WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MANUEL BARAJAS, *Applicant,* **vs.** **F&H COLD STORAGE; APPLIED RISK OMAHA,** *Defendant(s).*	**Case No. ADJ6559495** **OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of the June 15, 2010 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) allowed in full the lien of Dr. Marcus E. Vaughan, D.C..

Defendant contends the WCJ erred in allowing the lien, arguing that defendant properly established and gave notice of its medical provider network (MPN) and had no further obligation to "limit its liability," as suggested by the WCJ, and that the WCJ improperly relied on Labor Code section 4903.1(a) as a basis for allowing the lien

We have considered the Petition for Reconsideration, and we have reviewed the record in this matter. We have not received an Answer. The WCJ prepared a Report and Recommendation (Report), recommending that the petition be denied.

For the reasons discussed below, we will deny defendant's petition for reconsideration.

The parties stipulated at the March 15, 2010 hearing that applicant, while employed on September 15, 2008, as a forklift driver, sustained industrial injury to his right shoulder, that the regular issues have been resolved by the May 13, 2009 Order Approving Compromise and Release, and that Dr. Vaughn is not in defendant's MPN.

The WCJ summarized the factual background, as follows, at page 1 of his Opinion on Decision:

> "The injured worker was referred to Dr. M. Vaughn, D.C., on January 7, 2009 by his attorney. Dr. Vaughn filed a Doctor's First Report on January 8, 2009 (Exhibit 2) along with an Employee Notice of Change of Physician (Exhibit 3).
>
> On February 6, 2009, defendant notified Dr. Vaughn by letter (Exhibit 4) that he was not an authorized provider within defendant's MPN.
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> On February 26, 2009, Dr. Vaughn's office sent defendant a letter indicating that he had stopped treatment as of February 9, 2009 and referred the worker back to his attorney (Exhibit 5).
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> The date of injury was September 15, 2008.
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> On September 16, 2008 (Exhibit B, 11 pages) and October 31, 2008 (Exhibit A, 16 pages), defendant sent letters to the worker announcing and explaining the MPN.
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> The application was filed December 30, 2008.
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> A Compromise and Release was approved on May 28, 2009 [sic].
>
> Everything was done essentially in accordance with the rules. The exception being the attorney referral to the doctor, lien claimant, for a change of treating physician."

The Compromise and Release agreement executed by applicant and defendant provides, "Defendant will pay, adjust or litigate all liens filed on or before the date of the Order Approving Compromise wich [sic] are subject to the WCAB's jurisdiction." Lien claimant filed his lien on April 6, 2009, over a month before the Order Approving Compromise and Release. Therefore, the WCAB had jurisdiction to determine the validity of the lien. (Lab. Code, §§ 5300, 5301; see also §§ 4900(b), 4903.5.)

The May 13, 2009 Order Approving Compromise and Release provides, "Defendants are **ORDERED** to pay, adjust or litigate *and hold Applicant harmless* from all industrial liens of record not otherwise specified. The Board retains jurisdiction on these liens." (Emphasis added.)

The inclusion of "hold harmless" language in the order was improper because the WCAB cannot rewrite a Compromise and Release without the parties' consent. (*Burbank Studios v. Workers' Comp. Appeals Bd.* (*Yount*) 134 Cal.App.3d 929, 935 [47 Cal.Comp.Cases 832, 836].) Nevertheless, the Order was a "final order." (See *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45-46 [43 Cal.Comp.Cases 661] (order directing the defendant to "adjust" medical lien claim was a final order).) Defendant did not seek reconsideration of this Order.

Because reconsideration was not sought and the order to hold applicant harmless became final, defendant became bound by the order, even though it exceeded the terms of the Compromise and Release. The essence of a "hold harmless" provision is that the indemnitor becomes liable for any amount the indemnitee would otherwise have to pay to a third party. (See *Queen Villas Homeowners Association v. TCB Property Management* (2007) 149 Cal.App.4th 1, 8; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 969.)

Lien claimant filed a lien with the WCAB for treatment provided to applicant for an industrial injury. The WCAB, therefore, has jurisdiction to order defendant to pay the lien, even though, absent the "hold harmless" order, the treatment likely would have been applicant's liability under Labor Code section 4605.

Defendant argues that a ruling in favor of lien claimant will discourage defendants from settling claims by compromise and release, and that they will never agree to "pay, adjust or litigate" liens. We disagree that our narrow holding in this case will advance such an unfortunate result. It is not the "pay, adjust or litigate" provision of the Compromise and Release agreement which results in defendant's liability here. It is defendant's failure to seek reconsideration of the "hold harmless" provision of the Order which does. Absent this "hold harmless" provision, defendant could have "litigate[d]" the lien on the basis that the treatment was outside the MPN and, therefore, applicant's liability. (Lab. Code, § 4605.) Accordingly, our decision herein, which,

of course, is not binding on any future cases,[1] should cause no alarm to a defendant who timely seeks reconsideration of any order approving a compromise and release that goes beyond the terms agreed to by the parties. Nor does it license applicants to seek treatment outside an applicable MPN, unless they wish to do so at their own expense pursuant to Labor Code section 4605.

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[1] Appeals Board panel decisions are not binding precedent and have no stare decisis effect. (*Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the June 15, 2010 Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

NEIL P. SULLIVAN DEPUTY

I CONCUR.

JAMES C. CUNEO

PARTICIPATING, BUT NOT SIGNING
RONNIE G. CAPLANE

WORKERS' COMPENSATION APPEALS BOARD
EUREKA
SEAL

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 07 2010

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

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