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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SERGIO RODRIGUEZ,

Applicant,

vs.

**HAGEMANN MEAT CO.; ZENITH
INSURANCE CO.,**

Defendants.

Case No. ADJ7150996
(Santa Rosa District Office)

**OPINION AND DECISION
AFTER
RECONSIDERATION**

We previously granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant Zenith Insurance Company petitions for reconsideration of the March 1, 2013 Findings, Award and Orders. In that decision, the workers' compensation administrative law judge (WCJ) found that the applicant, while employed as an assistant sales manager on March 24, 2009, sustained an admitted industrial injury to his low back, and in the form of left inguinal hernia and femoral entrapment neuropathy, causing 6% permanent disability with no apportionment. The WCJ deferred the lien of the Employment Development Department (EDD) and determined that any outstanding temporary disability indemnity should be withheld pending resolution of that lien. The WCJ also found, among other things, that Dr. Keller was applicant's primary treating physician and that the Permanente Medical Group/Kaiser Foundation Hospitals (Kaiser) had provided treatment reasonable and necessary to cure or relieve applicant from the effects of his industrial injury. The WCJ awarded benefits and ordered defendant to pay Kaiser's lien.

Defendant contends that 1) the WCJ should have found that lien claimant Kaiser's recovery was limited to amounts under the Official Medical Fee Schedule (OMFS); 2) Dr. Keller was a treating physician but was not the *primary* treating physician, because he was not part of defendant's medical provider network (MPN); 3) the WCJ should have allowed defendant to withhold payment of the

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1 permanent disability award until the EDD lien is resolved; and 4) although the parties stipulated that
2 applicant earned \$750.00 per week, his actual wages were \$838.88 per week for a temporary disability
3 rate of \$559.26 per week.

4 We have considered the Petition for Reconsideration, and we have reviewed the record in this
5 matter. Applicant, representing himself, has filed a document which is not titled. We have treated the
6 document as an Answer and considered its contents.¹ The WCJ prepared a Report and Recommendation
7 on Petition for Reconsideration (Report) recommending that we amend the March 1, 2013 Findings,
8 Award and Orders to correct the finding of average weekly earnings and temporary disability indemnity
9 rate and to find that permanent disability indemnity be withheld pending resolution of EDD's lien.

10 For the reasons set forth below, we will amend the March 1, 2013 Findings, Award and Orders as
11 recommended by the WCJ and will also find that Kaiser is entitled to payment of its lien in an amount
12 pursuant to the OMFS.

13 **BACKGROUND**

14 Applicant testified that he was injured at work while lifting a 70-pound box of chicken and began
15 treating at Kaiser the following day. (July 19, 2011 Minutes of Hearing and Summary of Evidence
16 (MOH/SOE) pp. 5:30-6:29.) After his March 24, 2009 injury, applicant had laparoscopic hernia surgery
17 on April 2, and also received other treatment from Kaiser physicians. (Defendant's Exh. C2 [April 2,
18 2009 surgery report by Dr. George Huang]; see Joint Exh. 6, pp. 2-3 [July 25, 2012 report of Dr. Dell
19 summarizing treatment at Kaiser].)

20 In a letter dated December 11, 2009, defendant denied applicant's claim. (Defendant's Exh. K.)
21 Applicant continued treating with Kaiser. (Defendant's Exh. I [December 16, 2009 report by Dr.
22 Green].) Kaiser submitted a lien for \$7,019.65 on January 3, 2011. (Lien Claimant's Exh. 1.)

23 The case proceeded to trial on July 19, 2011 on the issue of injury arising out of and in the course
24

25
26 ¹ If this document was intended as a Petition for Reconsideration, it was untimely. A petition for reconsideration
27 must be filed within 20 days after service of the order, decision, or award at issue, extended by five days for
service by mail within California. (Lab. Code, §5903; Cal. Code Regs., tit. 8, §10507(a)(1); see *Rymer v. Hagler*
(1989) 211 Cal.App.3d 1171, 1182.) The document was not received until July 10, 2013, which was after the
deadline.

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1 of employment to various body parts. (January 2, 2011 Minutes of Hearing and Summary of Testimony
2 (MOH), p. 2:41-3:4.) The parties stipulated that defendant had paid no benefits. (*Id.* at p. 2:31.) In his
3 September 28, 2011 decision, the WCJ found that applicant had sustained industrial injury to his low
4 back and in the form of hernia and femoral entrapment neuropathy. The case was tried again on October
5 1, 2012 and December 11, 2012 on the issues of temporary and permanent disability, apportionment,
6 need for further medical treatment, EDD's lien, and Kaiser's lien. (October 1, 2012 MOH, p. 4:4-18.)

