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1. *Russell v. Providence Health and Services, 2024 Cal. Wrk. Comp. P.D. LEXIS 335*

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Russell v. Providence Health and Services, 2024 Cal. Wrk. Comp. P.D. LEXIS 335

Workers' Compensation Appeals Board (Board Panel Decision)

October 15, 2024 Opinion Filed

W.C.A.B. No. ADJ12023298—WCJ Clint Feddersen (VNO); WCAB Panel: Commissioner Capurro, Chair Zalewski, Commissioner Dodd

Reporter
2024 Cal. Wrk. Comp. P.D. LEXIS 335 *

Donate Russell, Applicant v. Providence Health and Services, PSI, administered by Sedgwick Claims Management Services, Defendants

Status:

Publication Status: **CAUTION:** This decision has not been designated as a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 257 Cal. Rptr. 813, 54 Cal. Comp. Cases 145]*. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 118 Cal. Rptr. 2d 105, 67 Cal. Comp. Cases 236]*. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see *Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]*. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: The Petition for Reconsideration is *denied*.

Core Terms

Dental, bills, codes, Claimant's, appeals board, dentists, workers' compensation, lien claimant, fee schedule, appliance, sleep apnea, petition for reconsideration, persuasive, valuation, Pharmacy, guard, sleep, recommended, believes, amounts, reasons, studies, region, certificate, exhibits, medical costs, transmission, defendants', notice, cases

Headnotes

Liens—Medical Treatment—Reasonable Value of Services—WCAB, denying reconsideration, affirmed WCJ's decision awarding lien claimant Dental Trauma Center $5,499.07 for medically necessary dental treatment provided to applicant who incurred work-related dental injuries while employed as EVS technician on 10/31/2017, based on opinion of defense expert regarding reasonableness of lien claimant's fees, which WCAB found more persuasive than opinion of lien claimant's expert, who valued lien claimant's services at $15,548.84, when WCAB noted that value of dental services must be established based on expert testimony and evidence presented in accordance *Kunz v. Patterson Floor Coverings, Inc. (2002) 67 Cal. Comp. Cases 1588* (Appeals Board en banc opinion), because they are not covered by Official Medical Fee Schedule, and WCAB found that opinion of defense expert was more convincing on issue of reasonableness of lien claimant's fees because defense expert had greater expertise and experience in valuation of medical services than lien claimant's expert, utilized more extensive sources to determine value of dental services, was more objective in his approach, provided significantly more detailed explanation regarding evidence he relied upon to reach his conclusions regarding lien claimant's fees, and prepared extensive analysis under *Kunz* with respect to fee lien claimant usually accepted and usual fee of other dental providers in same geographical region for services provided, whereas lien claimant's expert simply reviewed *Kunz* studies provided to him by his client, and WCAB concluded that, overall, evidence provided by defendant regarding value of lien claimant's services was more persuasive than lien claimant's evidence. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.22[2], [3], 21.02, 21.06, 21.07[5]; Rassp & Herlick, California Workers' Compensation Law, Ch. 13, §§ 13.01[2], 13.02.]

Counsel

[*1] For lien claimant—Law Office of Saam Ahmadinia

For defendants—Bredfeldt, Odukoya & Han

Panel: Commissioner Joseph V. Capurro; Chair Katherine A. Zalewski; Commissioner Katherine Williams Dodd

Opinion By: Commissioner Joseph V. Capurro

Opinion

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (*Lab. Code, § 5909*.) Effective July 2, 2024, *Labor Code section 5909* was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> > (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case **[*2]** and the appeals board.
> >
> > (2) For purposes of *paragraph (1)*, service of the accompanying report, pursuant to *subdivision (b) of Section 5900*, shall constitute providing notice.

Under *Labor Code section 5909(a)*, the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on August 21, 2024, and 60 days from the date of transmission is Sunday, October 20, 2024. The next business day that is 60 days from the date of transmission is Monday, October 21, 2024. (See *Cal. Code Regs., tit. 8 § 10600(b)*.)[1] This decision is issued by or on Monday, October 21, 2024, so that we have timely acted on the petition as required by *Labor Code section 5909(a)*.

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in *subdivision (1)* ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. *Labor Code section 5909(b)(2)* provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on August 21, 2024, and the case was transmitted to the Appeals Board on August 21, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by *Labor Code section 5909(b)(1)* because service of the Report in compliance with *Labor Code section 5909(b)(2)* provided them with actual notice as to the commencement of the 60-day period on August 21, 2024.

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' **[*4]** COMPENSATION APPEALS BOARD

Commissioner Joseph V. Capurro

I concur,

Chair Katherine A. Zalewski

Commissioner Katherine Williams Dodd

* * * * *

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Lien claimant, the Dental Trauma Center, has through its counsel of record herein filed a timely, verified petition for reconsideration of the Findings and Order Re: Lien Claims of CareQuest Pharmacy and Dental Trauma Center dated July 12, 2024 and served on July 15, 2024.

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[1] *WCAB Rule 10600(b)* (*Cal. Code Regs., tit. 8, § 10600(b)*) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the **[*3]** next business day.

