnity would have created a potential penalty under Labor Code section 5814. Defendant contends that because it provided prompt notice to EDD of payment of benefits and because EDD failed to act reasonably upon receipt of the notice that EDD's actions were the sole and proximate cause of the duplicate payment for which EDD is currently seeking reimbursement.

In addition, defendant argues that allowing the lien of EDD will result in inequity to the defendant and unjust enrichment to the applicant. Defendant contends that it is the only party with "clean hands". Defendant argues that not only did the applicant seek duplicate payments of benefits while represented by counsel for months on end, but that EDD also caused the profound period of duplicate payments by its failure to act in the face of notice by defendant that payments were issuing.

As noted in the Opinion on Decision, defendant initially took the position that it should not be held liable for reimbursement to EDD for duplicate payments of temporary disability and unemployment compensation disability benefits on the grounds that EDD was paying benefits on a non-industrial claim whereas defendant was paying temporary disability based on an industrial injury.

Defendant now acknowledges the well settled precedent that an employee who sustains both an industrial and non-industrial injuries may not receive both temporary disability benefits and unemployment compensation disability benefits for the same period and that the Employment Development Department is entitled to a lien against the employee's workers' compensation award for the unemployment compensation disability payments made which cover the same period of wage loss as the workers' compensation award (See, State of California, Employment Development Department vs. WCAB (Garcia) (1976) 41 CCC 489; and Petition at page 4).

Defendant's attempt to distinguish the facts in the present case from the holding in the Garcia case is not persuasive. As noted in Garcia the language of the statute is "clear and unambiguous" and provides that in determining the amount of the lien to be allowed for unemployment compensation disability benefits, the Appeals Board should allow such lien in the amount paid for the same day or days of disability for which an award of compensation of temporary disability is made. (See, Labor Code section 4904).

In addition, it is noted that the lien claim of the Employment Development Department was filed on January 27, 2014. At the time defendant negotiated the Compromise and Release with the applicant, the parties were fully aware of the lien claim of the Employment Development Department. Defendant at that time was obligated to address EDD's lien claim. Instead, due apparently to the mistaken position that it could not be held liable for reimbursement to EDD because EDD benefits were paid on a "non-industrial claim", defendant negotiated a settlement without considering EDD's statutory entitlement to reimbursement.

The provision in the Compromise and Release to "pay, adjust or litigate liens on file" is not a resolution of a disputed lien claim. Therefore, when defendant entered into the Compromise and Release and paid the Compromise and Release pursuant to the Order Approving Compromise and Release, defendant paid "in the face" of the EDD's lien claim and is liable for reimbursement to EDD for the period of duplicate payments of temporary disability indemnity and unemployment compensation disability indemnity from September 8, 2012 through August 29, 2013, in the total sum of \$33,921.68 (See, California Western States Life Insurance Company vs. IAC (1952) 17 CCC 154, 156).

Based upon a review of the Petition for Reconsideration, it continues to be found that the Joint Opinion on Decision fully supports the Findings and Order and the Joint Opinion on Decision is therefore adopted and incorporated herein, in part, as follows:

“Pursuant to the stipulations of the parties and review of the Compromise and Release and EDD’s lien claim, it is clear that during the period from September 8, 2012 through August 29, 2013, the applicant received duplicate payments of temporary disability and unemployment compensation disability indemnity. It is further clear that EDD paid unemployment compensation disability benefits on account of the applicant’s claimed heart and stress injury and that defendant paid the applicant temporary disability on the applicant’s accepted industrial injuries to his shoulder, upper extremities, and knees. It is further clear that defendant was aware of the applicant’s receipt of unemployment compensation disability benefits as early as October 25, 2012 when EDD issued a Notice of Lien Claim. (See, EDD Exhibit 2).

It is further clear that after receipt of EDD’s Notice of Lien Claim that defendant continued to pay applicant temporary total disability benefits; defendant and the injured worker agreed to a Compromise and Release with knowledge of EDD’s lien claim; and, that pursuant to the Order Approving Compromise and Release that defendant has paid the applicant the settlement sum without any consideration for the interests of EDD.

Defendant’s position that it should not be held liable for reimbursement to EDD for duplicate payments of temporary disability and unemployment compensation disability benefits is premised on the argument that EDD was paying benefits on a non-industrial claim whereas defendant was paying temporary disability based on an industrial injury.

It is well settled that an employee who sustains both industrial and non-industrial injuries may not receive both temporary disability benefits and unemployment compensation disability benefits for the same period and that the Employment Development Department is entitled to a lien against the employee’s Workers’ Compensation award for the unemployment compensation disability payments made which cover the same period of wage loss as the workers’ compensation award. (See, State of California, Employment Development Department vs. WCAB (Garcia) (1976) 41 Cal. Comp. Cases 489.

Based upon the above, it is therefore immaterial whether or not the applicant sustained injury arising out of and in the course of employment to his heart and stress. As noted in Garcia, the language of the statute is “clear and unambiguous” and provides that in determining the amount of the lien to be allowed for unemployment compensation disability benefits, the Appeals Board should allow such lien in the amount paid for the same day or days of disability for which an award of compensation of temporary disability is made. (See, Labor Code section 4904).

In making the above finding, it is further noted that defendant as early as October 25, 2012, was on notice that the applicant was receiving benefits from EDD. Defendant continued to make payments of temporary disability with knowledge of the applicant's receipt of unemployment compensation disability benefits. Defendant apparently took no action to investigate whether EDD continued to pay benefits or to stop payments of duplicate benefits.

In addition, pursuant to the Order Approving Compromise and Release, which is now a final order, defendant has made payment "in the face of" EDD's lien claim. As noted in California Western-States Life Insurance Company vs. IAC (1952) 17 Cal. Comp. Cases 154, 156, in similar situations it is uniformly upheld that a debtor pays his creditor at his peril after notice of garnishment or assignment.

Based on the above defendant is liable for reimbursement to the Employment Development Department for applicant's duplicate receipt of temporary disability benefits and unemployment compensation disability benefits from September 8, 2012 through August 29, 2013, in the total sum of \$33,921.68.

Pursuant to Unemployment Insurance Code section 2629.1(e), an employer is liable for payment of interest and penalties if EDD has made payments of unemployment compensation disability benefits "in lieu of other benefits".

Based upon the above, it is found that EDD did not make payments to the applicant "in lieu of other benefits" and therefore the provisions of Unemployment Insurance Code section 2629.1(e) are found to not apply to this case.

III

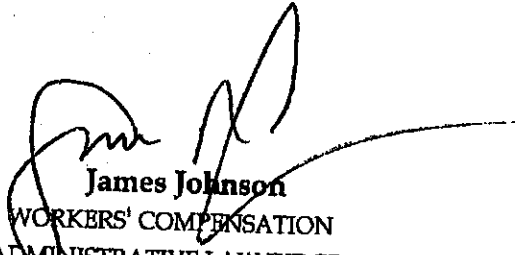
RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be dismissed for violation of Labor Code section 5905. In the alternative, it is respectfully recommended that the Petition for Reconsideration be denied.

10/23/15

Date

(See attached Proof of Service)
JRJ/jl


James Johnson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE