

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/ALL OFFICES/CLIENTS

FROM: W. Joseph Truce

DATE: June 20, 2002

RE: LIEN CLAIMS OF EDX/RX PHARMACY, P-X DRUG STORES, MH EXPRESS PHARMACY & MODERN HEALTH PHARMACY

Chuck Maki of our Ventura office has obtained an outstanding decision from Judge Jerold Cohn of the Appeals Board District Office in Van Nuys denying the lien claims and/or billings of P-X Drug Stores and Modern Health Pharmacy.

Although Judge Cohn found that the applicant, Vincent Lima, did not sustain injury arising out of and occurring in the course of his employment (thereby negating any claim for self-procured medical treatment) Judge Cohn addressed the reasonableness of the liens presented by the two (apparently) separate pharmacy companies as follows:

"Although both lien claimants maintained separate mailing addresses, they were represented by the same hearing representative. The Appeals Board's file contains no notice of representation. One can only wonder if one pharmacy rather than two, wouldn't have been enough in this case . . . "

Judge Cohn also "wondered" in his Opinion on Decision as to why the pharmacy bills were not provided to the applicant's group carrier when the defendant denied injury AOE/COE. Judge Cohn's comments are as follows:

"Having been hired in 1994, he no doubt had medical pay insurance. However, the pharmacies in this case chose to provide treatment on a lien basis, rather than make a claim to the medical pay carrier. Were the prices charged to medical pay providers the same? Perhaps. Perhaps not . . . "

In rebutting the reasonableness of the billings of P-X Drug Stores and Modern Health Pharmacy, Chuck submitted Explanation of Benefit Notices (EOBs) showing how the charges of pharmacies would be reduced under the Official Medical Fee Schedule. In commenting on the EOBs in comparison to the charges of lien claimants, Judge Cohn stated as follows:

Inter-Office Memo to All Attorneys/All Offices/Clients

RE: LIEN CLAIMS OF EDX/RX PHARMACY, P-X DRUG STORES, MH EXPRESS PHARMACY & MODERN HEALTH PHARMACY

June 20, 2002

Page 2

"The first thing that comes to mind in reviewing the amounts claimed by lien claimants herein is that their bills are approximately 40% to 100% [or more] higher than the bill reviews presented by defendants. When one sees differences that great, one can only wonder as to who could be right and who could be so terribly wrong. Since there was no substantial evidence as to the reasonableness of the liens, the query is easier to answer. . . . in this case the applicant's claim was denied and lien claimants' claims were objected to. The defendant served lien claimant with the bill reviews . . . "

However, the most important part of Judge Cohn's decision is as follows:

"However, lien claimants failed to offer proof after the reasonableness of the thier liens. Thus, it was felt that there was absolutely no substantial evidence offered by lien claimants as to the reasonableness of their liens . . . "

As of this date it is not certain as to whether or not the pharmacy companies plan to file a Petition for Reconsideration. Judge Cohn's opinion that lien claimants have the burden of proof as to reasonableness of their lien claims (when the lien claims exceed the official medical fee schedule) is a point that is highly disputed by lien claimants. It would appear that we can cite this decision as evidence under Labor Code §5703(g).

WJT:wf

Enclosure- Opinion on Decision; F&A re Vincent Lima v. Zenith

VINCENT LIMA,

CASE NO.
VNO 0403855

VS.

THE ZENITH INSURANCE CO.;
PREMISSIBLY SELF-INSURED,

WCJ: JEROLD S. COHN

KEGEL, TOBIN & TRUCE
By: E. CHARLES MAKI
Attorneys for Defendant

FELIPE CALVILLO
Hearing Representative for Lien Claimants

OPINION ON DECISION

In this case, lien claimants claim psychiatric injuries and internal injuries as a result of applicant having worked at Zenith from October, 1997 to March 28, 2000 as a telecom specialist. The present matter involved the liens of Px and Modern Pharmacy.

Applicant's medical reports from Dr. Curtis and Dr. Burstein were rejected as being rebutted and failing in their histories and opinions.

The case in chief was settled with a Thomas finding.

At trial, the judge was not convinced that either lien claimant should prevail.

There appeared to be insufficient evidence to support their claims.

Although both lien claimants maintain separate mailing addresses, they were represented by the same hearing representative. The appeals board file contains no "Notice of Representation." One can only wonder if one pharmacy, rather than two, wouldn have been enough in this case. Upon reflection, it can be noted that one pharmacy provided the psychiatric drugs and the other provided the internal medicine drugs.

For some reason, applicant, when he testified, did not seem too terribly concerned with the problems as work. And, he completely denied recalling one very important allegedly stressful event (when his boss purportedly stated that his newly serviced motorcycle was "dumb fucking filthy"). See page 3 of Dr. Curtis June 9, 2000 report.

