

SMG

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION

DEE CAPPELLI,

Applicant

vs.

TWENTIETH CENTURY FOX FILM
CORPORATION; NATIONAL UNION
FIRE INSURANCE COMPANY,

Defendants.

Case No.

MON 142383

FINDINGS & AWARD
AND
ORDER

ROBERT BOVSHOW
Attorney for Applicant

KEGEL, TOBIN & TRUCE
By: Steven M. Green
Attorneys for Defendant

CLAYTON ROBINS, ESQ.
By: Norma Casillas, Hearing Rep.
Attorney for Lien Claimant:
Orthopedic Associates

The above-entitled matter having been heard, the Honorable KEIGO OBATA, Workers' Compensation Judge, now finds and awards as follows:

FINDINGS OF FACT

1. The stipulations filed by the parties are true and are adopted by reference as though fully set forth here.
2. The issues of permanent disability, apportionment and need for further medical treatment are deferred pending an up to date medical-legal examination and report, preferably by the AME used previously; the present record is inadequate for findings on these matters.
3. Applicant's average earnings at the time of injury were \$6 55.00 per week.

**DEE CAPPELLI
MON 142383**

Page 2

4.. Applicant reasonably and necessarily procured medical-legal services from Alan Roberts, M.D., and Wilshire Medical Group; their liens are accordingly allowed in full against defendant at the appropriate medical-legal fee schedule.

5. Good cause does not exist to set aside the order dismissing the lien of Orthopedic Associates issued by Judge Rosenthal on 7/2/93.

7. A finding on attorney fees is deferred pending a finding on permanent disability.

AWARD

AWARD IS MADE in favor of **DEE CAPPELLI** against **NATIONAL UNION FIRE INSURANCE COMPANY** of the following:

[a] Medical-legal costs as indicated in Finding 4 above.

ORDER

IT IS ORDERED that lien claimant **ORTHOPEdic ASSOCIATES's** Petition to Reopen to set aside the order dismissing its lien be, and it here is, dismissed.

DATED: NOV 17 1995
Served by mail on parties
listed on the Official Address
Record)
By: Jane Renko
Jane Renko

Reigo Obata
REIGO OBATA
Workers' Compensation Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

CASE NO.: 142383

DEE CAPPELLI

vs.

**TWENTIETH CENTURY
FOX FILM
CORPORATION;NATIONAL
UNION FIRE INSURANCE
COMPANY**

WORKERS' COMPENSATION JUDGE: KEIGO OBATA

**INJURY DATE: JUNE 7, 1990
(BACK; NECK)**

OPINION ON DECISION

Permanent Disability/Apportionment/Occupational Group:

These issues are deferred pending an up-to-date medical-legal evaluation preferably by AME Hunt. The evidence after trial indicates clearly that applicant's condition is not the same at the present as it was at the time of the AME examination. The delay in obtaining an up-to-date medical-legal evaluation was contributed to in part by applicant's prior work schedule.

Earnings:

Based on the W-2s for 1990, applicant earned \$34,111.91 that year. This equates to \$34,111.91 /52 = \$655.00/wk. avg.

Need of Further Medical Treatment:

Deferred pending up to date medical evaluation.

1 DEE CAPPELLI
2 MON 142383

Page 2

3
4
5
6
7
8 Liability for Self-Procured Medical Treatment and/or
9 Medical-Legal Services:

10
11 There is a final order dismissing the lien of Orthopedic Associates
12 for self-procured medical treatment discussed below.

13
14 Applicant reasonably and necessarily procured medical-legal
15 services from Alan Roberts, M.D., and Wilshire Crest Medical Group
16 to prove a contested claim. Their liens are accordingly allowed in
17 full at the appropriate medical legal fee schedules.

18
19 Whether the Dismissal of Lien Claim of Orthopedics
20 Associates Should be Upheld:

21
22 The question here is whether lien claimant has filed sufficient
23 evidence to grant its Petition to Reopen to set aside the order
24 dismissing the lien claim of Orthopedics Associates.