The petition contends that by the Finding and Order, the WCJ acted without or in excess of his powers, the evidence submitted at trial does not justify the Findings of Fact, and the Findings of Fact do not support the Order, Decision or Award. More specifically, the petition contends that the decision to allow the lien of the Dental Trauma Center in the amount of $5,499.07, and to order defendants to pay that sum, plus a mandatory increase of 15% and annual simple interest of 10% under *Labor Code section 4603.2(b)(2)*, did not follow the analysis required by the Appeals Board's en banc decision in the case of *Kunz v. Patterson Floor Covering, Inc. (2002) 67 Cal. Comp. Cases 1588*, and that the testimony of defendant's billing expert, Donald Hodge, failed to rebut the value established by lien claimant's billing **[*5]** expert, Manuel Fuentes. The petition also contends that the 29-page findings, order, and opinion on decision did not provide sufficient reasons or grounds for finding the expert opinion of Mr. Hodge more persuasive than that of Mr. Fuentes.

There does not appear to be an answer to the petition at the time that this report was prepared.

II

FACTS

On the first day of lien trial, the parties stipulated that Donate Russell, while employed on October 31, 2017, at age 41, as an EVS tech, at Tarzana, California, by Providence Health and Services, sustained injury arising out of and in the course of employment to his right Achilles tendon and psyche, and claims to have sustained injury arising out of and in the course of employment to dental, insomnia, and back pain. The parties further stipulated that the employer was permissibly self-insured, and the primary treating physician is Barry Rosenblum, D.O. (Minutes of Hearing and Summary of Evidence, 2/1/2024, p. 2, l. 4-14).

Defendants offered exhibits that were admitted into evidence without objection as Defendant's A through N. Defendant's A was the Orthopedic PQME report of Mark Mikhael, M.D., dated October 29, 2019, and Defendant's B was the Orthopedic **[*6]** PQME report of Mark Mikhael, M.D., dated May 29, 2019. The Psychiatric PQME report of Gregory Marusak, M.D., dated July 23, 2020 was admitted as Defendant's C. Admitted as Defendant's D was an MPN notice letter from Sedgwick to applicant, dated November 9, 2017. Defendant's E was a claim acceptance letter from Sedgwick to applicant, dated November 14, 2017. Defendant's F was a medical cost containment retrospective bill review, re: Dental Trauma Center, dated May 9, 2023. Defendant's G was a medical Cost containment retrospective bill review, re: CareQuest Pharmacy, dated May 9, 2023. Defendant's H was a document regarding Del Carmen Medical Center, so it was withdrawn. Admitted as Defendant's I was a Dental Kunz study with date of March 29, 2023, and also April 2023. Defendant's J was an oral sleep devices study, dated May 9, 2023, including articles on sleep apnea, oral sleep apnea device comparables, and a CDT Code D9944 comparable study. Defendant's K was a CPT to CDT Crosswalk Study, dated December 22, 2015. Defendant's L was a report of Barry Rosenblum, D.O., dated November 8, 2017. Defendant's M was a Lidocaine, Gabapentin and Tramadol IMR Decision, dated October 24, 2014. Defendant's **[*7]** N was a Kunz study lien settlement log, dated May 9, 2023. (*Id.*, p. 3, l. 10 through p. 4, l. 23.)

Lien Claimant CareQuest Pharmacy offered exhibits that were admitted into evidence without objection as Lien Claimant's 1 through 10 (CareQuest Pharmacy). Those are not described here, because CareQuest pharmacy has not petitioned for reconsideration of the decision disallowing its lien, and its exhibits are not germane to the issues raised in lien claimant Dental Trauma Center's petition for reconsideration.

Lien Claimant Dental Trauma Center offered exhibits that were admitted into evidence without objection as Lien Claimant's 1 through 13 (Dental Trauma Center). Admitted as Lien Claimant's 1 (Dental Trauma Center) was a Dental Trauma Center itemized bill for dates of service from February 8, 2021 through June 25, 2021, dated July 5, 2023. Lien Claimant's 2 (Dental Trauma Center) was a CCR 10635 demand for medical records, dated March 21, 2022. Lien Claimant's 3 (Dental Trauma Center) was an applicant attorney e-mail referral, dated January 22, 2021. Lien Claimant's 4 (Dental Trauma Center) was a medical concierge services bill review and Kunz study, dated August 26, 2022. Lien Claimant's **[*8]** 5 (Dental Trauma Center) was a P&S report of Mayer Schames, D.D.S., dated June 25, 2021. Lien Claimant's 6 (Dental Trauma Center) was a supplemental report of Mayer Schames, D.D.S., dated March 8, 2021. Lien Claimant's 7 (Dental Trauma Center) consisted of seven RFAs of Mayer Schames, D.D.S., with a reference date of April 13, 2021. Lien Claimant's 8 (Dental Trauma Center) was an initial

report of Mayer Schames, D.D.S., dated March 12, 2021. Admitted as Lien Claimant's 9 (Dental Trauma Center) was correspondence requesting service of medical records dated August 15, 2022, and Lien Claimant's 10 (Dental Trauma Center) was a report of Marvin Pietruszka, M.D., dated December 4, 2019. Lien Claimant's 11 (Dental Trauma Center) was a report of Marvin Pietruszka, M.D., dated January 13, 2020, Lien Claimant's 12 (Dental Trauma Center) was a report of Marvin Pietruszka, M.D., dated June 17, 2020 and Lien Claimant's 13 (Dental Trauma Center) was a QME report of Gregory Marusak, M.D., dated July 23, 2020. (*Id.*, p. 4, l. 12 through p. 7, l. 25.)

