WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ASHLEY COLAMONICO, ***Applicant,*** **vs.** **SECURE TRANSPORTATION; NATIONAL UNION FIRE INSURANCE COMPANY, Administered by SEDGWICK CMS,** ***Defendants.***	**Case No. ADJ9542328** **(Long Beach District Office)** **OPINION AND DECISION AFTER RECONSIDERATION** **(En Banc)**

On July 22, 2019, we granted defendant's Petition for Reconsideration to further study the factual and legal issues in this case.

To secure uniformity of decision in the future, the Chair of the Appeals Board, upon a unanimous vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision.[1] (Lab. Code, § 115.)[2]

On May 10, 2019, a workers' compensation administrative law judge (WCJ) issued Findings and Orders, which found, as relevant herein, that: 1) defendant waived all objections to the unpaid portion of Med-Legal Photocopy's (lien claimant) billings; 2) lien claimant was entitled to reimbursement in the sum of $1,151.07 as well as penalty and interest;[3] and 3) lien claimant was entitled to penalty and interest on its invoices for copy services between August 31, 2015, and November 2, 2015, which defendant paid

[1] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd*. (*Garcia*) (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].) This en banc decision is also adopted as a precedent decision pursuant to Government Code section 11425.60(b).

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

[3] In the Opinion on Decision, the WCJ explained that the $1,151.07 amount is the sum of the unpaid portion of thirteen invoices from February 25, 2015, to April 7, 2015. According to the WCJ, defendant did not issue timely explanations of review in response to any of the thirteen invoices; therefore, lien claimant is entitled to penalty and interest on the unpaid sum of $1,151.07. (See § 4622(a)(1).)

in full but not within sixty days of receipt of said invoices.[4]

In its Petition for Reconsideration, defendant contends, as relevant herein, that: 1) it did not waive its section 4620 or 4621 objections pursuant to section 4622(f) and WCAB Rule 10451.1(f)(1)(A) (Cal. Code Regs., tit. 8, § 10451.1(f)(1)(A)); and 2) lien claimant was not entitled to reimbursement of $1,151.07 or penalty and interest because lien claimant did not meet its burden of proof that its expenses were reasonable and necessary at the time they were incurred.

We did not receive an answer from lien claimant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

Based upon our review of the record, the allegations of defendant's Petition for Reconsideration, the contents of the WCJ's Report, and the relevant statutes and case law, we hold as follows:

1. **A Medical-legal Provider Has the Initial Burden of Proof That: 1) A Contested Claim Existed at the Time the Expenses Were Incurred, and That the Expenses Were Incurred for the Purpose of Proving or Disproving a Contested Claim Pursuant to Section 4620; and 2) Its Medical-legal Services Were Reasonably, Actually, and Necessarily Incurred Pursuant to Section 4621(a).[5]**

2. **Defendant Does Not Waive an Objection Based on Section 4620 or 4621 By Failing to Raise Those Objections in an Explanation of Review Pursuant to Section 4622.**

For the reasons discussed below, we rescind the Findings and Orders and return this matter to the trial level for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

The parties stipulated that applicant, while employed from January 1, 2013, through April 15, 2013, as a driver for defendant, claimed injury arising out of and in the course of employment to her spine and internal organs. (Minutes of Hearing (MOH), April 3, 2019, p. 2:5-7.)

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[4] Neither party challenged the WCJ's finding of penalty and interest on the invoices for copy services between August 31, 2015, and November 2, 2015.

[5] We note that section 4620 was not an issue at the lien trial.

Between April 15, 2014, and June 25, 2015, applicant requested lien claimant's copy services for records at multiple locations. (Exhibit 2, Med-Legal Order Forms, April 15, 2014, to June 25, 2015.)

Lien claimant issued several subpoenas duces tecum (SDT) from July 25, 2014, to March 19, 2015. (Exhibit 3, Subpoenas Duces Tecum, July 25, 2014, to March 19, 2015.)

Between August 1, 2014, and November 2, 2015, lien claimant issued numerous invoices for its copy services.[6] (Exhibit 4, Various Invoices, August 1, 2014, to October 30, 2015.)

