

1 WORKERS' COMPENSATION APPEALS BOARD

2 STATE OF CALIFORNIA

3  
4 Case No. SRO 94356

5 CELESTE HALL,

6 *Applicant,*

7 vs.

8 TWO ROCK UNION SCHOOLS  
9 DISTRICT;  
10 REDWOOD EMPIRE SCHOOLS  
11 INSURANCE GROUP,

12 *Defendants.*

13  
14 OPINION AND ORDER  
15 GRANTING PETITION FOR  
16 RECONSIDERATION AND  
17 DECISION AFTER RECONSIDERATION

18  
19 Lien claimant, Blue Cross of California (petitioner), seeks reconsideration of the  
20 Findings and Order issued March 30, 2000, in which a workers' compensation  
21 administrative law judge (WCJ) found that, pursuant to the defendant's and applicant's  
22 stipulation, defendant Two Rock Union Schools District is entitled to a third-party credit  
23 in the amount of \$32,329.44. The WCJ further found, in pertinent part, that the lien of Blue  
24 Cross of California is subject to the Official Medical Fee Schedule, and that the lien claim  
25 of Blue Cross of California is subject to the defendant's credit for applicant's third party  
26 recovery which far exceeds the amount of the lien.

27  
28 Petitioner contends (1) that the WCJ erred in finding that its lien claim is subject to  
29 the Official Medical Fee Schedule, (2) that charges of non-industrial treatment should be  
30 disallowed individually rather than serving as a basis for disallowing the entire lien  
31 claim, (3) that Labor Code section 3861 does not apply to defeat a Group Health Plan's  
32 claim for reimbursement for medical treatment of an industrial injury, (4) that the  
33 purpose behind the employer's credit is to prevent a double recovery to the applicant,

1 and not to alleviate a defendant's burden to satisfy lien claims, (5) that defendant's  
2 "remedy is the first lien allowed in applicant's civil suit, not a petition for employer's  
3 credit," and (6) that the finding that defendant is entitled to credit in the sum of  
4 \$32,329.44 is not supported by substantial evidence.

5 After reviewing the record, and for the reasons set forth below, the Board will  
6 grant reconsideration for the limited purpose of amending the March 30, 2000 Findings  
7 and Order to reflect that petitioner's lien claim is not subject to the Official Medical Fee  
8 Schedule. In all other respects, the WCJ's decision is affirmed.

9 Defendant contends that the WCJ erred in finding that its lien claim is subject to  
10 the Official Medical Fee Schedule. Whether the lien is subject to the Official Medical Fee  
11 Schedule or not appears to be moot in view of the size of defendant's credit. However,  
12 the Board believes that the WCJ erred in finding that petitioner's lien claim is subject to  
13 the Official Medical Fee Schedule. The Board is persuaded that the Official Medical Fee  
14 Schedule does not apply in cases where the employer/carrier disputes a claim of  
15 industrial injury and refuses to pay the medical treatment charges on that basis. If the  
16 injury is later found to be industrial, the physician is entitled to payment of his or her  
17 reasonable, usual and customary charges. (CNA Insurance Companies v. Workers'  
18 Comp. Appeals Bd. (Valdez) (1997) 62 Cal.Comp.Cases 1145 (writ denied); Federal  
19 Mongul Corp. v. Workers' Comp. Appeals Bd. (Whitworth) (1973) 38 Cal.Comp.Cases  
20 584 (writ denied).)

21 In that regard, Valdez states at p. 1147:

22 "[T]he WCJ ... concluded that when an employer or carrier  
23 disputes a claim of industrial injury and refuses for that  
24 reason to pay the charges of the treating physician, the  
25 OMFS is not applicable if the injury is later found to be  
26 compensable and the physician is entitled to payment of his  
27 or her reasonable, usual and customary charges. To support  
this conclusion, the WCJ relied on Federal Mogul Corp. v.  
W.C.A.B. (Whitworth) (1973) 38 Cal. Comp. Cases 584 (writ  
denied), in which the WCAB found that a disputed

1 industrial injury was compensable and that, despite the  
2 OMFS, the employer had the burden of showing that the  
3 charges of a treating physician were excessive as compared  
4 to charges for similar services in the area where the  
5 employee was treated. The Court of Appeal denied review  
6 after considering the employer's position that the charges  
7 allowed exceeded those in the OMFS and the employee's  
8 position that the OMFS applies only to controversies  
9 between employers or carriers and the physicians they hire.  
10 The WCJ rejected Defendant's assertion that the Whitworth  
11 decision was nullified by the enactment of Labor Code §  
12 4603.2[Deering's]. It was the WCJ's belief that the statute was  
13 intended to apply only to cases in which a claimed injury  
14 was accepted by the employer and not to disputed claims.