On the first day of recorded testimony, Donald Hodge, Jr. was called as a witness on behalf of defendants. His testimony is summarized on pages 8 to 11 **[*9]** of the Minutes of Hearing and Summary of Evidence of February 1, 2024, and continues on pages 2 and 3 of the Minutes of Hearing and Summary of Evidence of April 25, 2024. Mr. Hodge testified that he has over 20 years of experience in workers' compensation matters. His employer is Medical Cost Review. Previously he was employed by Zenith for about 13 years as a hearing representative, bill reviewer, and lien specialist. Mr. Hodge is qualified as a bill reviewer under *Insurance Code section 11761*. This certification requires 40 hours of training. He was in Zenith's medical managed review department. There he worked on establishing the value of non-fee schedule medical treatment, such as durable medical equipment, copy services, interpreting services, dental services, and outpatient hospital services before there was a fee schedule for that. Mr. Hodge has a self-insurance claims examiner certificate, and a workers' compensation claims professional certificate. Around 2004 or 2005 he began reviewing dental bills, for which there is no fee scheduled. He helped to develop protocols for Zenith for non-fee schedule bills. He took classes, including a class called "Dental Economics" and a class about dental care and sleep **[*10]** apnea. Mr. Hodge has studied the codes used in medical billing and has manually valued compound medications for which there is no fee schedule. At Zenith he used the "Mountain View" system, transitioning out of the "Comp Advisor" system.

At Medical Cost Review, Mr. Hodge explained that he is currently a senior hearing representative and an expert witness. He has testified regarding medical bills many times in workers' compensation cases. In this case, he reviewed the bills of the Dental Trauma Center and CareQuest Pharmacy. He completed the bill reviews that were admitted into evidence in this case. He used the "Find-a-Code" platform and the "Manageware" platform to create EORs. He prepared a *Kunz* study for items not in the fee schedule. There are actually two *Kunz* studies in this case: one is a dental *Kunz* study settlement log, and the other one is a collection of Dr. Schames' bills from 2016 to 2022. These show the actual negotiated value for billing code E0486, which is for an oral sleep appliance. Included with the *Kunz* studies are articles regarding oral sleep appliances. Mr. Hodge believes the literature indicates that a sleep study is required for a diagnosis of sleep apnea before **[*11]** prescribing such a device.

Mr. Hodge testified that he is familiar with sleep apnea and dental device cases and related IMR cases. Based on this experience, Mr. Hodge believes that a patient should be referred for a sleep study first, and not just sent to a dentist. This is what he was taught in training. There is no sleep study in this case, to Mr. Hodge's knowledge.

Mr. Hodge explained that the abbreviation CPT stands for Current Procedure Technology. This is used to refer to codes that can be processed for bill review. These codes are governed by CMS and Medicare. CDT is an abbreviation for Current Dental Technology. These codes are governed by the ADA. They are not adopted by the California Official Medical Fee Schedule, or OMFS. A CDT to CPT "crosswalk" indicates which CPT codes can be used for related CDT codes for Medicare purposes. These correlations were used to try to provide some basis to assess the reasonable value of dental services in this case.

Mr. Hodge does not believe that a *Kunz* study is necessarily the most important evidence in this case. It does show cherry-picked examples of settlements for less than full value. Mr. Hodge does not believe the fact that settlements **[*12]** were cherry-picked invalidates the *Kunz* study, and he has observed that generally lien claimants as well as defendants can be selective about what to include in their *Kunz* studies. The American Dental Association, or ADA, does a survey of dental offices' billing every two or three years. In determining values for dental services, Mr. Hodge relies on the average of each code in this ADA survey in a six-state area of the western United States, which includes California. In the retroactive bill review for Dental Trauma Center's services, a code of G2 was used to mean that they substituted a different code, and a code of G54 means they changed a code to a more relevant code in accordance with Mr. Hodge's experience. CDT codes are not in the OMFS, so they were cross-walked into CPT codes. The Dental Trauma Center billed for two mouth devices: a nighttime guard, and a

daytime guard. The occlusal guard with the code D8210 did not use the correct code, according to Mr. Hodge. He indicated that D7880 or D9940 would be the correct code for an occlusal orthotic device. Mr. Hodge used the ADA survey to value this device. For code is 0486, an oral sleep appliance, Mr. Hodge used a *Kunz* study based **[*13]** on a couple of dentists in the region. In 2012, he observed that the last scheduled value for this device was about $1,200. As an example, he used a dentist in Newport Beach who charged $3,000 for a similar unit. In another case, a new code was used at a value of $1,985. This device was billed at the daytime code, D8210, which is not correct for a nighttime device. Mr. Hodge himself has one of these devices and replaces it every 3 to 5 years. Some dentists manufacture the device themselves, and others send them to outside manufacturing facilities, such as Glidewell. These devices are manufactured based on an impression or mold of the teeth. Mr. Hodge paid about $300 for his device but believes health insurance generally pays around $700-$1300 for similar devices. The price Mr. Hodge would assign, if it was properly prescribed, is $2,500 for the nighttime appliance provided by Dental Trauma Center.