25
26 The WCAB file indicates that lien claimant did not appear at the
27 7/2/93 Conference. On 7/2/93, Judge Rosenthal issued an Order
28 Disallowing Lien Claim of Orthopedics Associates and For Allowing
29 Restitution which included a 30-day period for the lien claimant to
30 submit good cause to the contrary which, if done, would make the
31 order of no effect.

32
33 The WCAB file contains no objection to the 7/2/93 order of
34 dismissal.

35
36 On 8/9/94, lien claimant through counsel, filed a Petition to Reopen
37 which in essence objects to the order of dismissal of 7/2/93 on
38 grounds that the Labor Code contains no provision for a self-
39 cancelling order, that lien claimant prior to representation by
40 counsel was confused by the "...strange pleadings that issued from
41
42
43

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43

DEE CAPPELLI
MON 142383

Page 3

the defendants and the judge...", and that the order of dismissal does not set forth the grounds for dismissal.

After 30 days of issuance of the order, the only remedy available was a timely Petition for Reconsideration. Lien claimant cannot do later by Petition to Reopen what it was required to do by Petition for Reconsideration. Thus the Petition to Reopen was not an available remedy to set aside the order.

Was the order defective ab initio for the reasons asserted by lien claimant in its petition to reopen?

The use of a self-destruct order, which in effect is a notice of intent, has been in use at WCAB proceedings for several years and its use is not confusing as is asserted by lien claimant. The self-destruct order, while creating efficiency in the resolution of WCAB matters, fulfills due process requirements in that it permits the affected parties, here lien claimant, every opportunity to be heard and proceed to trial if required. The assertion that lien claimant when still not represented by counsel was confused by the self-destruct language has no merit and does not void the order; the order states that the order shall be null and void if lien claimant files good cause to the contrary within 30 days; lien claimant did not do that. The order states further that the order is based on the defendant's petition.

Good cause does not exist to grant lien claimant's Petition to Reopen and the order is not defective ab initio.

ATTORNEYS FEES:

This issue is deferred pending a finding on permanent disability.

1
2
3
4
5
6
7
8
9
10
11
12
13
14

**DEE CAPPELLI
MON 142383**

Page 4

DATED: NOV 17 1995
Served by mail on parties
listed on the Official
Address Record.
By Jane Renko
Jane Renko

Keigo Obata
KEIGO OBATA
Workers' Compensation Judge

SMG

CASE NO.: MON 142383

1 2 3 4 5 6 7 8 9	Dee Cappelli Workers' Compensation Judge: Dated:	vs. Twentieth Century Fox Film Corporation; National Union Fire Insurance Company Keigo Obata December 18, 1995
---	---	---

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

1

INTRODUCTION

Dee Cappelli, applicant, born 3/9/49, while employed as an executive secretary/administrator on on 6/7/90, by Twentieth Century Fox Film Corporation, whose compensation carrier was National Union Fire Insurance Company, sustained industrial injuries to her back.

Decision after trial issued in this matter on November 17, 1995. Lien Claimant Orthopedic Associates has filed a timely petition for reconsideration in which the following contention is made:

It was error to sustain the prior dismissal of its lien because the self-destruct notice upon which it was based violates various Rules and Labor Code Sections.

1 1

FACTS ON DISPUTED ISSUES

The facts related to the issue at hand are included in the Opinion on Decision which was as follows:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43

DEE CAPPELLI
MON 142383

Opinion on Decision

Liability for Self-Procured Medical Treatment and/or Medical-Legal Services:

There is a final order dismissing the lien of Orthopedic Associates for self-procured medical treatment discussed below.

Applicant reasonably and necessarily procured medical-legal services from Alan Roberts, M.D., and Wilshire Crest Medical Group to prove a contested claim. Their liens are accordingly allowed in full at the appropriate medical legal fee schedules.

Whether the Dismissal of Lien Claim of Orthopedics Associates Should be Upheld:

The question here is whether lien claimant has filed sufficient evidence to grant its Petition to Reopen to set aside the order dismissing the lien claim of Orthopedics Associates.

The WCAB file indicates that lien claimant did not appear at the 7/2/93 Conference. On 7/2/93, Judge Rosenthal issued an Order Disallowing Lien Claim of Orthopedics Associates and for Allowing Restitution which included a 30-day period for the lien claimant to submit good cause to the contrary which, if done, would make the order of no effect.