During the period from August 22, 2018, to August 25, 2018, defendant issued eight Explanations of Review (EOR) for lien claimant's copy services performed in 2014 and 2015. (Exhibit B, EORs, August 22, 2018, to August 25, 2018.)

On April 3, 2019, the matter proceeded to a lien trial on the following issues, as relevant herein, regarding lien claimant's lien: necessity and value of the copy services as well as penalty and interest. (MOH, April 3, 2019, p. 2:11-16.)

On May 10, 2019, the WCJ issued the disputed decision as outlined above.

DISCUSSION

I. A Medical-legal Provider Has the Initial Burden of Proof That It Complied with Sections 4620 and 4621.

Section 4622 provides the framework for reimbursement of medical-legal expenses. Subsection (f) of the statute, however, specifically states that "[t]his section is not applicable unless there has been compliance with Sections 4620 and 4621." (§ 4622(f).)

Section 4620(a) defines a medical-legal expense as a cost or expense that a party incurs "for the purpose of proving or disproving a contested claim." (§ 4620(a).) Copy service fees are considered medical-legal expenses under section 4620(a). (*Cornejo v. Younique Cafe, Inc.* (2015) 81 Cal.Comp.Cases 48, 55 [2015 Cal. Wrk. Comp. LEXIS 160] (Appeals Board en banc); *Martinez v. Terrazas* (2013) 78 Cal.Comp.Cases 444, 449 [2013 Cal. Wrk. Comp. LEXIS 69] (Appeals Board en banc).) Lien claimant's initial burden in proving entitlement to reimbursement for a medical-legal

[6] Defendant's petition specifically focuses on the invoices with dates of service from February 25, 2015, to April 7, 2015.

expense is to show that a "contested claim" existed at the time the service was performed. Subsection (b) sets forth the parameters for determining whether a contested claim existed. (§ 4620(b).) Essentially, there is a contested claim when: 1) the employer knows or reasonably should know of an employee's claim for workers' compensation benefits; and 2) the employer denies the employee's claim outright or fails to act within a reasonable time regarding the claim. (§ 4620(b).)

While the parties did not raise section 4620 as an issue at the lien trial, we note that a determination of whether a purported medical-legal expense involves a "contested claim" is a fact-driven inquiry. The public policy favoring liberal pre-trial discovery that may reasonably lead to relevant and admissible evidence is applicable in workers' compensation cases. (*Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654, 663 [64 Cal.Comp.Cases 624].) Thus, parties generally have broad discretion in seeking and obtaining documents with a subpoena duces tecum in workers' compensation cases.

Assuming a lien claimant has met its burden of proof pursuant to section 4620(a), it has a second hurdle to overcome; the purported medical-legal expense must be reasonably, actually, and necessarily incurred.[7] (§ 4621(a).) The determination of the reasonableness and necessity of a service focuses on the time period when the service was actually performed. (*Id.*)

A lien claimant holds the burden of proof to establish all elements necessary to establish its entitlement to payment for a medical-legal expense. (See §§ 3205.5, 5705; *Torres v. AJC Sandblasting* (2012) 77 Cal.Comp.Cases 1113, 1115 [2012 Cal. Wrk. Comp. LEXIS 160] (Appeals Board en banc).) Thus, a lien claimant is required to establish that: 1) a contested claim existed at the time the expenses were incurred; 2) the expenses were incurred for the purpose of proving or disproving the contested claim; and 3) the expenses were reasonable and necessary at the time they were incurred. (§§ 4620, 4621, 4622(f); *American Psychometric Consultants Inc. v. Workers' Comp. Appeals Bd.* (*Hurtado*) (1995) 36 Cal.App.4th 1626 [60 Cal.Comp.Cases 559].) Once a lien claimant has established these three elements, it then may proceed to address the reasonable value of its service under section 4622. In sum, sections

[7] Section 4621(a) states that section 4621(a) "is not applicable unless there has been compliance with Section 4620." (§ 4621(a).)