A summary of Mr. Hodge's testimony regarding the lien claim of CareQuest Pharmacy is omitted here as CareQuest Pharmacy has not filed a petition for reconsideration of the decision disallowing its lien.

Upon cross-examination, Mr. Hodge testified again about his job duties and experience. He **[*14]** is currently employed by Medical Cost Review. He is a Hearing Representative, and a Bill Review Expert. As a Hearing Representative, he appears at the WCAB, mostly for defendants. He has been representing defendants since 2015, and before that he worked at Zenith. Mr. Hodge estimates that he has testified in about 15 to 20 WCAB trials regarding dental bills in the last five years. He or someone from medical cost review testified at the case of Jose Badillo. That case is actually one of the cases included in the lien settlement log admitted into evidence in this case. In that case, Judge Pollak found Manuel Fuentes to be credible.

Mr. Hodge explained that a *Kunz* study is a study of what is paid for non-fee schedule items in a geographic region. This name comes from the case of Scott Kunz at the WCAB. With respect to dental code E0486, the explanation code of G63 in Mr. Hodge's bill review means that this item is outside the scope of practice. Although there is an article included with the *Kunz* study that says a dentist can create such a device with materials commonly found in a general-practice dental office, Mr. Hodge indicated that he indicated that the device was outside the scope **[*15]** of Dr. Schames' practice, because did not see a code for sleep apnea, and he believes this to be a prerequisite for prescribing such a device. Mr. Hodge admitted that although he found code E0486 to be outside of Dr. Schames' scope of practice, the article included with the *Kunz* study does seem to indicate otherwise.

On the second day of testimony, Mr. Hodge explained that in reviewing lien claimant Dental Trauma Center's Bills, he changed one of the codes that was billed, D8210, to a different code, D7880, and recommended that the amount of $678.42 be allowed for this billing code. Two more codes, G2 and AD1, indicated the reasons for this adjustment. Code G2 means that the item billed is not listed in the Official Medical Fee Schedule (OMFS), so an allowance was made for a comparable service. Code AD1 means that the recommended fee allowance was based on an American Dental Association (ADA) survey of fees.

Mr. Hodge was asked specifically about page 8 of Defendant's I, which lists the D7880 procedure code and the 2020 ADA survey. Mr. Hodge confirmed that he used the 2020 ADA survey of fees, which obtained data from 47 dentists in five states: Alaska, California, Hawaii, Oregon, and **[*16]** Washington. Mr. Hodge admitted that the dentists who participated in the survey could have been from any of these five states, and the survey does not indicate how many of them were from California. They could have all been from California, or they could have all been from other states. Mr. Hodge couldn't say where these dentists were from. The dentists surveyed could have been from Van Nuys or they could have been from Vancouver. Usual and customary rates in the region are one of the components mentioned in the *Kunz* case.

Manuel Fuentes was called as a witness by lien claimant Dental Trauma Center, and his testimony is summarized on pages 3 to 5 of the Minutes of Hearing and Summary of Evidence of April 25, 2024. Mr. Fuentes runs a medical billing company that provides services to dentists and has more than 1,000 active clients in 19 states. Mr. Fuentes received a certificate from WorkCompCentral when he took a class taught by Sue Honor in 2020. Within the last few years, he testified before Judge Pollak in the case of *Jose Badillo* [*v. Geneva Staffing, Inc., et al.*, ADJ11286905; ADJ11287164], where Judge Pollak found his testimony credible.

Mr. Fuentes stated that he has reviewed the **[*17]** bills of Dr. Schames for about four years and is familiar with his billing practices. There is no Official Medical Fee Schedule for dental services.

At this point, counsel for defendant objected to the qualifications of Mr. Fuentes as an expert witness. The objection was overruled, with the degree of Mr. Fuentes' qualifications to be given due consideration with respect to the weight accorded to his testimony.

Mr. Fuentes indicated that he used a *Kunz* study to value the dental services provided in this case. The *Kunz* study looks at what other dentists are paid for similar services in a similar geographic region. Dr. Schames provided Explanations of Benefits (EOBs) from the past few years with the same date range as in the present case, with the same or similar codes. These EOBs show that multiple carriers paid what Dr. Schames was charging for his services.

Because the company that Mr. Fuentes runs is near Los Angeles, he used its data, especially data from Southern California dentists showing what they charges and what they were paid. Mr. Fuentes also consulted fairhealthconsumer.org. His research showed that in this case Dr. Schames billed below others in his area for codes D0486 and **[*18]** D8210.

Mr. Fuentes testified that he has reviewed the bill review of Medical Cost Review in this case. He disagrees with the Medical Cost Review bill review regarding codes D0486 and D8260. Mr. Fuentes has been in the dental billing field more than 10 years. In his review that was admitted as Lien Claimant's 4 (Dental Trauma Center), Mr. Fuentes recommended payment of $15,548.84. Mr. Fuentes has no changes to this review.

On cross-examination, Mr. Fuentes stated that he has reviewed approximately 150 to 200 bills in about four years. All of these bills were from the Dental Trauma Center. He has reviewed no other providers' bills. Mr. Fuentes does not have a coding license. He has staff members who do, but he does not. He knows what a coding license is, but he does not need one. To get a coding license, you have to study a CBT book, and take a test, then you get a certificate.