7 Defendant introduced a document titled "Claim Payment History" indicating that it had made
8 some payments to The Permanente Medical Group, Inc. and to Kaiser Foundation Hospital.
9 (Defendant's Exh. D.) In its Petition, defendant states that it "believes that it... paid Kaiser in
10 accordance with the OMFS [Official Medical Fee Schedule]," although the record does not contain
11 testimony from a bill reviewer or other evidence of the amount payable under the OMFS. (Petition, p. 3.)

12 Kaiser claimed an outstanding balance of for \$3,050.52. (October 1, 2012 MOH, p. 4:17-18.) It
13 introduced its billing records at trial. (Lien Claimant Kaiser's Exh. 2.)

14 On March 1, 2013, the WCJ ordered defendant to pay Kaiser's lien. In the Opinion on Decision,
15 he wrote: "As this was a denied case at the time [Kaiser's] services were provided, Kaiser is not limited
16 to the official fee schedule, only their usual and customary fee." (Opinion on Decision, p. 4.) Defendant
17 then filed the present Petition.

18 ANALYSIS

19 Defendant does not contest that Kaiser is entitled to payment for medical services it provided to
20 applicant but argues that Kaiser cannot recover more than the amount set by the OMFS. (Petition, pp. 2-
21 3.)

22 Previously, several writ denied decisions have held that a medical provider is not limited to the
23 OMFS when the injured employee's claim has been denied. (*CNA Insurance Companies v. Workers'*
24 *Comp. Appeals Bd. (Valdez)* (1997) 62 Cal.Comp.Cases 1145, 1146 (writ den.) (*Valdez*); *Southern*
25 *California Edison Co. v. Workers' Comp. Appeals Bd. (Wells)* (1999) 65 Cal.Comp.Cases 100 (writ
26 den.) This line of cases originated with *Federal Mogul Corp. v. Workmen's Comp. Appeals Bd.*
27 (*Whitworth*) (1973) 38 Cal.Comp.Cases 584 (writ den.) (*Whitworth*), in which the applicant self-procured

1 treatment after the defendant's insurer did not accept the claim. The *Whitworth* decision held that the
2 treating surgeon was entitled to the billed amount of his services rather than the amount set by the
3 Official Minimum Fee Schedule, absent evidence that the billed charges were excessive. (*Id.* at pp. 585-
4 586.)

5 Appeals Board panel decisions, including writ denied decisions, are not binding on other panels.
6 (See e.g., *Fanners Ins. Group of Companies v. Workers' Comp. Appeals Bd. (Sanchez)* (2002) 104
7 Cal.App.4th 684, 689, fn. 4 [67 Cal.Comp.Cases 1545]; *Bowen v. Workers' Comp. Appeals Bd.* (1999)
8 73 Cal.App.4th 15, 21, fn. 10 [64 Cal.Comp.Cases 745].) More importantly, the statutory basis for the
9 *Whitworth* decision has changed in the intervening years. At the time of the 1972 injury and surgery
10 addressed in *Whitworth*, an Official Minimum Fee Schedule had been adopted pursuant to an earlier
11 version of Labor Code section 5307.1. (*Whitworth, supra*, at p. 585; *Gould v. Workers' Comp. Appeals*
12 *Bd.* (1992) 4 Cal.App.4th 1059, 1065-1066 [57 Cal.Comp.Cases 157].) That *minimum* fee schedule has
13 since been replaced with an Official Medical Fee Schedule which establishes reasonable *maximum* fees.
14 (Lab. Code, § 5307.1.) Administrative Rule 9792(c) now sets forth the specific circumstances under
15 which a medical provider may recover more than the amount under the OMFS. "A medical provider or a
16 licensed health care facility may be paid a fee in excess of the reasonable maximum fees [under the
17 OMFS] if the fee is reasonable, accompanied by itemization, and justified by an explanation of
18 extraordinary circumstances related to the unusual nature of the services rendered; however, in no event
19 shall a physician charge in excess of his or her usual fee." (Cal. Code Regs., tit. 8, § 9792(c).)

20 The dissent cites *Valdez, supra*, which relied on *Whitworth* to hold that the OMFS is not
21 applicable when defendant has disputed the compensability of the claimed injury. *Valdez* stated that, in
22 disputed cases, defendant has the burden of showing that a treating physician's charges are excessive.
23 (*Valdez, supra*, at p. 1147.) Since that decision, however, case law has established that lien claimants
24 have the burden of proving, by a preponderance of the evidence, that their charges are reasonable.
25 (*Tapia v. Skill Master Staffing* (2008) 73 Cal.Comp.Cases 1338, 1339 (Appeals Board en banc); Lab.
26 Code, §§ 3202.5, 5705; see *Kunz v. Patterson Floor Coverings, Inc.* (2002) 67 Cal.Comp.Cases 1588,
27 1589-1599 (Appeals Board en banc).) This contrasts with a regulation in effect when *Whitworth* issued,

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1 which was repealed January 1, 1991 and which stated that, once there was evidence that expenses were
2 incurred under Labor Code section 4600, "recovery thereof will be allowed as they appear" unless "proof
3 of unreasonableness is entered by the party contesting the reasonableness of the charge" or "the record...
4 makes manifest the unreasonableness of an expense or the expenses claimed." (Former Cal. Code Regs.,
5 tit. 8, § 10635; see *Gould v. Workers' Comp. Appeals Bd.*, *supra*, 4 Cal.App.4th at p. 1070 [quoting
6 repealed rule].)

