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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

FELIPE GARCIA,

Applicant,

vs.

**E RECYCLING OF CALIFORNIA; ZURICH
NORTH AMERICA,**

Defendants.

Case No. ADJ7590683
(Marina del Rey District Office)

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Workers' Compensation Appeals Board (Appeals Board) previously granted reconsideration in order to further study the factual and legal issues. This is our Decision After Reconsideration.

In the March 17, 2014 Findings and Order, the workers' compensation administrative law judge (WCJ) found that lien claimant Western Medical Center is entitled to payment of fees in excess of the Inpatient Hospital Fee Schedule section of the Official Medical Fee Schedule (OMFS) "due to the extraordinary circumstances related to the unusual nature of the services as well as the applicability of the exemption for an urgent injury pursuant to California Code of Regulations, title 8, sections 9792(c) and 9792.1 (c)(2)." (March 17, 2014 Finding of Fact No. 2.)

Defendant contends that the WCAB lacks jurisdiction over the lien of Western Medical Center due to an express agreement between Western Medical Center and defendant. Defendant also contends that Labor Code section 5307.1(b) which allows payment in excess of the OMFS for medical treatment related to extraordinary circumstances was deleted in 2004 thus eliminating the enabling statute for Rule 9792.1. Finally, defendant contends that the WCJ did adequately explain the basis for her decision as required by Labor Code section 5313.

We have considered the Petition for Reconsideration and we have reviewed the record in this matter. We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

///

1 For the reasons stated below, we will grant reconsideration, rescind the WCJ's decision and find
2 that lien claimant is entitled to payment pursuant to the OMFS and, thus, is entitled to nothing further on
3 its lien.

4 As a preliminary matter, Labor Code section 5313 requires the WCJ to "make and file findings
5 upon all facts involved in the controversy and [make and file] an award, order or decision stating the
6 determination as to the rights of the parties. . . [and include] a summary of the evidence received and
7 relied upon and the reasons or grounds upon which the determination was made" after the case is
8 submitted. A WCJ may cure the failure to provide the grounds for a decision by subsequently specifying
9 the grounds in the report contemplated by Appeals Board Rule 10860. (*Smales v. Workers' Comp.*
10 *Appeals Bd.* (1980) 45 Cal.Comp.Cases 1026, 1027 (writ den.); *Hoag Memorial Hospital Presbyterian v.*
11 *Workers' Comp. Appeals Bd. (Giannini)* (1997) 62 Cal.Comp.Cases 1720, 1721 (writ den.).)

12 Here, the WCJ correctly determined that the WCAB has jurisdiction over the lien of Western
13 Medical Center. With respect to defendant's contention that it paid Western Medical Center pursuant to
14 an agreement, for the reasons stated by the WCJ in her Report at pages 2-3, the WCAB has jurisdiction.
15 We hereby adopt and incorporate by reference the WCJ's discussion of jurisdiction at pages 2-3 of her
16 Report.

17 However, the WCJ incorrectly found that lien claimant was entitled to payment in excess of the
18 OMFS. Defendant is correct that 5307.1(b) which allows payment in excess of the OMFS for medical
19 treatment related to extraordinary circumstances was deleted in 2004. Concurrently, Labor Code
20 5307.1(e)(1) was amended to provide that: "Prior to the adoption by the administrative director of a
21 medical fee schedule pursuant to this section, for any treatment, facility use, product, or service not
22 covered by a Medicare payment system, including acupuncture services, the maximum reasonable fee
23 paid shall not exceed the fee specified in the official medical fee schedule in effect on December 31,
24 2003.

25 The OMFS in effect on December 31, 2003 included California Code of Regulations, title 8,
26 section 9792.1(a) which provides that: "Maximum reimbursement for inpatient medical services shall be
27 determined by multiplying 1.20 by the product of the health facility's composite factor and the applicable

1 DRG weight or revised DRG weight..." Rule 9792.1(c) provides that: "The following are exempt from
2 the maximum reimbursement formula set forth in subdivision (a)...(2) Inpatient services provided by a
3 Level I or Level II trauma center."