Mr. Fuentes has testified in about five to ten cases besides the *Badillo* case. He does not recall the *Darby* case or the *Fregoso* case. Mr. Fuentes does not ask about the outcome of the cases in which he testifies, so he does not know whether his testimony has ever been considered not substantial. He does know the **[*19]** outcome of the *Badillo* case.

To analyze the services changed in this case, Mr. Fuentes said that he looked at the bills of the Dental Trauma Center, the amounts charged, and what other dentists charged and were paid for similar services in similar regions. Mr. Fuentes reviewed the reports of Dr. Schames in this case, but he did not review any other reports as he believes that was not his job as an expert witness. Mr. Fuentes doesn't recall seeing any reference by Dr. Schames to a diagnosis of temporomandibular joint (TMJ) disorder or sleep apnea.

Mr. Fuentes admitted that he is not a physician, so he does not know whether a particular diagnosis is required for devices prescribed by Dr. Schames. The clinical side is up to the physician. Mr. Fuentes is not an expert in medical necessity. He is not a physician. His testimony is only regarding the amount that is billed, and not whether it is reasonable or necessary.

Mr. Fuentes explained that he used a FAIR Health, Inc. study to do his bill review. He doesn't know whether this was included in the exhibits in this case. Mr. Fuentes did not assist in preparing Dental Trauma Center's *Kunz* study in this case. Mr. Fuentes reviewed his own *Kunz* ***[*20]*** study, using the data of dental providers for which he provides medical billing services. He looked at their bills and the amounts paid for services in a similar region. His own data was not included in the exhibits, because that data is confidential. This data showed that Dr. Schames billed amounts that were lower than the amounts billed by other doctors represented by Mr. Fuentes. He used FAIR Health data as well, which also supports his conclusion that Dr. Schames billed amounts that were lower than the amounts billed by other doctors in the same region.

Mr. Fuentes indicated that he has reviewed Dental Trauma Center's *Kunz* study in this case. He has reviewed Dental Trauma Center's bills and Explanations of Review (EORs), but he has no way of knowing whether the Dental

Trauma Center has sent him all of their bills. The Dental Trauma Center provided Mr. Fuentes with a *Kunz* study, and Mr. Fuentes has no reason to think that it is false. He has no reason to think that they would pick only EORs showing the highest amounts.

Mr. Fuentes believes that Code D8210 is the code for removable appliance therapy. This involves an appliance that can be removed when therapy is not needed. It doesn't **[*21]** specify whether this is a day or night guard.

Following the testimony of Mr. Fuentes, Mr. Hodge was called to testify once again as a rebuttal witness for the defendant. This testimony is summarized at pages 5 and 6 of the Minutes of Hearing and Summary of Evidence of April 25, 2024.

Mr. Hodge believes Code D8210 is the Current Dental Terminology (CDT) Code for removable appliance therapy to help children with thumb sucking. It is not for a day or night guard. Therefore, D7880 was used instead by Mr. Hodge. This, or D9940, would be the correct code.

Mr. Hodge is not aware of any TMJ disorder or sleep apnea diagnosis in this case. He saw a TMJ code on the bill. He did not see any International Classification of Diseases (ICD) sleep apnea code. The ICD-10 code for sleep apnea would be G47.36. Sleep apnea should be diagnosed with this code after a sleep study, which is not normally done by a dentist. Based on Mr. Hodge's training, a sleep study is needed in order to prescribe a sleep apnea device.

After the second day of testimony, issues were submitted for decision. The issues submitted for decision were identified at trial as (1) parts of body injured, (2) liability for self-procured medical **[*22]** treatment, (3) the liens of CareQuest Pharmacy for medical treatment in the amount of $12,254.64 and Dental Trauma Center for medical treatment in the amount of $16,969.23, (4) whether there is waiver of Retro UR; penalties and interest, (5) failure to request *Labor Code § 4062* panel in dentistry, citing Patrick Robertson vs. Alpine Cabinets, (6) Dental Trauma Center's reservation of right to amend exhibits pending receipt of medical file, (7) the reasonableness and necessity of the services/billing of Dental Trauma Center and CareQuest Pharmacy, (8) the validity of MPN as per defendant, (9) whether adverse inference should be given against defendant for failure to comply, (10) Lien Claimant asks, did defendants comply with Rule 9767.6? (11) Does defendant have a prescription MPN pharmacy? (12) inadmissibility of evidence not served, (13) failure to respond to RFAs, and (14) costs and sanctions. (Minutes of Hearing and Summary of Evidence dated February 1, 2024, pp. 2-3.)

Each of the issues was addressed in the opinion on decision that accompanied the findings and order dated July 12, 2024, with references to the evidence, testimony, and applicable law, along with a summary of all evidence and billing expert testimony **[*23]** as set forth above. The lien claim of CareQuest Pharmacy was disallowed based on the lack of evidence to support a finding of injury to the back or neck, but that finding and order has not been appealed by CareQuest Pharmacy. The lien claim of Dental Trauma Center was allowed, albeit in the amount recommended by defense billing expert Donald Hodge, $5,499.07, and not the amount recommended by lien claimant's billing expert Manuel Fuentes.

III.