As a result of that and all the factors used in weighing the evidence, the trial judge did not feel that lien claimants had proven that an injury AOECOE had taken place. In regard to the psychiatric complaint, it was felt that lien claimants had failed in their proof as to "a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury." Labor Code Section 3208.3(b) (1). The particular motorcycle incident took place at a picnic and lien claimants failed to show that it (if it took place at all) wasn't an off duty recreational activity.

Another event took place at an after-hours recreational activity where a supervisor is purported to have slapped someone. Applicant was not even present but states that he heard about it and reported it to management.

Applicant gave the impression that he had previously worked at various places (including Zenith) and was not particularly insulted by the interactions of his fellow employees. In fact, he stated he's had no problems up until 1997 although he had worked with the same bosses for quite some time. Having been hired in 1994, he no doubt had medical pay insurance. However, the pharmacies in this case chose to provide treatment on a lien basis, rather than make a claim to the medical pay carrier. Were the prices charged to medical pay providers the same? Perhaps. Perhaps not.

We needn't be too concerned with that query in order to solve the present case. Yet, the Administrative Director, in setting pharmacy fee schedules might wish to take such a factor into consideration.

The first thing that comes to mind in reviewing the amounts claimed by lien claimants herein is that their bills are approximately 40% to 100% [or more] higher than the bill reviews presented by defendants. When one sees differences that great, one can only wonder as to who could be right and who could be so terribly wrong. Since there was no substantial evidence as to the reasonableness of the liens, the query is easier to answer.

In this case the applicant's claim was denied and lien claimants' claims were objected to. The defendant served lien claimants with the bill reviews.

However, lien claimants failed to offer any proof as to the reasonableness of their liens. Thus, it was felt that there was absolutely no substantial evidence offered by lien claimants as to the reasonableness of their liens. By contrast, defendant did offer evidence from an often-used bill reviewer. When viewing the evidence in light of their being *only* evidence that lien claimants were unreasonable by having over-billed anywhere from 40% to 100% or more, one cannot have a positive impression of the claims of these lien claimants. Needless to say, each case has to be decided on its own facts. It is perfectly obvious to the unbiased trier of fact that in other cases an opposite impression and result can occur.

However, in this case, the initial impression is that these lien claimants, because they have failed to rebut or otherwise offer evidence contrary to defendant's evidence, perhaps should realize that the claims made are unpersuasive in an adversary proceeding.

It was felt that defendants rebutted any evidence of compensability by reports, testimony and documentation.

The trial judge has considered all of evidence as well as impressions reasonably made of the evidence and lack thereof. It is concluded that lien claimants have failed to prove industrially, need and reasonableness of its liens. Consequently, its liens are hereby being denied.

Dated: 5-15-02


JEROLD S. COHN
WORKERS' COMPENSATION JUDGE

JC:eh

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Case Nos. VNO 0403855

VINCENT LIMA,

Applicant

vs.

THE ZENITH INSURANCE CO.;
PREMISSIBLY SELF-INSURED,

Defendants.

**FINDINGS AND ORDER
DISALLOWING LIENS**

KEGEL, TOBIN & TRUCE
BY: E. CHARLES MAKI Esq.
Attorney for Defendant

FELIPE CALVILLO
Hearing Representative for Lien Claimants

The above-entitled matter having been heard and regularly submitted, the Honorable JEROLD S. COHN, Workers' Compensation Judge now makes his decision as follows:

FINDINGS OF FACT

1. Lien claimants, Px Pharmacy and Modern Pharmacy assert claims for treatment allegedly provided to Vincent Lima, applicant herein.
2. Lien claimants failed to offer any proof as to reasonableness of its liens and the evidence as to necessity was rebutted.
3. The defendant has put on evidence that tends to show that the billings are indeed unreasonable and unnecessary.

E. CHARLES MAKI

MAY 17 2002

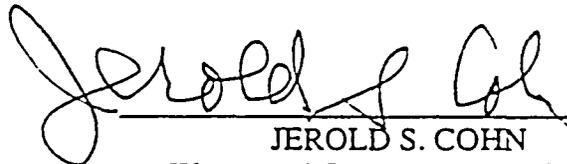
4. Lien claimants have failed to prove that their claims are reasonable and necessary. In fact, lien claimants have failed in their burden of proof.

5. There has been insufficient proof of injury arising out of and in the course of employment.

ORDER

IT IS ORDERED THAT the lien of PX Drug and Modern Pharmacy are disallowed.

Dated: 5-15-02
Filed and Served by mail
On all interested parties/liens
on the Official Address Record.
By: Elma Havan
Elma Havan



JEROLD S. COHN
WORKERS' COMPENSATION JUDGE