7 Consistent with the general principle that lien claimants have the burden of demonstrating the
8 reasonableness of the amounts charged, a lien claimant seeking to establish that it should receive
9 payment at its usual and customary rate, above the level set by the OMFS, must present evidence
10 sufficient to satisfy the requirements of Rule 9792(c). Here, lien claimant has not presented any evidence
11 that "extraordinary circumstances" justify payment above the OMFS amount. (See *Midas Recovery*
12 *Services, Inc. v. Workers' Comp. Appeals Bd. (Garcia)* (1997) 62 Cal.Comp.Cases 537 (writ den.) [lien
13 claimant which presented no evidence to support charges in excess of the OMFS limited to OMFS
14 amount].)

15 There is evidence that lien claimant performed surgery and provided other care, but there is
16 nothing in the record to suggest that this medical treatment was in any way out of the ordinary. The
17 panel qualified medical evaluator in neurosurgery, Dr. Stephen Dell, having reviewed applicant's
18 medical records, testified in his deposition that "nothing unusual" occurred during the hernia surgery.
19 (Exh. 5, pp. 6:22-7:9.) The medical records from Kaiser physicians Dr. Huang, Dr. Green, Dr. Holve and
20 Dr. Nunuz do not indicate that this was a particularly complex or difficult case. (Compare *Bresler v.*
21 *Workers' Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 637 (writ den.) [psychologist allowed payment
22 at his usual and customary rates where evidence showed that applicant had suffered intractable pain,
23 underwent three surgeries, and became violent and suicidal].) Although applicant testified that he suffers
24 from chronic pain and is receiving physical therapy and psychological treatment (July 26, 2011 MOH,
25 pp. 6:31-7:6), that does not demonstrate that any extraordinary circumstances existed at the time
26 applicant received treatment from Kaiser. We therefore conclude that lien claimant is entitled to
27 payment pursuant to the OMFS.

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1 Turning to the other contentions in the Petition, defendant acknowledges that Dr. Keller is a
2 treating physician but argues that he is not the primary treating physician because he is not part of
3 defendant's MPN. As the WCJ pointed out in the Report, the record contains no evidence that defendant
4 ever acted to transfer applicant's treatment into its MPN in conformity with applicable statutes and
5 regulations. (See *Babbitt v. Ow Jing* (2007) 72 Cal.Comp.Cases 70 (Appeals Board en banc); Cal. Code
6 Regs., tit. 8, § 9767.9; Report, p. 2.)

7 Finally, we will follow the WCJ's recommendation that we amend the decision to defer payment
8 of permanent disability indemnity until the EDD lien is resolved and to correct the temporary disability
9 rate. Defendant has acknowledged in its Petition that applicant's wages were actually \$838.88 per week,
10 not \$750.00 per week (Petition, p. 5) and will correct the temporary disability indemnity rate accordingly.

11 For the foregoing reasons,

12 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
13 Appeals Board, that the March 1, 2013 Findings, Award and Orders is **AFFIRMED, EXCEPT** that
14 Findings Nos. 1C and 6, and the Award, are **AMENDED** as follows:

15 **FINDINGS OF FACT**

16 1.

17 C. At the time of injury the employee's earnings were \$838.88 per week, entitling applicant to
18 temporary disability indemnity payable at \$559.26 per week and permanent partial disability
19 at the maximum weekly rate based upon the date of injury.

20 6. The lien of Kaiser is found to have been for reasonable medical treatment to cure or relieve
21 applicant from the effects of the industrial injury. Kaiser is entitled to payment for its services
22 pursuant to the Official Medical Fee Schedule.

23 **AWARD**

24 **AWARD IS MADE** in favor of applicant Sergio Rodriguez and against Hagemann Meat
25 Company and Zenith Insurance Company of:

26 A. Temporary disability indemnity at the rate of \$559.26 per week beginning March 24, 2009 to and
27 including November 12, 2009, less days worked, less credit for sums previously paid on account

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1 thereof, with any outstanding amount owed to applicant to be withheld pending resolution of the
2 lien of the Employment Development Department.

3 B. Permanent disability indemnity of \$4,140.00, less credit for sums previously paid, with any
4 outstanding amount owed to applicant to be withheld pending resolution of the lien of the
5 Employment Development Department.