4 Rule 9792.1 was last amended in 2002 and is part of the OMFS in effect on December 31, 2003.
5 The 2004 OMFS changed the formula for maximum reimbursement for inpatient medical services and
6 that formula is now found at California Code of Regulations, title 8, section 9789.22(a).

7 Because 2004 OMFS is the fee schedule authorized by Labor Code section 5307.1, the WCJ
8 should not have relied on Rule 9792.1(c)(2) which addresses an exception to the pre-2004 fee schedule.
9 While subdivision (c)(2) provides an exception to subdivision (a), neither subdivision (a) nor subdivision
10 (c) are applicable in this case because it must be decided pursuant to the 2004 OMFS.

11 Accordingly, we will find that lien claimant is entitled to payment pursuant to the OMFS and
12 return the matter to the trial level for the WCJ to determine whether defendant has paid the amount due
13 under the fee schedule.

14 For the foregoing reasons,

15 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
16 Appeals Board, that the March 17, 2014 Findings and Order is **RESCINDED** and this following is
17 **SUBSTITUTED** in its place:

18 Finding and Order

19 Finding

- 20 1. Lien claimant is entitled to payment pursuant to the Official Medical Fee
21 Schedule.

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1 Order

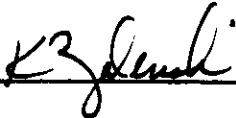
2 IT IS HEREBY ORDERED that this matter is returned to the trial level for the
3 WCJ to determine whether lien claimant is entitled to additional payment
4 pursuant to the OMFS.

5 **WORKERS' COMPENSATION APPEALS BOARD**

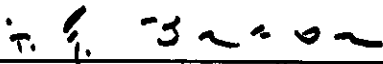
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8 **RONNIE G. CAPLANE**

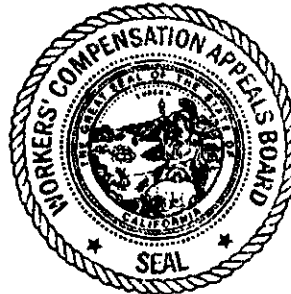
9 I CONCUR,

10
11 

12 **KATHERINE ZALEWSKI**

13
14 

15 **FRANK M. BRASS**



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

17 **MAR 23 2015**

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

20 FELIPE GARCIA
21 LAW OFFICES OF TOBIN LUCKS
22 LAW OFFICES OF REID L. STEINFELD
23 SAUL, ALLWEISS & MCMURTRY

24
25
26
27 **MWH/ebc** 

GARCIA, Felipe

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

3
4 **FELIPE GARCIA,**
5 *Applicant,*
6 **vs.**
7 **E RECYCLING OF CALIFORNIA; ZURICH**
8 **NORTH AMERICA,**
9 *Defendants.*

Case No. ADJ7590683
(Marina del Rey District Office)

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION

10
11 Reconsideration has been sought by defendant, with regard to a decision filed on March 17, 2014.

12 Taking into account the statutory time constraints for acting on the petition, and based upon our
13 initial review of the record, we believe reconsideration must be granted in order to allow sufficient
14 opportunity to further study the factual and legal issues in this case. We believe that this action is
15 necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned
16 decision. Reconsideration will be granted for this purpose and for such further proceedings as we may
17 hereinafter determine to be appropriate.

18 For the foregoing reasons,

19 **IT IS ORDERED** that the Petition for Reconsideration is **GRANTED.**

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1 IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in
2 the above case(s), all further correspondence, objections, motions, requests and communications shall be
3 filed in writing only with the Office of the Commissioners of the Workers' Compensation Appeals Board
4 at either its street address (455 Golden Gate Avenue, 9th floor, San Francisco, CA 94102) or its Post
5 Office Box address (PO Box 429459, San Francisco, CA 94142-9459), and shall not be submitted to the
6 Marina del Rey District Office or any other district office of the WCAB and shall not be e-filed in the
7 Electronic Adjudication Management System.