4620 and 4621 pertain to a medical-legal provider's service, and section 4622 pertains to the reasonable value of the service.

II. Defendant Does Not Waive an Objection Based on Section 4620 or 4621 By Failing to Raise Those Objections in an Explanation of Review in Accordance with Section 4622.

"A fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citation.] In construing a statute, our first task is to look to the language of the statute itself. [Citation.] When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms. [Citations.] [¶] Additionally, however, we must consider . . . the context of the entire statute [] and the statutory scheme of which it is a part." (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-88 [58 Cal.Comp.Cases 286].)

As mentioned above, section 4622(f) explicitly states that section 4622 is not applicable unless there has been compliance with sections 4620 and 4621. In *Hurtado*, *supra*, the Court of Appeal addressed the significance of the 1993 amendment to section 4622 that created subsection (d), the precursor to subsection (f):[8]

> Thus, Labor Code section 4620 was expanded in 1993 to render it crystal clear that an applicant could not seek medical-legal evaluations for which the employer/carrier would be financially responsible before the employer had received notice of the industrial claim and had had an opportunity to respond to it.
> . . . .
> The Legislature also amended Labor Code section 4622, by adding subdivision (d), which provided: "Nothing contained in this section shall be construed to create a rebuttable presumption of entitlement to payment of an expense upon receipt by the employer of the required reports and documents. *This section is not applicable unless there has been compliance with Sections 4620 and 4621*."
> (*Hurtado, supra,* 36 Cal.App.4th. at pp. 1641-42, emphasis in original.)

In its detailed analysis of the 1993 amendments, the *Hurtado* Court held that "section 4622, which provides that an employer/carrier must protest a medical-legal billing within 60 days of receipt, *has no application in its entirety when the medical provider has not complied with the "contested claim"*

[8] Former section 4622(d) was re-designated as subsection(f) in 2012. (Stats. 2012, ch. 363, § 53.)

rule, because the Legislature so provided, in Labor Code, section 4622, subdivision (d), as amended in 1993." (*Hurtado*, *supra*, 36 Cal.App.4th at p. 1644, emphasis in original.)

We note that the holding in *Hurtado* is specifically limited to the "contested claim" rule found in section 4620. The reasonableness of, and necessity for, medical-legal services found in section 4621 was not before the *Hurtado* Court. However, the rationale expressed by the *Hurtado* Court mandating compliance with the "contested claim" rule found in section 4620 applies equally to the reasonableness and necessity requirement found in section 4621. The Legislature's inclusion of section 4621 when it amended former section 4622(d) reflects that compliance with both sections is necessary before section 4622 is applicable.

Here, the WCJ found that defendant waived its section 4620 and 4621 objections. In the Report, the WCJ explained that that defendant waived all objections to reasonableness and necessity of the services due to defendant's failure to issue timely EORs.

The WCJ's analysis is inconsistent with section 4622(f), which is discussed in detail above. Additionally, the WCJ's reasoning is inconsistent with WCAB Rule 10451.1(f)(1)(A) (Cal. Code Regs., tit. 8, § 10451.1(f)(1)(A)), which specifically states that a defendant "shall be deemed to have finally waived all objections to a medical-legal provider's billing, *other than compliance with Labor Code sections 4620 and 4621*" for failure to respond to a provider's billing as required. (Cal. Code Regs., tit. 8, § 10451.1(f)(1)(A), emphasis added.) For the reasons stated above, defendant did not waive its objections based on section 4620 or 4621 for failing to raise these objections in an EOR.

We also address the holding in *Otis v. City of Los Angeles* (1980) 45 Cal.Comp.Cases 1132 [1980 Cal. Wrk. Comp. LEXIS 3527] (Appeals Board en banc). Some medical-legal providers cite to *Otis* in arguing that defendants' failure to timely object to the reasonableness or necessity of their copy services is a waiver of those objections. As relevant herein, *Otis* held that "[u]nless the employer or its carrier contests the billing for medical-legal costs within sixty days after receipt, it is precluded from raising, and the workers' compensation judge or the Board is precluded from considering the reasonableness and necessity of the cost." (*Otis*, *supra*, 45 Cal.Comp.Cases at p. 1141.) *Otis* was decided in 1980, and the holding was based on the language of former section 4601.5, which stated in relevant part, "'all fees and

expenses for [medical-legal costs] shall be paid . . .' unless the bill is contested within sixty days." (*Id.* at p. 1141.)

