California Workers' Compensation Institute

Significant Decision

No. 17-06 October 27, 2017

**IN RE THE LIEN CASES [RODRIGUEZ V. GARDEN PLATING AND CONSOLIDATED CASES]**

**WORKERS' COMPENSATION APPEALS BOARD – EN BANC**
**(**ADJ8588344 Designated as Master File**)**

FILED: OCTOBER 26, 2017

**Lien Claimants who filed Declarations required by Labor Code §4903.05(c) after the close of business at 5:00 p.m. on Friday, June 30, 2017, through the close of business at 5:00 p.m. on Monday, July 3, 2017, are entitled to a hearing on the timeliness of the filing.**

**Significance**: The issue of whether lien Declarations were timely filed must be adjudicated in each case in the first instance at the trial level.

**Facts:** As part of SB 1160, Labor Code section 4903.05(c) was amended to require lien claimants to file a Declaration under penalty of perjury that the lien met certain criteria outlined in the statute. For new liens filed on or after 1/1/17, the Declaration must be filed with the lien; for liens filed prior to 1/1/17, that were subject to the lien filing fee, the Declaration was required to be filed by July 1, 2017. Failure to timely file a Declaration resulted in a dismissal of the lien with prejudice by operation of law.

But it turns out that July 1, 2017, fell on a Saturday. Ordinarily, under Civil Code §12a-c, for any action required by a date that falls on a weekend or holiday, the deadline is extended until the next business day (in this instance, Monday, July 3). But initially, the DWC took the position that liens filed on July 2 or July 3 were untimely and those liens were dismissed. In all, more than 292,000 liens were dismissed in August, including 2,794 liens filed on July 2 or July 3. Some of these lien claimants objected to having their liens dismissed, and (according to the new decision) at least 1,234 "nearly identical" Petitions for Reconsideration were filed.

In response, on October 3, a Newsline announced that the DWC had lifted the dismissals of liens where the Declaration was filed on July 2 or July 3. Instead, those liens were deemed be eligible for a hearing to determine whether their Declarations were timely filed.

**Holding**: Acting en banc, the WCAB has consolidated all of the cases in which Reconsideration Petitions were filed, and dismissed them as moot in light of the October 3 DWC announcement. The WCAB suspended Rule 10859 from the date of the first Petition for Reconsideration through the date of the en banc decision, leaving each lien subject to separate adjudication on the issue of timeliness.

**Discussion**: The decision applies to any case in which a Labor Code section 4903.05(c) Declaration was filed by a lien claimant after the close of business at 5:00 p.m. on Friday, June 30, 2017 through the close of business at 5:00 p.m. on Monday, July 3, 2017. It is of particular note that the en banc decision does not address the merits of the Petitions for Reconsideration (*i.e.*, whether Declarations filed on July 2 or July 3 are valid). Instead, the purpose of the decision seems to be one of providing judicial cover to the administrative action by the DWC. The end result is the same, and each individual lien claimant may proceed to hearing on the question of whether its Declaration was timely filed.

To reach this result, the Appeals Board had to address a number of highly technical rules under the California Code of Regulations. And while the bottom-line holding of the decision may seem dull, there is a hidden procedural trick used in this case that may constitute further evidence of an ongoing effort by the Appeals Board to expand its own power. In particular, the decision suspends Rule 10859 from September 14 through October 26. Rule 10859 states:

> After a petition for reconsideration has been timely filed, a workers' compensation judge may, within the period of fifteen (15) days following the date of filing of that petition for reconsideration, amend or modify the order, decision or award or rescind the order, decision or award and conduct further proceedings. . . .After this period of fifteen (15) days has elapsed, a workers' compensation judge shall not make any order in the case nor correct any error until the Appeals Board has denied or dismissed the petition for reconsideration or issued a decision after reconsideration.

Since the deadlines set forth in Rule 10859 have long since passed, the Appeals Board had to address rulings that had been made in the interim. To accomplish this, the Appeals Board found it necessary to suspend the Rule 10859 altogether: "However, procedural rules serve the convenience of the appeals board and the parties, and they do not deprive the appeals board of the power to disregard them when the purpose of justice requires it, particularly when there is no substantial prejudice to the other parties." Of course, this begs the question of whether the Appeals Board has the power to suspend a CCR Board Rule at its convenience. None of the cases cited in the decision directly addresses suspension of a Board Rule. Much as it did with its recent Decision After Reconsideration in *Stevens*, the Appeals Board may have created a new jurisdictional power not previously exercised.

In any event, in light of the suspension of Rule 10859, the Appeals Board concluded that the District Offices have been free to proceed on the underlying cases throughout this entire time, and no order, decision or award by a WCJ has been rendered void. The en banc decision takes pains to note that all parties, including lien claimants, are entitled to fundamental due process, which requires notice and an opportunity to be heard. "[W]e emphasize that in the absence of an adjudication that a declaration was untimely, a lien claimant is not barred from proceeding on its lien."

The Appeals Board also had to grapple with the consolidation of over 1,200 cases, pursuant to Rule 10589. To this end, in light of the fact that the Petitions for Reconsideration presented common issues of fact or law (and given the limited resources of the Appeals Board), consolidation was deemed appropriate, and the consolidated cases are collectively referenced as "*The Lien Cases*."

The decision spends nearly 5 pages of single-spaced type, listing all of the ADJ numbers involved in the consolidation; lien claimant representative Maximum Medical has the dubious honor of being designated to serve the decision on all of the involved parties.

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