15 "The WCJ explained the policy behind his decision as  
16 follows:

17 " It is the policy of the law to permit the provision of  
18 treatment to injured workers on a lien basis where an  
19 employer refuses to provide the treatment. (See, Labor Code  
20 § 4903[Deering's].) Treatment provided on a lien basis may  
21 avoid such undesirable consequences to society as an injured  
22 worker going without needed medical treatment or  
23 burdening public resources. Yet a medical provider may be  
24 reluctant to provide treatment on a lien basis where he or  
25 she must assume both the risk of (a) not being paid at all if  
26 the injury is adjudicated to be not compensable or, (b) if the  
27 injury is adjudicated compensable, being paid at a rate less  
than his or her usual and customary charges in accordance  
with the Medical Fee Schedule. The law protects an  
employer from liability for treatment when the injury  
necessitating the treatment is not compensable. (See, Labor  
Code § 4600[Deering's].) Where a lien claimant has not  
contracted with, or been hired by, an employer through the  
employer's authorization of the treatment, however, I find  
the rule in Whitworth to be more consistent with the  
beneficent purposes of the workers' compensation laws.  
(Labor Code § 3202[Deering's]) Thus, under Whitworth Dr.  
Lehrich would be entitled to payment of his reasonable,  
usual and customary charges (not exceeding what he  
charges non-industrial patients). "

Therefore, Finding of Fact No. 2 will be amended to reflect that petitioner's lien

1 claim is not subject to the Official Medical Fee Schedule.

2 Regarding petitioner's remaining contentions, the Board has independently  
3 reviewed the record, and carefully considered the applicable facts and law. Based on the  
4 reasons stated by the WCJ in the Report and Recommendation on Petition for  
5 Reconsideration (Report) which the Board adopts and incorporates by this reference,  
6 except the WCJ's discussion on the Official Medical Fee Schedule at page three,  
7 paragraph two, the Board will affirm the WCJ's decision.

8 In arriving at its decision, the Board notes that self-procured medical treatment is  
9 "compensation" and under Labor Code section 3861, defendant is entitled to assert credit  
10 against compensation. Defendant's right to assert credit includes a claim for credit against  
11 liens for self-procured medical treatment. (Trustees' Collection Service v. Workers'  
12 Comp. Appeals Board (Lyon) (1997) 62 Cal.Comp.Cases 997 (writ denied).)

13 Moreover, the Board notes that petitioner had the option to pursue its lien claim in  
14 the civil case by filing its own lien or intervening in the third party case, but apparently  
15 chose not to so.

16 Accordingly, the Board will grant reconsideration for the limited purpose of  
17 amending the March 30, 2000 Findings and Order to reflect that petitioner's lien claim is  
18 not subject to the Official Medical Fee Schedule. In all other respects, the WCJ's decision  
19 is affirmed.

20 Finally, petitioner's request to file a supplemental petition or reply under  
21 California Code of Regulations, title 8, section 10848 is denied.

22 For the foregoing reasons,

23 **IT IS ORDERED** that Lien Claimant's Petition for Reconsideration filed April 10,  
24 2000 be, and it hereby is, **GRANTED**.

25 ....  
26 ....  
27 ....

1 IT IS FURTHER ORDERED as the decision after reconsideration of the Workers'  
2 Compensation Appeals Board that the Findings and Order issued March 30, 2000 be, and  
3 it hereby is, AFFIRMED except that Finding of Fact No. 2 and the Order are AMENDED  
4 as follows:

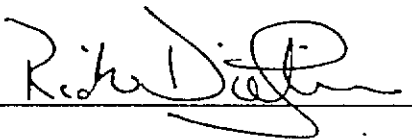
5 "FINDING OF FACT

6 "2. The lien of Blue Cross of California is not subject to  
7 the Official Medical Fee Schedule.

8 "ORDER

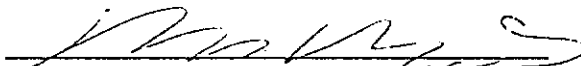
9 "IT IS ORDERED that the lien claim of Blue Cross of  
10 California be reimbursed, subject to application of  
11 defendant's credit in the amount of \$32,329.44."


12 WORKERS' COMPENSATION APPEALS BOARD

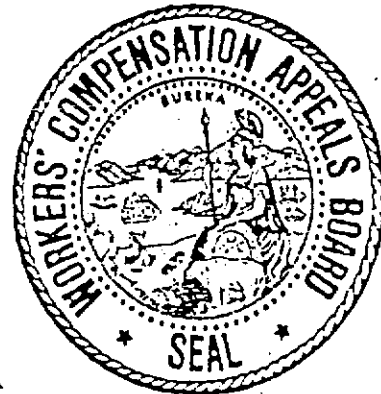
13  DEPUTY

14 RICK DIETRICH

15 I CONCUR,

16   
17 ROBERT N. RUGGLES

18   
19 ROBERT E. BURTON

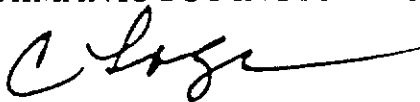


20 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

21 JUN 09 2000

22 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES  
23 LISTED ON THE OFFICIAL ADDRESS RECORD EXCEPT  
24 LIEN CLAIMANTS BUT INCLUDING PETITIONER LIEN CLAIMANT.

25 vpd

26 

27 HALL, Celeste