The WCAB file contains no objection to the 7/2/93 order of dismissal.

1 DEE CAPPELLI
2 MON 142383

Page 3

3
4
5
6
7
8
9 On 8/9/94, lien claimant, through counsel, filed a Petition to
10 Reopen which in essence objects to the order of dismissal of
11 7/2/93 on grounds that the Labor Code contains no provision
12 for a self-cancelling order, that lien claimant prior to
13 representation by counsel was confused by the "...strange
14 pleadings that issued from the defendants and the judge...",
15 and that the order of dismissal does not set forth the grounds
16 for dismissal.

17
18 After 30 days of issuance of the order, the only remedy
19 available was a timely Petition for Reconsideration. Lien
20 claimant cannot do later by Petition to Reopen what it was
21 required to do by Petition for Reconsideration. Thus the
22 Petition to Reopen was not an available remedy to set aside
23 the order.

24
25 Was the order defective *ab initio* for the reasons asserted by
26 lien claimant in its petition to reopen?
27

28 The use of a self-destruct order, which in effect is a notice
29 of intent, has been in use at WCAB proceedings for several
30 years and its use is not confusing as is asserted by lien
31 claimant. The self-destruct order, while creating efficiency
32 in the resolution of WCAB matters, fulfills due process
33 requirements in that it permits the affected parties, here
34 lien claimant, every opportunity to be heard and proceed to
35 trial if required. The assertion that lien claimant when still
36 not represented by counsel was confused by the self-
37 destruct language has no merit and does not void the order;
38 the order states that the order shall be null and void if lien
39 claimant files good cause to the contrary within 30 days; lien
40 claimant did not do that. The order states further that the
41 order is based on the defendant's petition.
42
43

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43

DEE CAPPELLI
MON 142383

Page 4

Good cause does not exist to grant lien claimant's Petition to Reopen and the order is not defective *ab initio*.

(Opinion on Decision, 11-7-95, in pertinent part)

111


DISCUSSION OF PETITIONER'S ARGUMENTS

Petitioner's arguments here are essentially those previously submitted at trial and have been responded to in the Opinion on Decision. The added argument that "... it was inequitable for the WCJ, on November 17, 1995 to have denied the most recent petition to reopen while, in effect, awarding or providing for the awarding of all other benefits ..." has no merit. The burden of proof on petitions to reopen is not the same as the burden of proof on first pending issues.

IV

RECOMMENDATION

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



KEIGO OBATA
Workers' Compensation Judge

Moreover, the condition of compensation expressly states that the injury must not arise out of specified activity "not constituting part of the employee's work-related duties. . . ." Here the evidence is undisputed that the activity did constitute part of the work-related duties. In other words, the injury arose out of expected participation in an on-duty athletic activity that comprised part of the employee's work-related functions. An injury during such activity is not excluded by the subdivision and should be compensable without regard to the exception clause. The legislature, moreover, did not intend to exclude such activity, an assertion that can be tested by the facts in the cases that gave rise to enactment of subdivision (a)(9). The complicating factor in this case is that the golfing companion was both the employer's client and the employee's friend. Unlike the court, the Board viewed the game as stemming from the friendship rather than the employment, a tenable conclusion that loses force when weighed against the testimony of applicant and the bank vice-president that applicant's duties required him to entertain customers.

As to compensability of the injury en route to work, the court appears to be on solid ground in its analysis of the origins of the going and coming rule and its many exceptions. The court's rejection of the Board's view that an employee must use a personal vehicle every business day to fall within the exception shows a preference for a more elastic interpretation of an exception in order to find compensability. It is no coincidence that the court referred several times to the statutory mandate of liberal interpretation.

WCAB Disallows Lien for PD Overpayment Against PD Owing From Subsequent Injury

Court Affirms; Lien Allowable Only for Obligation Specified in Labor Code §4903

[*Richard Marquez Painting et al. v. WCAB (Moore)*. Court of Appeal, 5th App. Dist., July 28, 1995, No. F022267, certified for nonpublication.]