8 **WORKERS' COMPENSATION APPEALS BOARD**

9
10 *F. G. - 3-2-10-*
11 _____
12 FRANK M. BRASS

13 I CONCUR,

14 *KZelewski*
15 _____
16 KATHERINE ZELEWSKI

17 CONCURRING, BUT NOT SIGNING
18 RONNIE G. CAPLANE
19 _____



20 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

21
22 SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR
23 ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

24 FELIPE GARCIA
25 LAW OFFICES OF TOBIN LUCKS
26 LAW OFFICES OF REID L. STEINFELD
27 LAW OFFICES OF ALLWEISS & MCMURTRY

ou

MWH/bgr
GARCIA, Felipe

WCAB Case No: ADJ7590683

FELIPE GARCIA, v. E RECYCLING OF CALIFORNIA
Insurance Company: ZURICH NORTH AMERICA
Workers' Compensation
Administrative Law Judge: LISA A. SUSSMAN

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

I.

INTRODUCTION:

1. Applicant's Occupation : General Laborer
Applicant's Age : 54
Date of Injury : 12/6/10
Parts of Body Injured : Left upper extremity
Manner in which injury occurred : Arm caught in assembly line band
2. Identity of Petitioner : **Defendant** filed the Petition.
Timeliness : The petition is timely.
Verification : The petition is verified.
3. Date of Findings & Order : March 17, 2014
4. Petitioner contends that: 1) the WCJ erred in finding the Court has jurisdiction over the lien of Western Medical Center; 2) the WCJ erred in finding Western Medical Center's fees are not limited to the amounts in the Inpatient Hospital Fee Schedule of the OMFS; 3) payment under the OMFS is mandatory for all dates of discharge on or after 7/1/04; and 4) the WCJ violated LC §5313 by failing to provide an adequate opinion on decision.

II
FACTS:

Applicant Felipe Garcia suffered an admitted industrial injury on December 6, 2010 to his left upper extremity when his arm was caught in an assembly line band. As a

result of his injuries, applicant was admitted to ICU at Western Medical Center on a traumatic injury admission, remained in the hospital for 34 days, and underwent 11 surgical procedures including splinting, grafting, and debridement.

His claim resolved by Stipulation and Award on May 20, 2013 for 48% permanent disability with the need for future medical care, and on July 16, 2013, applicant settled out his claim by Compromise and Release for the sum of \$90,000.00. The agreements were approved by WCJ Rose.

On January 30, 2014, lien claimant Western Medical Center and defendant carrier Zurich proceeded to trial on the issue of the lien of Western Medical in the sum of \$ 407,654.23, \$ 42,297.81 of which was paid by defendant (Exhibit 15).

Evidence was admitted, testimony was taken, and the parties provided the court with post-trial briefs as to the applicable issues. The matter stood submitted on February 14, 2014.

On March 17, 2014, a Findings of Fact and Order issued in which it was found that 1) the Court has jurisdiction to determine the lien of Western Medical Center; 2) lien claimant's fees are not limited to amounts in the Inpatient Hospital Fee Schedule section of the OMFS ; 3) the court is unable to determine the reasonable value of lien claimant's services based upon the existing record; and, 4) the matter is ordered off calendar and the parties are given 45 days in which to resolve the lien or select an agreed bill reviewer to determine the reasonable value of the lien, court jurisdiction reserved.

It is from this Findings and Order that petitioner seeks reconsideration.

III

ISSUES RAISED:

JURISDICTION

Defendant contends that the WCJ erred in finding that the court has jurisdiction over the lien of Western Medical Center due to the existence of an express agreement between themselves and lien claimant. In support of same, defendants reference Exhibit B. The court has reviewed the only evidence presented by the defendant on this issue as

stated above. There was no testimony with regard to these documents or how they may relate to the applicant and the services rendered to him, or how the agreement relates to Zurich North America other than the non-Bates stamped and non-verified pages attached to the end of Exhibit B entitled The First Health Payor list, listing a number of insurance carriers, including Zurich North America.

