

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

3
4 **SARA OCHOA,**

5 *Applicant,*

6
7 **vs.**

8 **BEL AIRE WINDOW COVERINGS; ZENITH**
9 **INSURANCE COMPANY,**

10 *Defendants,*

11 **ASPEN MEDICAL RESOURCES,**

12 *Lien Claimant.*
13

Case Nos. ADJ1148042 (RIV 0079139)

OPINION AND DECISION
AFTER
RECONSIDERATION

14
15 We earlier granted the petition of lien claimant Aspen Medical Resources (AMR) for
16 reconsideration of the October 5, 2011 Findings & Order of the workers' compensation administrative
17 law judge (WCJ) who found that AMR "failed to meet their burden of proof that their charges were
18 credible or reasonable," and that "defendant had a valid Medical Provider Network in place at the time of
19 lien claimant's date of services." With those findings, the WCJ ordered that defendant "is not liable for
20 the medical lien of Aspen Medical Resources and that the lien is disallowed."

21 Applicant's admitted claim of industrial injury to her low back and other body parts while
22 working for defendant Bel Aire Windows as a sander on September 21, 2006, was earlier settled by
23 compromise and release for the lump sum of \$56,000 as approved by order of a WCJ on June 24, 2008.

24 AMR contends that defendant failed to prove that it had a valid Medical Provider Network
25 (MPN) and that the WCJ exceeded his authority by making a determination of the value of its services
26 and erred by allowing defendant to submit a proof of service of exhibits after the lien trial had concluded.

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1 An answer was received and the WCJ provided a Report and Recommendation on Petition for
2 Reconsideration (Report).

3 We affirm the WCJ's October 5, 2011 Findings & Order as our Decision After Reconsideration.

4 **BACKGROUND**

5 AMR alleges that it provided applicant with reasonable medical treatment in the form of durable
6 medical equipment, and a lien claim was filed in the amount of \$15,120. A lien trial was conducted on
7 August 24, 2011. According to the Minutes of Hearing from that date the issues to be determined by the
8 WCJ in addition to the validity of the lien were "Medical Provider Network," "Utilization Review," and
9 "Admissibility of Evidence." However, the minutes further note that the issue of the "Value of Services"
10 was "bifurcated" along with issues of penalties and interest.¹

11 Lien claimant offered several documents into evidence at trial including reports by applicant's
12 primary treating physician John Larson, D.C., and documents concerning the equipment delivered by
13 AMR. Defendant offered several documents into evidence, including copies of two utilization review
14 reports sent to Dr. Larson dated October 1, 2007 and November 14, 2007, with both recommending non-
15 certification of a request for "Unknown DME & TENS/EMS." Both parties objected to certain of the
16 other's documents. No testimony was received at the lien trial and the August 24, 2011 Minutes reflect
17 that the matter was submitted for decision at that time. Following the trial the WCJ issued his October 5,
18 2011 decision as described above.

19 In his Report the WCJ discusses the facts, responds to AMR's contentions, and explains the
20 reasons for his decision as follows:

21 "The applicant began treating with John Larson, D.C. on or about 2/5/2007.
22 On 7/7/2007, Dr. Larson D.C. prescribed a motorized cold unit and a moist
23 heat unit. On 8/13/2007, Aspen Medical requested authorization, by fax,
24 based on a prescription signed by Justin Long, D.C. On 8/20/2011, Aspen
25 Medical sent a second request by fax. These items were provided, on a
rental basis, from approximately 8/10/2007 through 11/16/2007. The
request for the units was supported by PR-2 Progress report from Dr.
Larson, D.C, dated 7/11/2007.

26 ¹ We disagree with lien claimant's contention that the WCJ made a finding regarding the "Value of Services" in his October 5,
27 2011 decision. Instead, we accept the WCJ's explanation in his Report that he found that the claimed "services were not
reasonable and necessary."

1 "On 7/26/2007, the applicant and Dr. Larson, D.C. were notified that Dr.
2 Larson was not a member of the Zenith MPN. The applicant received
3 notice in English and Spanish. Despite receiving notice that treatment
4 outside the MPN would not be authorized, Dr. Larson prescribed the cold
5 unit and hot unit...