Former section 4601.5(a) allowed for the recovery of "that portion of the billed sum then unpaid" when an objection was not made to a medical-legal expense. (Stats. 1976, ch. 446, § 1.) However, in 1984, subsequent to the issuance of *Otis*, section 4622(a) was enacted and former section 4601.5 was repealed. (Stats. 1984, ch. 596, § 4.) Unlike the procedures set forth under former section 4601.5, under section 4622(a)(1), the provider's recovery was instead limited to "that portion of the billed sum then *unreasonably* unpaid" when a defendant failed to contest the billing. (§ 4622(a)(1), emphasis added.) Additionally, with the enactment of former section 4622(d) in 1993, the Legislature explicitly shifted the burden from the employer to the provider: the burden was no longer on the defendant to object to the reasonableness or necessity of the provider's services. Instead, the initial burden was on the provider to show its services were reasonable and necessary. We recognize that some previous Appeals Board panel decisions on this issue may have created confusion by applying the holding in *Otis* to medical-legal expenses.[9] To the extent that those decisions do not comport with the above analysis, we disagree with them. Therefore, we conclude that this holding in *Otis* is inconsistent with section 4622, and we reject the application of this holding in *Otis* with respect to the statutory framework of sections 4620, 4621, or 4622.

In the matter before us, lien claimant has the initial burden of proof that it complied with section 4621(a). The record is not sufficiently developed for us to render a decision on the merits of this particular issue. (See *Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Board en banc.).) Upon return to the trial level, the WCJ should conduct further proceedings, wherein lien claimant must first demonstrate the reasonableness of, and necessity for, its copy services at the time they were incurred pursuant to section 4621(a). The WCJ should address this issue in the first instance.

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[9] See, e.g., *Camerena v. Stonehave, Inc.* (2018) (2018 Cal. Wrk. Comp. P.D. LEXIS 397).

We are aware that a defendant may challenge the reasonableness and/or necessity of a medical-legal expense for the first time at a lien conference without first objecting in an EOR. Should a defendant pursue this type of litigation strategy, a defendant potentially exposes itself to penalties and interest "retroactive to the date of receipt of the bill . . . ." (§ 4622(a).) Furthermore, if a defendant failed to communicate these objections to a lien claimant before the lien conference, the WCJ has the discretion to consider whether it is engaging in bad-faith tactics to delay the resolution of the lien. Any bad-faith action or tactic may be the basis for potential sanctions pursuant to section 5813. (§ 5813; Cal. Code Regs., tit. 8, § 10561.)

In sum, as relevant to this matter, lien claimant has the burden of proof that its services were reasonable and necessary at the time they were incurred pursuant to section 4621(a); and defendant did not waive this objection by failing to address this issue in an EOR in accordance with section 4622.

As our decision after reconsideration, we will rescind the Findings and Orders and return this matter to the trial level for further proceedings consistent with this opinion.

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For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the WCJ's May 10, 2019 Findings and Orders is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/ Katherine A. Zalewski
KATHERINE A. ZALEWSKI, Chair

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

/s/ Marguerite Sweeney
MARGUERITE SWEENEY, Commissioner

/s/ José H. Razo
JOSÉ H. RAZO, Commissioner

/s/ Juan Pedro Gaffney
JUAN PEDRO GAFFNEY, Commissioner

/s/ Katherine Williams Dodd
KATHERINE WILLIAMS DODD, Commissioner

/s/ Craig Snellings
CRAIG SNELLINGS, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

11/14/2019

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

ANNA MONTES GLUCK
LAW OFFICES OF EDWARD T. DE LA LOZA
MED LEGAL PHOTOCOPY
BOEHM & ASSOCIATES

SS/abs