6 C. Such further medical treatment as is necessary to cure or relieve applicant from the effects of the
7 industrial injury.

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1 AWARD IS MADE in favor of lien claimant The Permanente Medical Group/Kaiser Foundation
2 Hospitals and against Hagemann Meat Company and Zenith Insurance Company of:

3 A. Reimbursement for the cost of reasonable medical treatment to cure or relieve applicant from the
4 effects of the industrial injury pursuant to the Official Medical Fee Schedule, to be adjusted by
5 the parties with jurisdiction reserved at the trial level in the case of a dispute.

7 WORKERS' COMPENSATION APPEALS BOARD

8 *Deidra E. Lowe*
9 _____

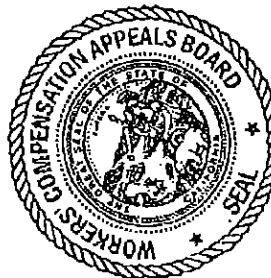
DEIDRA E. LOWE

10 I CONCUR,

11 *Alfonso J. Moresi*
12 _____

ALFONSO J. MORESI

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14
15 I DISSENT,
16 (See attached Dissenting Opinion)



17 *Frank M. Brass*
18 _____

FRANK M. BRASS

19
20 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

21 FEB 11 2014

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

24 FLUSS AND WILLIAMS
25 SERGIO RODRIGUEZ
26 CHERNOW AND LIEB
27 EMPLOYMENT DEVELOPMENT DEPARTMENT

CNF/jp

Sergio Rodriguez

RODRIGUEZ, Sergio

DISSENTING OPINION

I respectfully dissent. I would allow lien claimant to recover the usual and customary cost of its services rather than restricting payment according to the OMFS.

The majority disregards *Federal Mogul Corp. v. Workmen's Comp. Appeals Bd. (Whitworth)* (1973) 38 Cal.Comp.Cases 584 (writ den.) (*Whitworth*) because it was decided at a time when an Official Minimum Fee Schedule was in place. This is not a distinguishing factor, however—despite the difference in title, the Official Minimum Fee Schedule, like the Official Medical Fee Schedule in effect today, generally limited the amount which a lien claimant could be paid for medical services “absent extraordinary circumstances.” (*Neff v. Vega* (1969) 34 Cal.Comp.Cases 333, 333 (Appeals Board en banc).) It is therefore no surprise that the later *Valdez* and *Wells* decisions continued to follow *Whitworth* even in the context of an Official Medical Fee Schedule. (*CNA Insurance Companies v. Workers' Comp. Appeals Bd. (Valdez)* (1997) 62 Cal.Comp.Cases 1145, 1146 (writ den.) (*Valdez*); *Southern California Edison Co. v. Workers' Comp. Appeals Bd. (Wells)* (1999) 65 Cal.Comp.Cases 100 (writ den.).) Furthermore, at the time that *Valdez* and *Wells* were decided, a statute was in effect which was very similar to the present Administrative Rule 9792(c) quoted by the majority. The former Labor Code section 5307.1(b) stated that a medical provider could recover the value of services in excess of the OMFS when the fee was “[r]easonable” and “[a]ccompanied by itemization and justified by an explanation of the extraordinary circumstances related to the unusual nature of the medical services rendered,” provided that “[i]n no event shall a physician charge in excess of his or her usual fee.” (Former Lab. Code, § 5307.1(b); repealed Stats 2003 ch. 121 §§ 34.) Thus, the law on this issue has not changed so as to undercut *Whitworth* and *Valdez*.

The WCJ in *Valdez* explained why the *Whitworth* decision remained good law:

It is the policy of the law to permit the provision of treatment to injured workers on a lien basis where an employer refuses to provide the treatment. (See, *Labor Code § 4903* [Deering's].) Treatment provided on a lien basis may avoid such undesirable consequences to society as an injured worker going without needed medical treatment or burdening public resources. Yet a medical provider may be reluctant to provide treatment on a lien basis where he or she must assume both the risk of (a) not being paid at all if the injury is adjudicated to be not compensable or, (b) if the injury is adjudicated compensable, being paid at a rate less than

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his or her usual and customary charges in accordance with the Medical Fee Schedule. (*Valdez, supra*, at p. 1147.)

These policy considerations still hold true today. Nothing in the changes to Labor Code section 5307.1 suggests that the Legislature intended to alter existing law in order to allow defendants the advantage of the OMFS even when they deny claims for injuries that are later determined to be compensable.



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Frank M. Brass, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 11 2014

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

FLUSS AND WILLIAMS
SERGIO RODRIGUEZ
CHERNOW AND LIEB
EMPLOYMENT DEVELOPMENT DEPARTMENT

CNF/jp

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