6 "Lien claimant contends that the defendant did not meet the burden of
7 proof of proper notice of a Medical Provider Network (MPN). Lien
8 claimant does not specify how defendant's notice was defective.

9 "Zenith Insurance Company implemented a Medical Provider Network
10 (MPN) on 2/1/2005. The applicant was injured at work on 9/21/2006. The
11 defendant provided medical treatment. When she obtained legal
12 representation, she was referred to John Larson, D.C. Dr. Larson D.C.
13 wrote an initial report on 2/5/2007.

14 "Defendant notified the applicant that a MPN had been implemented on
15 7/26/2007. On the same day, John Larson D.C. was notified that a MPN
16 had been implemented and that he was not a member of the MPN. The
17 applicant was provided with information on how to obtain medical
18 treatment within the MPN and how to obtain a second opinion. The
19 information was also provided in Spanish. The applicant was provided
20 with a provider directory [that included] the names of numerous
21 physicians.

22 "There is no authority for the proposition that a defect, once corrected,
23 forever exempts the injured worker from having to treat within the MPN
24 (Cynthia Krause v. W.C.A.B. (2010) 75 Cal. Comp. Cases, 683 (writ
25 denied)). A defective notice can be corrected...

26 "The WCJ found that the services were not reasonable and necessary.
27 There was no evidence that explains why a motorized cold unit and a moist
heat unit would be reasonable and necessary.

"There is no indication that the applicant had surgery. Lien Claimant's
Exhibit 8 includes the delivery form and instructions, dated 8/10/2007.
The instructions state that the hot/cold therapy unit is to reduce edema,
inflammation, and pain in the affected area. The protocol is for 'post-
surgery, ie patient is to use the Cold Therapy for 30 minutes 3 to 5 times a
day for the [f]irst two days. After the [f]irst two days, the patient is then to
use heat therapy for 10 minutes, then immediately turn the dial to Cold
Therapy for 20 minutes.' Since the applicant did not have surgery, it is not
known why a hot/cold therapy unit is reasonable and necessary.

"Lien Claimant failed to meet their burden of proof. Since the services
were not reasonable and necessary, the charges were not reasonable and
necessary...

"AMR does not appear to be contending that they did not receive evidence
prior to the lien trial. AMR contends that the WCJ erred by allowing the
proof of service for defendant's exhibits to be admitted into evidence after
the Trial.

1 "The lien trial took place on the afternoon of 8/24/2011, at 3:49 P.M. At
2 the lien trial, the lien claimant raised the objection to the lack of a proof of
3 service for Defendant's Trial Exhibits for the [f]irst time. Defendant was
4 rumbling [*sic*] with his [f]ile and could not locate the proof of service.
Rather than further delaying the proceedings, defendant represented that he
did not have a proof of service. This objection amounted to surprise and an
attempt to catch the opposing side off guard.

5 "Defendant's trial exhibits included Medical Provider Notices. They were
6 not lengthy. Lien claimant had more than enough time to review the
7 exhibits prior to the trial. The WCJ determined that there was no prejudice
to the lien claimant by allowing the exhibits into evidence.

8 "In hindsight, the WCJ should have issued a 'Notice of Intention to Amend
9 Exhibits.' However, the appearance of the proof of service was not
10 determinative in allowing the exhibits into evidence. The determinative
11 factors in allowing the exhibits included that the objection was not timely,
the objection was raised as a surprise on opposing counsel, the lack of
prejudice to lien claimant, and the intent to make a decision on the
available evidence, not on a technicality." (Bracketed material added.)

12 DISCUSSION

13 We agree with and adopt the WCJ's analysis and reasoning as expressed in his Report as part of
14 our Decision After Reconsideration. In addition, we note that AMR's reliance upon *Knight v. Liberty*
15 *Mut Ins Co.* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc) in support of its argument that
16 its lien claim should be allowed because defendant did not initially provide applicant with required notice
17 of the MPN is misplaced. It is true that the Appeals Board held in *Knight* that "an employer or insurer's
18 *failure to provide required notice* to an employee of rights under the MPN *that results in a neglect or*
19 *refusal to provide reasonable medical treatment* renders the employer or insurer liable for reasonable
20 medical treatment self-procured by the employee." (Emphasis added.) However, the record in this case
21 shows that defendant's delay in providing applicant with the MPN notice did not result in a neglect or
22 refusal to provide reasonable medical treatment.