The court of appeal has affirmed a WCAB denial of an insurer's lien filed in another case for its advances of \$9,291.67 more in permanent disability indemnity than applicant was entitled to. Applying "well-established" principles, the court concluded that the insurer failed to demonstrate any entitlement to a lien on the employee's PD benefits owing from a subsequent employer as a result of a subsequent injury. Such a lien is not authorized by either *Labor Code §4903* or *§4903.1*, and under *Ogdon v. WCAB (1974)* 11 C3d 192, 2 CWCR 77, 39 CCC 297, the Board exceeds its authority if it allows a lien in satisfaction of an obligation not specified in *§4903*. The court rejected the insurer's assertion that it is entitled to equitable relief for overpayment of PD advances and that applicant is not entitled to a "double recovery," pointing out that those issues were not before the Board and thus are not properly before the appellate court. The court

noted too that the record does not indicate that the carrier asked applicant to repay the excess amount.

Facts and Proceedings

Applicant Robert Moore sustained three separate injuries while working as a painter. In FRE 125670, applicant was working for Richard Marquez Painting when his picking up a 100 pound "sand pot" caused a left inguinal hernia. Surgery was performed to repair the hernia, and a second surgery was performed shortly thereafter to repair an "entrapped nerve." The insurer, Transamerica Insurance Company, advanced applicant \$13,806.67 in PD benefits between February 1990 and January 1993.

In FRE 112615, applicant was working for Kious Painting, insured by Ohio Casualty Company, on August 28, 1991. Lifting five-gallon buckets of paint weighing about 55 pounds, he felt a sharp pain in the left groin area at the site of his previous hernia repair.

In FRE 121815, while still working for Kious, insured by Ohio Casualty, applicant lifted a 200 pound generator, and suffered a bilateral inguinal hernia that was repaired in January 1992.

On August 19, 1993, applicant filed an application before the Board for his 1990 injury at Marquez, and Ohio Casualty then filed applications for the subsequent two injuries. Transamerica filed a lien in FRE 112615 (injury of August 28, 1991) in the amount of \$9,291.67, representing the amount of its expected PD overpayment to applicant for 1990 injury.

Over applicant's objection, Workers' Compensation Judge James G. Tarr consolidated the three cases. Applicant and both carriers agreed to use Glenn Malley, M.D., as an agreed medical examiner. On the basis of the AME's apportionment, applicant and Ohio stipulated in the two subsequent injuries to PD of 29¾ percent in the sum of \$17,649. Applicant and Transamerica stipulated that the 1990 injury caused PD of 10½ percent in the sum of \$4,515 and that Transamerica had advanced \$13,806.67 to applicant.

In May 1994, the judge issued orders in all three cases in accordance with the PD stipulations and allowed various liens and attorney's fees. However, he disallowed Transamerica's lien request for \$9,291.67 in FRE 112615. A panel of Commissioners Gannon, Marshall, and Wiegand denied reconsideration, adopting the WCJ's reasoning.

Transamerica sought review, contending that the Board erred in disallowing its lien and in allowing a lien requested by Ohio in FRE 125670. Review was granted.

Court of Appeal Opinion: Lien for PD Overpayment

In an opinion by Presiding Justice Ardaiz, concurred in by Justice Thaxter and Justice Reed (municipal court judge sitting under assignment), the court noted that *§4901* provides that "no claim for compensation nor compensation awarded, adjudged, or paid, is subject to be taken for the debts of the party entitled to such

compensation except as hereinafter provided." As pointed out in *Ott v. WCAB* (1981) 118 CA3d 912, 9 CWCR 103, 46 CCC 545, the debts that may be allowed as liens against a compensation award are set out in §§4903 and 4903.1. Setting out the provisions of §4903, the court noted that in *Ogdon*, the Supreme Court said that the Board acts in excess of its authority and without jurisdiction if it allows a lien in satisfaction of an obligation not specified in the section. After enactment of §4903.1 in 1975, the high court said in *Prudential Ins. Co. v. WCAB* (Wright) (1978), 22 C3d 776, 7 CWCR 1, 43 CCC 1319, a lien claimant "must show that not only was its claim a valid debt, but that such debt is within one of the classes enumerated by section 4903 for which a lien can lawfully be imposed [citations], or was otherwise

Petitioners failed to demonstrate any entitlement to such a lien.

provided for under section 4903.1." Under *Wright*, the lien claimant has the burden of demonstrating that the requested lien falls within the two sections.

