

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **Case No. ADJ3102031 (MON 0358522)**

5 **GABRIEL OLIVAS,**

6 *Applicant,*

7 **vs.**

8 **NORTH AMERICAN PLYWOOD
CORPORATION; BHHC/REDWOOD FIRE
AND CASUALTY INSURANCE COMPANY,**

9 *Defendants.*

10 **ORDER DENYING
PETITION FOR
RECONSIDERATION**

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12 We have considered the allegations of the Petition for Reconsideration and the contents of the
13 report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our
14 review of the record, and for the reasons stated in said report which we adopt and incorporate, we will
15 deny reconsideration.

16 Although we are denying reconsideration, we will return this matter to the WCJ for further
17 proceedings on sanctions against lien claimant, as he deems appropriate.

18 For the foregoing reasons,

19 **IT IS ORDERED** that said Petition for Reconsideration be, and it hereby is, **DENIED.**

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1 IT IS FURTHER ORDERED, that this matter is RETURNED to the WCJ for further
2 proceedings on sanctions against lien claimant, as deemed appropriate by the WCJ.

4 WORKERS' COMPENSATION APPEALS BOARD

5 *Cristine E. Gondak*

6 DEPUTY

7 CRISTINE E. GONDAK

8 I CONCUR,

9 *Frank M. Brass*

10 FRANK M. BRASS

11 *Marguerite Sweeney*

12 MARGUERITE SWEENEY



13 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

14 JUN 18 2014

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

17 ALTOS, INC.
18 BBE MANAGEMENT
19 BERKSHIRE HATHAWAY
20 CA MED MANAGEMENT
21 GABRIEL OLIVAS
22 GOLDMAN, MAGDALIN & KRIKES
23 JACOBSON & ASSOCIATES
24 LANDMARK MEDICAL
25 NORTH AMERICAN PLYWOOD
26 PINNACLE LIEN
27 PREMIER MED BILL SERVICE
UNALISYS

ebc

OLIVAS, Gabriel

CASE NUMBER: ADJ3102031

GABRIEL OLIVAS

VS. NORTH AMERICAN PLYWOOD CORP.;

B.H.H.C./REDWOOD FIRE & CAS. INS.

JUDGE:

GILBERT KATEN

DATE OF INJURY:

JANUARY 16, 2008

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION (Lien Trial)

INTRODUCTION

Petitioner, Lien Claimant Access Mediquip hereafter, "Access"), through its collection agent, Pinnacle Lien Services, has filed a timely and verified Petition for Reconsideration following the Findings and Order following lien trial, dated March 28, 2014 which disallowed the petitioner's lien claim and found, among other things, that adverse inferences should be drawn against the petitioner, by reason of its failure to comply with a discovery order issued by Judge Robin Leviton, dated August 15, 2013. Specifically, Findings Number 8 and 9 drew the following adverse inferences: (a) The petitioner had a financial interest in providing surgical hardware to Pacific Hospital of Long Beach, to whom it allegedly provided surgical hardware used in the worker's spinal surgery there (for which the employer paid Pacific Hospital); (b) the petitioner lacked the capacity to litigate its lien before the Appeals Board in the absence of a Fictitious Business Name certificate; and (c) the petitioner lacked the required licensure to dispense the surgical hardware allegedly dispensed to Pacific Hospital.

The underlying case involved an admitted specific spinal injury of January 16, 2008 incurred by Gabriel Olivas, born October 7, 1966, while employed as a warehouseman by North American Plywood Corporation.

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This Judge is unable to decipher the specific contentions of the petitioner, but it appears to him that it contends the following: (1) Access contends it submitted evidence that it was entitled to payment of its lien claim for the surgical hardware it provided to Pacific Hospital of Long Beach; (2) The adverse inferences drawn in Findings Number 8 and 9 were improper.

FACTS

The worker herein sustained an admitted back injury on January 16, 2008 and filed his Application for Adjudication of Claim for it herein.

He underwent authorized spinal surgery for that injury at Pacific Hospital of Long Beach on October 26, 2009.

The worker and employer settled the underlying case by a Compromise and Release which this Judge ordered approved by and Order dated July 25, 2012, leaving outstanding several lien claims, including that of the this petitioner.

On June 27, 2013, the employer served upon the petitioner a Demand for Production of numerous items, received into evidence at the lien trial as Exhibit "A". The Demand included, *inter alia*, the following, at pages 5-6:

"6. ALL DOCUMENTS REFERRING TO the names and addresses of each PERSON holding an ownership interest in YOUR business entity.

"7. ALL DOCUMENTS REFERRING TO your fictitious business name statement in effect commencing from the first date of service rendered by YOU to APPLICANT to the present.

"...

"22. ALL DOCUMENTS REFERRING TO YOUR license in effect curing all time periods during which durable medical equipment or other medical appliances, supplies or equipment dispensed to APPLICANT."