23 The April 8, 2008 report of the Panel Qualified Medical Examiner Charles Sadler, M.D.,
24 (Defendant's Exhibit A) shows that applicant received reasonable medical treatment within the MPN
25 before the MPN notice was sent. The numerous MPN reports and examinations identified in Dr. Sadler's
26 report demonstrate that defendant did not neglect or refuse to provide reasonable medical treatment, but
27 instead was providing reasonable medical treatment through the MPN before applicant was referred to

1 Dr. Larson by her attorney. Moreover, a delay in serving the injured worker with required MPN notice
2 does not mean that a defendant is liable forever after for the costs of any and all treatment self-procured
3 by the injured worker. As noted by the WCJ in his Report, defects in providing MPN notice can be
4 cured, and when a defect is cured a defendant can satisfy its obligation under Labor Code section 4600 to
5 provide reasonable medical treatment through its MPN. (*Babbitt v. Ow Jing* (2007) 72 Cal.Comp.Cases
6 70 (Appeals Board en banc).)

7 We also agree with the WCJ that lien claimant failed to meet its burden of proving that the
8 equipment it provide was “reasonably required to cure or relieve” applicant from the effects of her injury.
9 (Lab. Code, § 4600; *Beverly Hills Multispecialty Group, Inc. v Workers’ Comp Appeals Bd.* (1994) 26
10 Cal.App.4th 789 [59 Cal.Comp.Cases 461]; *Kunz v. Patterson Floor Coverings, Inc.* (2002) 67
11 Cal.Comp.Cases 1588 (Appeals Board en banc); *Tapia v Skill Masters Staffing* (2008) 73
12 Cal.Comp.Cases 1338 (Appeals Board en banc); *Midas Recovery Services v. Workers’ Comp Appeals*
13 *Bd. (Garcia)* (1997) 62 Cal.Comp.Cases 537 (writ den.).)

14 The documents placed into evidence by AMR include an invoice showing delivery of equipment
15 to applicant on August 10, 2007. (Lien Claimant’s Exhibit 8.) In its subsequent August 20, 2007
16 facsimile transmission to defendant, AMR stated that it was providing the equipment pursuant to an
17 earlier August 10, 2007 communication with defendant regarding a request “from Dr. Justin Long.”
18 (Lien Claimant’s Exhibit 5). However, there are no reports by Dr. Long in evidence and the Minutes of
19 Hearing show that the parties stipulated at trial that applicant’s primary treating physician was
20 John Larson, D.C. Thus, AMR’s own exhibits show that it provided the equipment upon the request of
21 someone other than applicant’s primary treating physician, and that it was provided before authorization
22 was requested.

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1 Moreover, AMR offered no report by Dr. Larson wherein he requested authorization to provide
2 durable medical equipment as part of applicant's medical treatment.² The lack of such a report is
3 contrary to the rule promulgated by the Administrative Director in pertinent part, as follows:

4 "A primary treating physician shall, unless good cause is shown, within 20
5 days report to the claims administrator when any one or more of the
6 following occurs...

7 (2) There is any significant change in the treatment plan reported,
8 including, but not limited to...a need for rental or purchase of durable
9 medical equipment or orthotic devices..." (Cal. Code Regs., tit. 8, §
10 9785(f)(2)(E).)

11 The lack of any report by Dr. Larson discussing the need for durable medical equipment or its use
12 further undermines AMR's contention that the equipment it claims to have provided was reasonable
13 medical treatment. In this regard, AMR was obligated to present evidence that the equipment it provided
14 was "reasonably required to cure or relieve" applicant from the effects of her injury in order to satisfy its
15 burden of proof, regardless of whether or not applicant was obligated to treat within defendant's MPN at
16 that time. (Lab. Code, § 4600.)