DISCUSSION

Under *California Labor Code section 5904*, any objections, irregularities, and illegalities not raised by the petition for reconsideration may be deemed waived. Accordingly, the discussion of legal issues in connection with the July 12, 2024 decision need not address the following questions that were decided in the underlying decision, for the most part favorably to lien claimant Dental Trauma Center, but which were not raised in the petition for reconsideration: parts of body were injured on an industrial basis, right to self-procure dental treatment with Dental Trauma Center without respect to defendants' Medical Provider Network (MPN), whether the MPN was valid, whether utilization review was properly deferred, the effect of the failure of the parties to obtain a QME **[*24]** panel in dentistry, the lack of utilization review, reasonableness and necessity under the Medical Treatment Utilization Schedule (MTUS), defendants' lack of response to Forms RFA, whether exhibits could be amended by Denta Trauma Center after its receipt of the medical file, whether there should be an adverse inference for failure to produce the medical file, defendants' duty to provide an initial medical evaluation, and penalties, interest, sanctions and costs.

The contentions of the petition for reconsideration are all centered around the basis for, and explanation of, the valuation of the lien claim. Each of the contentions raised in the petition for reconsideration will be addressed here, by responding to each of the four sections under the heading "argument" in the petition. These arguments all overlap to some extent.

1. Reasons for accepting defendant's bill review as more persuasive

To the extent that the opinion on decision failed to explain the reasons why Mr. Hodge's expert testimony was found to be more persuasive than the testimony of Mr. Fuentes, that technical defect is cured here by provision of a detailed explanation in satisfaction of the requirements of *Labor Code section 5313*. (*City of San Diego v. Workers' Comp. Appeals Bd. (Rutherford) (1989) 54 Cal. Comp. Cases 57 (writ den.)*; *Smales v. Workers' Comp. Appeals Bd. (1980) 45 Cal. Comp. Cases 1026* (writ **[*25]** den.).)

As explained in the opinion, dental fees are not covered by the Official Medical Fee Schedule (OMFS). Accordingly, the value of these services had to be established by written evidence (in accordance with the principles set forth in the Appeals Board's en banc decision in the case of *Kunz v. Patterson Floor Covering, Inc. (2002) 67 Cal. Comp. Cases 1588*, discussed in the next section below), and by expert testimony. As stated in the July 12, 2024 Opinion on Decision, Mr. Hodge's opinions regarding the valuation of the bills of Dental Trauma Center were followed as more persuasive than those of Mr. Fuentes, and his bill review's recommended "fee schedule" values were added, without disallowances, as shown in his bill review admitted as Defendant's F. Accepting Mr. Hodge's expertise regarding valuation, but not his medically-based reasons for complete disallowance of charges (as to which he is not a competent witness, as he is a billing expert, not a medical expert), the total is $5,499.07 (obtained by adding all sums under the "Fee Schedule" column in Defendant's F, representing Mr. Hodge's opinion regarding the correct value for services if allowed). Accordingly, Dental Trauma Center's lien was allowed for medically necessary services with a total **[*26]** value of $5,499.07, plus an increase of 15% and 10% annual interest as required under *Labor Code section 4603.2(b)(2)* for any payment made later than 45 days after defendants' receipt of the bills.

The undersigned felt that the juxtaposition of Mr. Hodge's experience and opinions set forth in the opinion on decision with those of Mr. Fuentes spoke for themselves as to the greater persuasiveness of Mr. Hodge, but in the interests of adequately explaining the reasoning behind the choice to follow Mr. Hodge's opinions with respect to valuation (but not disallowance of charges), following is a more direct and explicit analysis.

As summarized above, defense billing expert Mr. Hodge testified that he has over 20 years of experience in workers' compensation matters, and began reviewing dental bills around 2004 or 2005. The lien claimant's billing expert, Mr. Fuentes, testified that he has been in the dental billing field more than 10 years. Thus, Mr. Hodge has approximately twice as many years of experience as Mr. Fuentes, and the experience is specifically with respect to workers' compensation.

In terms of experience testifying as a billing expert in Workers' Compensation Appeals Board trials, Mr. Hodge estimates that he **[*27]** has testified in about 15 to 20 WCAB trials regarding dental bills in the last five years. Mr. Fuentes has testified in about five to ten cases besides the *Badillo* case, in which his opinions were used by the Workers' Compensation Judge. So, it appears that Mr. Hodge has testified as an expert approximately two to three times as often as Mr. Fuentes. Mr. Hodge's employer is Medical Cost Review, where he represents defendants. Previously he was employed by Zenith for about 13 years as a hearing representative, bill reviewer, and lien specialist. Mr. Fuentes runs a medical billing company that provides services to dentists and has more than 1,000 active clients in 19 states, and he has reviewed approximately 150 to 200 bills in about four years, but all of these bills were from the Dental Trauma Center. He has reviewed no other providers' bills. Thus, while Mr. Hodge has represented defendants, and specifically one defendant, Zenith, for about 13 years, his former employer Zenith is not the defendant in this case an dh[sic] seems to have a broad range of experience in reviewing workers' compensation bills. At Zenith, he worked in the medical managed review department, where he established **[*28]** the value of non-fee schedule medical treatment, such as durable medical equipment, copy services, interpreting services, dental services, and outpatient hospital services before there was a fee schedule for that. Mr. Fuentes, on the other hand, has apparently worked with a large number of dentists in different states, but has only reviewed bills for the Dental Trauma Center, the dental lien claimant in this case. This makes Mr. Fuentes appear somewhat more limited, at least in his experience and perspective as a workers' compensation bill reviewer.