When the petitioner failed to respond to the Demand for Production, a hearing was held before Judge Robin Leviton on August 15, 2013, and she issued an Order on that day, compelling the petitioner to provide those items, within 30 days (Exhibit "B").

The petitioner filed an unverified response on or about January 14, 2014 (Exhibit "C"). In it, the petitioner's response to Requests Number 6 and 7 was as follows to both: "Responding party is unable to locate any such documents" A similar response was given to Request number 22.

A lien trial was held before this Judge on March 4, 2014 and submitted on documents received into evidence: Lien Claimant's 1-8 (which included invoices dated after the worker's surgery, but professes to be for that surgery); Defendants' "A" through "C"; and Appeals Board's Exhibit "X", the plea agreement of Michael Drobot, owner of Pacific Hospital of Long Beach wherein he plead guilty to fraud, including fraud in respect to billings for surgeries requiring surgical hardware of the type for which petitioner sought reimbursement in its lien claim.

The issues for decision at lien trial were:

1. Liability for the allegedly self-procured surgical hardware expenses allegedly used in this worker's surgery;
2. Whether adverse inferences should be drawn against the petitioner for failure to comply with Judge Leviton's discovery Order of August 15, 2013, compelling production of the above items;

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3. Whether the petitioner was barred from recovery under Regulation 9789.22 (d), as the employer asserted, or is entitled to recovery by Labor Code Sec. 5318, as petitioner asserted. [The parties were given time to submit Points and Authorities on this issue. The employer filed them, but the petitioner did not];

4. Whether the petitioner can establish the acquisition costs of the exact units used in applicant's October 26, 2009 surgery.

Thereafter, upon review of all of the evidence and of the employer's Points and Authorities, the Judge determined that Access was nothing but a middleman, supplying surgical hardware from other companies (Sea Spine, Orthovita and Medtronic, according to Exhibits 3, 4 and 5, as well as the Petition for Reconsideration) to Pacific Hospital, which allegedly used them in this worker's spinal surgery. Because the hardware was invoiced after the surgery, this judge was dubious that the evidence established their use in that surgery. Moreover, in light of the admitted fraudulent activities of Michael Drobot (Exhibit "X"), and the petitioner's failure to appropriately respond to the Demand for Production and Judge Leviton's Order that it do so, the Judge drew the adverse inferences requested, in Finding Number 9.

DISCUSSION

The first point that this Judge wishes to make is that the Petition for Reconsideration is non-compliant with Rules 10846 b), in that asserts, as “background” alleged facts that are found nowhere in the record, and refers to documents which are neither identified nor found in the record. Reconsideration is not the time to assert facts not in evidence; and, if they are in evidence, the petitioner has failed to identify what exhibit(s) it refers to in making its arguments. This is particularly important, because this Judge is dubious of the verification of the Petition for Reconsideration, for the following reason: It is verified by “Donald M. Lower”, who identified himself as “President of Pinnacle Lien Services”. He is not the president of the party, Access Mediquip, and no basis is given in the verification for his purported knowledge of the facts set forth in the Petition.

As the employer asserts in its Answer to Petition for Reconsideration, at page 4, the petitioner is actually improperly seeking to provide evidence not produced at the time of trial, under a questionable verification. Because those purported facts are the apparent bases for the petitioner’s contention that its lien is payable, it must fail.

Moreover, Regulation 9789.22 (d), applicable hereto under SB-863, clearly provides that there is no liability to anyone other than Pacific Hospital of Long Beach for the surgical hardware. The petitioner’s assertion at lien trial that it was entitled under Labor Code Section 5318 to its lien claim fails, as that provision was repealed by SB-863 (Sec. 64).

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Furthermore, the evidence that the petitioner did introduce, Exhibits 3-5 were invoices dated *after* this worker's October 26, 2009 surgery, causing one to question their *bona-fides*.

Finally, as to the adverse inferences drawn in Finding Number 9, it is clear that the items 6, 7 and 22 were never provided. Nor did the petitioner file a response until five months after Judge Leviton's Order. That response, too, is of questionable *bona fides*, because it is unverified and contends that Access does not access to its own licensure or documents naming those having a financial interest in the company.

RECOMMENDATION

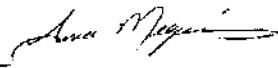
It is recommended that the Petition for Reconsideration be dismissed, for failure to comply with Rule 10846 (b) or denied for its lack of merit. It is further recommended that consideration be given to the imposition of sanctions against the petitioner for the frivolous litigation of its lien claim without evidence, and the frivolous filing of this Petition for Reconsideration.

DATED:5/7/2014



GILBERT KATEN
Workers' Compensation Judge

On the above date, copies of the foregoing were served by
US Mail on counsel for Defendants, Pinnacle Lien Services and
Access Mediquip, at their addresses set forth in the Official
Address Record

By  5/7/14

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