17 As a lien claimant, AMR has the burden of proving all the elements necessary to establish the
18 validity of its lien. This includes the burden of showing that the equipment it claims to have provided
19 applicant was "reasonably required to cure or relieve" her from the effects of her injury as required by
20 Labor Code section 4600. (Lab. Code, § 5705 ("[t]he burden of proof rests upon the party *or lien*
21 *claimant* holding the affirmative of the issue" (emphasis added); Lab. Code, § 3202.5 ("[a]ll parties *and*
22 *lien claimants* shall meet the evidentiary burden of proof on all issues by a preponderance of the
23 evidence" (emphasis added); *Zenith Insurance Company v. Workers' Comp Appeals Bd (Capi)* (2006)
24 138 Cal.App.4th 373 [71 Cal.Comp.Cases 374]; *Kunz, supra.*) As concluded by the WCJ, AMR did not
25 meet its burden of proof on this record.

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27 ² AMR did place into evidence a copy of one of its prescription forms that purportedly includes the signature of Dr. Larson
(Lien Claimant's Exhibit 7) However, the prescription form is dated October 5, 2007, which was nearly two months *after* the
equipment was delivered to applicant on August 10, 2007, and it includes no discussion, explanation or reason for the request.

1 Lastly, we find no error in the WCJ's receipt of defendant's documents into evidence. In addition
2 to the points made by the WCJ in his Report, we note that AMR's dispute is with defendant's proof of
3 service of the documents on AMR, not with validity of the documents themselves. The file includes
4 defendant's letter to the WCJ dated August 25, 2011, the day after the trial, referencing an attached proof
5 of service showing that the documents were in fact served by mail on AMR on July 18, 2011. The letter
6 was sent to the WCJ in response to AMR's objection at trial that it did not receive the documents, but
7 AMR made no contemporaneous objection to the WCJ's receipt of that ancillary information. Indeed, no
8 objection was made until after the October 5, 2011 decision had issued. AMR's failure to timely object
9 to the WCJ's consideration of the proof of service before he issued his decision was a waiver of the
10 objection. (*MCA, Inc /Universal Studios, Inc. v. Workers' Comp. Appeals Bd. (Ferrell)* (1977) 62
11 Cal.Comp.Cases 529 (writ den.); c.f. *American Int'l Group Claim Servs., Inc. v. Workers' Comp.*
12 *Appeals Bd (Naranjo)* (2001) 66 Cal.Comp.Cases 248 (writ den); see also *Los Angeles Unified Sch*
13 *Dist. v Workers' Comp Appeals Bd. (Henry)* (2001) 66 Cal.Comp.Cases 1220 (writ denied);
14 *Hollingsworth v Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 715 (writ denied); *Sanchez v*
15 *Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 485 (writ denied); *Sycamore Pharmacy, Inc v*
16 *Workers' Comp. Appeals Bd. (Reynoso)* (1997) 62 Cal.Comp.Cases 1322 (writ denied); *Travelers Ins*
17 *Co. v Workers' Comp. Appeals Bd (Coker)* 45 Cal.Comp.Cases 535 (writ denied).)

18 AMR did not meet its burden of proving that the durable medical equipment it claims to have
19 provided applicant was medical treatment reasonably required to cure or relieve her from the effects of
20 her industrial injury. The WCJ's October 5, 2011 decision is affirmed.

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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Appeals Board that the
3 October 5, 2011 Findings & Order of the workers' compensation administrative law judge is
4 **AFFIRMED.**

5 **WORKERS' COMPENSATION APPEALS BOARD**

6
7 *F. M. Brass*
8 **FRANK M. BRASS**

9 **I CONCUR,**

10
11 *Deidra E. Lowe*
12 **DEIDRA E. LOWE**

13
14 *Alfonso J. Moresi*
15 **ALFONSO J. MORESI**



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

19 **APR 24 2012**

20
21 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
22 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

23
24 **SARA OCHOA**
25 **ASPEN MEDICAL RESOURCES**
26 **PINNACLE LIEN**
WALL, MCCORMICK ET. AL.

af

27 *JFS/abs*