Further, no evidence was presented regarding compliance with the disclosure requirements of LC §4609(a).

While it is entirely appropriate to review the terms of several inter-related contracts to determine whether there was an agreement to fix the amounts to be paid for medical treatment (See, Tri-City Medical Center v. WCAB (2010) 75 CCC 790(writ denied)), the defendant failed to provide a sufficient nexus of this agreement as it relates to the services provided applicant due to his industrial injury. The party asserting the affirmative of an issue has the burden of proof.

Not only did defendant fail to prove up the existence of an express agreement, but the record is insufficient to link the parties through a chain of contracts as would be required in the absence of an express contract. In the absence of an express agreement, the WCAB retains jurisdiction over such disputes per LC §5304. Waters v. Los Angeles Clippers Basketball Club, Inc. (BPD) (2005) 2005 Cal. Wrk. Comp. P.D. LEXIS 15; Woodruff v. Greenfield Trucking (BPD) (2007) 2007 Cal. Wrk. Comp. P.D. LEXIS 93.

It is noted that if defendant had proven up a valid series of contracts between Western Medical and defendant linking the medical provider and defendant so as to create a binding contract between the two entities under Labor Code § 5304, the WCAB would still retain jurisdiction absent an arbitration clause in the agreements. Waters, at p. 21.¹

Regardless, the issue is moot as defendant has not only failed to prove up such a series of valid contracts, but their own medical review expert, Jimmy Tran, testified that he was unaware of any contractual discount related to this case and did not use any such contract when evaluating the value of lien claimant's services.

¹ In this regard, if the WCAB were to determine that defendant has proven the existence of a series of contracts binding the parties to a sum certain payment, per the terms of the Affordable Health Care Concepts Hospital Contract, Appendix A, Bates stamped page 23, paragraph 9 (Exhibit B), it appears defendant should have paid 85% of Western Medical Center's bill.

VALIDITY OF CCR §9792(c):

Defendant contends that the WCJ's reliance upon CCR §9792(c) et seq. is misplaced because that code section derives its authority from the now repealed former LC §5307.1(b) which allowed fees in excess of the OMFS if the fee was reasonable and accompanied by an explanation of extraordinary circumstances related to the unusual nature of the medical services rendered.

As stated in the Findings of Fact and Opinion on Decision, the court relied upon not just CCR 9792(c), but several other factors in its findings, including CCR §9792.1(c)(2) which exempts from the maximum reimbursement formula inpatient services provided by a level I or Level II trauma center as to a patient with an immediately life threatening or urgent injury.

Applicant's injury, as discussed in the Opinion on Decision, was certainly an urgent injury, not to mention potentially life threatening. The operative reporting from the applicant's date of admission and injury on 12/6/10 (Exhibit 3) states that applicant arrived via ambulance with an almost total amputation to his arm. Further, he underwent a total of 11 separate surgeries including grafting, debridement, and splinting, and was an inpatient for 34 days. Additionally, Western Medical Center is admittedly a Level II trauma center, per defense expert witness Jimmy Tran. (See, Minutes of Hearing and Summary of Evidence, dated 1/30/14, page 9, lines 13-15.)

While it is true that LC §5307.1 has been amended to eliminate paragraph (b) and is one of the authorities for CCR §9792.1, additional authority for said CCR §9792.1 is LC §5307.3 (allowing the AD to adopt, amend, and/or rescind a regulation after public hearing), LC §4600 (providing for medical services at the expense of the employer), and LC §4603.2 (providing the appeals board with jurisdiction over disputes arising out of LC §5304).