With respect to training, Mr. Hodge testified that he is qualified as a bill reviewer under *Insurance Code section 11761*. This certification requires 40 hours of training. Mr. Hodge has a self-insurance claims examiner certificate, and a workers' compensation claims professional certificate. Mr. Hodge has taken classes, including a class called "Dental Economics" and a class about dental care and sleep apnea. In comparison, Mr. Fuentes received a certificate from WorkCompCentral when he took a class taught by Sue Honor in 2020. He does not have a coding license. He has staff members who do, but he does not. He knows what a coding license is, but he believes he does **[*29]** not need one. Mr. Fuentes explained that to get a coding license, he would need to study a CBT book and take a test. Although both Mr. Hodge and Mr. Fuentes have training, it was not clear whether the class taken by Mr. Fuentes was a one-time class or a 40-hour program like the one completed by Mr. Hodge, or whether Mr. Fuentes is qualified as a bill reviewer under *Insurance Code section 11761* as Mr. Hodge is. Mr. Hodge's training and certification seems to be more extensive than that of Mr. Fuentes.

With respect to the content of the *Kunz* studies and valuation opinions of Mr. Hodge and Mr. Fuentes, Mr. Hodge explained his work more thoroughly than Mr. Fuentes. Mr. Hodge explained that a *Kunz* study is a study of what is paid for non-fee schedule items in a geographic region, and he prepared a *Kunz* study for items not in the fee schedule in this case. Mr. Hodge provided both a dental settlement log, admitted as Defendant's Exhibit N, and a collection of relevant documents regarding dental fees that was admitted as Defendant's Exhibit I, which includes tables of results from the 2020 ADA Survey of Dental Fees, coding information from dentalbilling.com and dentistryiq.com, a 4/10/2023 bill from Downey Modern Dentistry **[*30]** showing that the usual and customary fee for a nightguard (D9944) is $2,470.00, with $1,230.00 accepted as payment, an ADA document explaining that code D9944 is for an occlusal guard—hard appliance, full arch, a table with a "crosswalk" of CPT codes to CDT codes, a night guard cost estimate of $200-$1,000 from dentaly.org, and a webpage offering a "hybrid night guard" for $189.99, a Noridian Healthcare Solutions table indicating that in 2012, the fee schedule amount for HCPS code E0486 (Oral device/appliance used to reduce upper airway collapsibility, that the usual and customary fee for a nightguard (D9944) is $2,470.00, with $1,230.00 accepted as payment, an ADA document explaining that code D9944 is for an occlusal guard—hard appliance, full arch, a table with a "crosswalk" of CPT codes to CDT codes, a night guard cost estimate of $200-$1,000 from dentaly.org, and a webpage offering a "hybrid night guard" for $189.99, a Noridian Healthcare Solutions table indicating that in 2012, the fee schedule amount for HCPS code E0486 (Oral device/appliance used to reduce upper airway collapsibility, adjustable or nonadjustable, custom fabricated, includes fitting and adjustment) was $1,321.61 **[*31]** in California, a table from niermanpm.com with a map indicating that in the Western United States (called "Jurisdiction D") approximately $1,250 to $1,550 was billed for E0486 as of June 2019. These provide persuasive evidence of recent actual values for billing code E0486, which is for an oral sleep appliance. Included with the *Kunz* studies are some articles regarding oral sleep appliances, but these have no relevance to the valuation of the appliances, just whether they were reasonable or necessary. Mr. Hodge also testified that he believes the literature indicates that a sleep study is required for a diagnosis of sleep apnea before prescribing such a device, but he did nevertheless analyze their value, and Mr. Hodge's opinion on valuation, not necessity, was followed in the decision regarding the lien claim of the Dental Trauma Center. Mr. Hodge questioned whether a *Kunz* study is necessarily the most important evidence in this case, although he does not believe the fact that settlements are "cherry-picked" for a *Kunz* study necessarily invalidates the *Kunz* study. Mr. Hodge demonstrated objectivity by admitting that generally lien claimants as well as defendants can be selective about **[*32]** what to include in their *Kunz* studies. Mr. Hodge explained that he used American Dental Association (ADA) survey averages for each code in a six-state area of the western United States that includes California. In the retroactive bill review for Dental Trauma Center's services, a code of G2 was used to mean that they substituted a different code, and a code of G54 means they changed a code to a more relevant code in accordance with Mr. Hodge's experience. Mr. Hodge explained that Current Dental Technology (CDT) codes are not in the OMFS, so he cross-walked them into Current Procedure Technology (CPT) codes. Mr. Hodge provided a detailed explanation of how and why he believed different billing codes were appropriate for the nighttime guard and daytime guard provided by the Dental Trauma Center, and how he used the ADA survey to value this device. Mr. Hodge explained his coding and valuation of $2,500.00 for a sleep appliance by providing specific examples, all but one of which were lower than his valuation.