The instant court ruled:

Notwithstanding this well-established body of law, petitioner Transamerica does not even attempt to assert that any statute authorizes its request for a lien in the amount of \$9,291.67 in 112615. Instead, Transamerica argues that it "is entitled to equitable relief," that it "has a right to be reimbursed for overpayment of permanent disability advances," and that Moore is not entitled to a "double recovery."

The issue before the board was not whether Transamerica was entitled to "equitable relief" but rather whether Transamerica was entitled to its requested lien for \$9,291.67. Petitioners' arguments to the board, just as their arguments to this court, have made no mention of *Ogdon*, *supra*; *Prudential Ins. Co.*, *supra*, or sections 4903 or 4903.1. Petitioners' argument is, reduced to its essence, "we paid too much money on Mr. Moore's claim against Marquez, so give us a lien on Mr. Moore's compensation from his subsequent employer." Petitioners failed to demonstrate any entitlement to such a lien, and the board did not err in refusing to allow the requested lien.

Finally, although the issues of (1) whether Transamerica has a right to be reimbursed and (2) whether Moore would receive a "double recovery" were not the issues before the board, and thus are not properly before us (see Lab. Code §5904 and *U.S. Auto Stores v. Workmen's Comp. App. Bd.* (1971) 4 Cal. 3d 469), we nevertheless note that the record contains no indication that petitioners have asked Moore himself to pay back the \$9,291.67 excess amount. (See *Coltherd v. Workers' Comp. Appeals Bd.*, *supra*, 225 Cal. App. 3d at p. 460, fn. 4.)

Ohio Casualty's Lien

As to Transamerica's contention that the Board erred in allowing a lien request by Ohio Casualty in FRE 125670, the court said review of a Board decision may be sought

by any person affected by it, citing §5950. Here Transamerica made no attempt to explain how it was aggrieved or in any way affected by the allowance of a lien request by another lien claimant. Ohio Casualty's lien on any amount that Transamerica may have to pay applicant could affect him but not Transamerica. Applicant did not seek review of the allowance of the lien. Petitioner failed not only to try to explain why the lien allowance did not comply with §4903 and 4903.1, but also failed to explain why the allowance, even if erroneous, affected petitioner.

Accordingly, the court affirmed the Board's order denying reconsideration. Applicant's request for an attorney's fee pursuant to §5801 was denied.

Editor's Note: The opinion leaves unresolved the questions of whether an insurer is entitled to equitable relief for overpayment of PD advances and an injured worker is entitled to a "double recovery." Since those issues were not raised before the Board, the court declined to consider them.

**Board Jurisdiction Over Injury at Sea;
Diver as Employee or Independent Contractor;
Timeliness of Petition for Review**

Court Affirms Board's Findings of State Jurisdiction and Independent Contractor Status; Petition Timely Since Delay Not Petitioner's Fault

[*Noah v. WCAB*, Court of Appeal, 2d App. Dist., Div. 6, Aug. 1, 1995, No. B084657, certified for nonpublication]

The court of appeal has affirmed a Board panel's findings that (1) the state had jurisdiction over an injury that occurred while applicant was diving for sea urchins off the California coast, and (2) the diver was an independent contractor rather than an employee of the boat owner. The court held that since the agreement was entered into in California and the injury occurred in waters off the California coast, concurrent federal and state jurisdiction existed over the injury, and the Board ruled correctly that it had jurisdiction. The court held further that the Board was correct in its conclusion that defendant carried his burden of proof that applicant was an independent contractor, given the tradition of independent contractor status for divers in the commercial fishing industry and the boat owner's lack of control over a diver's functioning. The petition for writ of review was timely where it was filed within 45 days of the Board's order denying reconsideration even though the order itself was filed more than 60 days after reconsideration was sought; the Board's delay was not petitioner's fault.

Facts and Proceedings

Applicant Steven Noah was working as a diver on a boat owned by Eric Bjorklund near San Nicholas Island, off the California coast, when his depth meter malfunctioned. He subsequently suffered from "bends," i.e., decompression sickness that caused serious injury to his central nervous