Furthermore, LC §5307.1 as amended in 2012 still lists as a reference CCR § 9792.1 (and §9792) which clearly sets forth exemptions to the maximum reimbursement formula of the OMFS for inpatient services of health facilities.

With respect to the WCJ's reliance upon CCR §9792 (c), which allows for a medical provider to be paid a fee in excess of the maximum amounts in the OMFS and contains language previously contained in subsection (b) of LC 5307.1, the court notes that the authority relied upon for that regulation section is also LC § 5307.3, LC §4600 and LC 4603.2. In other words, although the repeal of a statute may extinguish rights existing under that statute, it cannot extinguish a right that would exist by virtue of legal authority other than the repealed statute.

The mere fact that subsection (b) of LC § 5307.1 has been deleted from its provisions does not amount to a blanket preclusion from a rebuttal of the OMFS.

Thus, the elimination of subsection b in Labor Code § 5307.1 which stated that nothing in this section (emphasis added) shall prohibit a medical provider from being paid in excess of the OMFS under certain conditions does not per se eliminate the ability to ever prove an exception to such fee schedule, if in fact the OMFS is rebuttable.²

It appears that the OMFS is in fact rebuttable, as nowhere in the OMFS does it state that the OMFS is conclusively presumed correct for all issues contained therein, and the court will not read language into a statute when none exists.

Further, several panel cases seem to suggest that the OMFS can in fact be rebutted, specifically with respect to issues involving traumatic injuries and inpatient care of an urgent or life threatening nature. Bayley v. YMCA of the East Bay (2011) (ADJ2367528) 2011 Cal. Wrk. Comp. P.D. LEXIS 259; 2011 Cal. Wrk. Comp. P.D. LEXIS 149; Gene Del Mastro v. John Manninger Electric (2008) 2008 Cal. Wrk. Comp. P.D. LEXIS 859 (finding that some treatment modalities are specifically excluded from the OMFS under CCR § 9792.1(c), thus limiting the employer's liability to "reasonable fees" under LC § 4600(a)).

² The reason for the elimination would appear to be that there are now things in section §5307.1 prohibiting a medical provider from being paid in excess of the OMFS.

APPLICABILITY OF CCR §9789.20 – 9789.24:

Defendants next assert that the OMFS is mandatory for the calculation of an inpatient facility fee for dates of discharge on or after July 1, 2004 based upon the AD's adoption of CCR §9789.20 – 9789.24, and that the court erred in failing to award lien claimant fees pursuant to these regulations.

While July 1, 2004 is the operative date for the application of the relevant OMFS, for the reasons previously stated, the OMFS does not state such fees are conclusively presumed correct. In fact, CCR §9789.22(k) specifically exempts a number of facilities from the maximum reimbursement formulas set forth in the OMFS for inpatient hospital services, including critical access hospitals. A Level II trauma Center such as Western Medical Center could certainly be considered a critical access hospital. Thus, the court did consider these sections in her decision.

FAILURE TO ADEQUATELY EXPLAIN THE BASIS FOR DECISION:

Finally, petitioner claims that the WCJ failed to set forth her reasoning with respect to the Findings and Award issued in the herein case in violation of LC §5313.. When a WCJ files a detailed report on Petition for Reconsideration and adequately sets forth the evidence relied upon and the reasons therefore, his (or her) requirement to set forth such reasoning in the Opinion on Decision is excused. Smales v. WCAB (1980) 45 CCC 1026.

Additionally, the actual opinion on decision issued by the court does explain the rationale behind the finding that the amount owed to lien claimant Western Medical Center is not limited to the amounts in the Inpatient Hospital Fee Schedule of the OMFS.

IV

RECOMMENDATION:

For the reasons stated above, it is respectfully recommended that the defendant's Petition for Reconsideration be denied.

DATED: 4/8/14



HON. LISA A. SUSSMAN
Workers Compensation Judge

Served on said date by mail
On the persons shown on the
Official address record.

By: [Signature] 4-9-14