Mr. Fuentes explained his opinions in a manner that was not necessarily deficient, but not nearly as persuasive as Mr. Hodge. Mr. Fuentes said that he looked at the bills of the Dental **[*33]** Trauma Center, the amounts charged, and what other dentists charged and were paid for similar services in similar regions. Mr. Fuentes reviewed the reports of Dr. Schames in this case, but he did not review any other reports as he believes that was not his job as

an expert witness. Mr. Fuentes explained that he used a FAIR Health, Inc. study to do his bill review. He doesn't know whether this was included in the exhibits in this case. Mr. Fuentes did not assist in preparing Dental Trauma Center's *Kunz* study in this case. Mr. Fuentes reviewed his own *Kunz* study, using the data of dental providers for which he provides medical billing services. He looked at their bills and the amounts paid for services in a similar region. His own data was not included in the exhibits, because that data is confidential. However, according to Mr. Fuentes, this undisclosed data showed that Dr. Schames billed amounts that were lower than the amounts billed by other doctors represented by Mr. Fuentes. He believes FAIR Health data also supports his conclusion that Dr. Schames billed amounts that were lower than the amounts billed by other doctors in the same region. Although Mr. Fuentes indicated that he **[*34]** has reviewed Dental Trauma Center's *Kunz* study, bills, and Explanations of Review (EORs), he admitted that he has no way of knowing whether the Dental Trauma Center has sent him all of their bills. However, Mr. Fuentes testified that he has no reason to think that the Dental Trauma Center's *Kunz* study is false, and specifically he testified that he has no reason to think that the Dental Trauma Center would pick only EORs showing the highest amounts for their *Kunz* study.

Therefore, taking all things into account, including having had an opportunity to observe the demeanor of the witnesses, the testimony of Mr. Hodge was found to have a greater basis in expertise and experience, be more wide-ranging in its sources, more objective in its approach, and more detailed in its explanation, and therefore more probable and persuasive in its conclusions. Accordingly, Mr. Hodge's fee values totaling $5,499.07 were followed, and not Mr. Fuentes' recommended payment of $15,548.84.

2. Application of Kunz v. Patterson

Kunz v. Patterson Floor Covering, Inc. (2002) 67 Cal. Comp. Cases 1588 (Appeals Board en banc) held, in relevant part, that when determining the reasonableness of a fee not covered by the Official Medical Fee Schedule (OMFS), the Board may take into consideration **[*35]** a number of factors, including but not limited to the medical provider's usual fee and the usual fee of other medical providers in the same geographical area, the fee the lien claimant usually accepts for the same or similar services (for both workers' compensation cases, and outside of workers compensation), and the fee usually accepted by other providers in the same geographical area (including in-patient providers).

Dental fees are not covered by the OMFS, so with respect to valuation of the bills of Dental Trauma Center, competing valuations of Denta Trauma Center's fees using criteria identified in the *Kunz* case were offered by both defendants and the lien claimant.

For the reasons set forth in the previous section, Mr. Hodge's opinions, including his Kunz studies, were accepted as more persuasive than those of Mr. Fuentes, and his bill review's recommended "fee schedule" values were added, without disallowances, as shown in his bill review admitted as Defendant's F. Accepting Mr. Hodge's expertise regarding valuation, but not medically-based reasons for complete disallowance of charges, the total is $5,499.07 (obtained by adding all sums under the "Fee Schedule" column, with the **[*36]** understanding that obviously there is no fee schedule for dental treatment, so these are Mr. Hodge's opinion regarding the correct value for services if allowed).Accordingly, Dental Trauma Center's lien was allowed for medically necessary services with a total value of $5,499.07 based on the superior explanation provided in support of Mr. Hodge's Kunz study.

3. Dental Trauma Center's evidence of the reasonable value of services was less persuasive

The lien claimant is the proponent of the issue of payment for its services, so it must meet the burden of proof as to the value of its services by a preponderance of the evidence as required by *Labor Code section 3202.5*. As explained above, Dental Trauma Center's billing expert was less capable than defendants' billing expert of explaining the basis for the differences between their respective *Kunz* studies, probably due in part to the fact that while defendants' expert created the *Kunz* studies on which he relied, the lien claimant's expert merely reviewed what was given to him by his client. For each of the reasons explained more fully above, the undersigned exercised his discretion to weigh competing evidence and determine which evidence has more convincing force **[*37]** and greater probability of truth. Whether the lien claimant's expert met his burden or not is merely of academic interest, because the conclusions of the defendants' expert were found to be more persuasive than those of the lien

claimant's expert. Although credibility determinations for an expert witness are certainly different than for a lay witness, the undersigned did assess the relative believability of both witnesses' testimony and believes his exercise of discretion in that respect, weighing all of the factors discussed above as well as observing the demeanor and manner of the witnesses, was in this case not only appropriate, but is a determination that should be entitled to some degree of deference on appeal. (*Garza v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500]*.)

4. Defendant's evidence of the reasonable value of services was more persuasive

As also explained above, defendants' billing expert testimony and Kunz studies were found to have more convincing force and greater probability of truth than the testimony and Kunz study offered by lien claimant Dental Trauma Center. To the extent that lien claimant's evidence had established anything on the issue of valuation of dental services, defendants' evidence established it more persuasively. **[*38]** The reasons for that will not be recited yet again in this section, but rather incorporated by reference to the response to the first section of argument above. Accordingly, for all of the forgoing reasons, Dental Trauma Center's lien was allowed for medically necessary services with a total value of $5,499.07, and not $15,548.84.

IV.

CONCLUSION

It is respectfully recommended that the petition be denied.

Clint Feddersen

Workers' Compensation Administrative Law Judge

Dated: August 20, 2024
