

2018 Cal. Wrk. Comp. P.D. LEXIS 75

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed February 21, 2018

W.C.A.B. No. ADJ8390531—WCAB Panel: Chair Zalewski, Commissioners Razo, Sweeney

Reporter

2018 Cal. Wrk. Comp. P.D. LEXIS 75 *

Sara Rush, Applicant v. ProCare Mobile Response, Everest National Insurance Company, administered by Sedgwick Claims Management Services, Defendants

Status:

CAUTION: This decision has not been designated 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, 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 However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see *Gee v. Workers' Comp.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, 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: [*1]

Reconsideration is *granted*, the December 5, 2016 Findings and Order is *rescinded*, and the matter is *returned* to the trial level for further proceedings.

Core Terms

declaration, billing, EAMS, documents, medical treatment, electronic, products, injured employee, verification, signature, liens, penalty of perjury, reconsideration, compliance, itemized, appeals board, lien claimant, file a lien, sanctions, invoice, proof of service, Exhibits, Notice, costs, dwc, personal knowledge, reasons

Headnotes

HEADNOTES

Liens-Filing and Service-Lien Declarations-WCAB, reversing WCJ, held that lien claimant Keystone Medical Group complied with lien and declaration requirements in Labor Code § 4903.8, when (1) absence of handwritten signature on lien and declaration did not make them invalid as determined by WCJ, where both were electronically filed and contained electronic "S" signatures pursuant to DWC's Reference and Instructional Manual for Electronic Filing (Manual), that although Manual does not specifically instruct lien claimants to sign declarations with "S" signature, such inference is reasonable because declarations must be concurrently filed with lien and lien can only be filed electronically, and that, under circumstances, lien claimant's lien and declaration under Labor Code § 4903.8(d) were properly signed, and (2) defendant did not establish that declarant Jennifer Zambrana lacked competency to make declaration on lien claimant's behalf, where Ms. Zambrana was billing clerk for lien claimant's billing agent, Associated Lien [*2] Services, and asserted under penalty of perjury that billing statements served with lien truly and accurately reflected services lien claimant provided to applicant and that those services were actually provided, and WCAB concluded that lien declaration signed by Ms. Zambrana under penalty of perjury complied with format required by Labor Code § 4903.8(d), thereby making prima facie showing of truth of matters asserted in declaration pursuant to Code of Civil Procedure § 2015.5, whereupon burden shifted to defendant to prove that Ms. Zambrana lacked competency to sign declaration, and defendant here did not meet burden, especially given that defendant did not dispute that lien claimant provided medical treatment to applicant as set forth by Ms. Zambrana in declaration or that it received bills with regard to that medical treatment. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 30.20[1], 30.25[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 17, § 17.10[4].]

Counsel

For lien claimant—Associated Lien Services

For defendants—Healthcare Resource Group

Opinion By: Chair Katherine Zalewski

Opinion

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration with [*3] regard to the decision filed in this case on December 5, 2016, which we deemed necessary to allow a sufficient opportunity to further study the factual and legal issues in this case and to enable us to issue a just and reasoned decision. This is our decision after reconsideration.

Associated Lien Services (Associated), representative on behalf of lien claimant, Keystone Medical Group (Keystone) sought reconsideration of the Findings and Order (F&O) issued herein by a workers' compensation administrative law judge (WCJ) on December 5, 2016. That decision found that Keystone failed to comply with

Labor Code ¹ section 4903.8(d) because it did not concurrently file a supporting declaration by a natural person competent to testify that the services or products described in its billing statement were actually provided to the injured employee, and that the billing statement filed accurately describes the services or products that were provided to the injured employee. The F&O also found that Keystone violated section 5813 and is liable for costs and sanctions. Keystone's lien was disallowed in its entirety, and Keystone was ordered to pay defendant costs and sanctions under section 5813 in [*4] an amount to be determined.

Keystone contends that the WCJ erred by finding that its lien claim for medical treatment provided to injured employee, Sara Rush (applicant), fails to comply with the declaration requirement set forth in section 4903.8(d). Keystone alleges that it provided medical treatment to applicant in conjunction with this injury claim; that there is an unpaid balance for its services; that Associated serves as its billing and collections company; that Associated filed the Notice of Request for Allowance of Lien (lien) on its behalf in accordance with applicable rules and required electronic filing provisions; that when Associated filed the lien, it also filed the required section 4903.8 declaration, the 10770.5 verification, and proof of service on defendant of all the aforementioned documents, including the itemized billing statement. Keystone further contends that each of the documents it filed was signed by Jennifer Zambrana in her capacity as billing clerk, and that Ms. Zambrana is a natural person and is competent as the billing clerk to execute each of the documents. In addition, [*5] Keystone points out that Associated is an "e-filer" and that it filed the lien in this case and other required documents in accordance with required rules and procedures. For these reasons, Keystone claims that the WCJ erred in disallowing its lien and in finding it liable for costs and sanctions.

The WCJ has prepared a Report and Recommendation on Petition for Reconsideration (Report) that recommends denial of the petition. Defendant has filed an answer that incorporates and endorses the WCJ's Report.

We have carefully reviewed the record in this case and have considered the allegations of the Petition, the WCJ's Report, and defendant's answer. Based upon our review of the record and for the reasons set forth in the following discussion, we find the petition has merit and will grant it. As our decision after reconsideration, we will rescind the F&O and return this matter to the trial level for further proceedings and decision consistent with this opinion.

RELEVANT FACTS

Applicant, while employed by defendant as an emergency medical technician on February 20, 2012, sustained an admitted industrial injury to her back. (Minutes of Hearing [MOH], October 3, 2016, p. 2: 3–6.) The case in chief [*6] was resolved by an Order Approving Compromise and Release issued by a WCJ on November 23, 2015. (*Id.*, p. 2: 1–2.)

Keystone provided medical treatment to applicant with regard to this injury claim, beginning in June, 2012 and continuing through November 28, 2012. (Exhibits 10–14.)

It appears that Associated first attempted to file a lien on Keystone's behalf through the JET Trial method on January 31, 2013. (EAMS Document ID 9562764.) Included with the lien filing is a proof of service (EAMS Document ID 9562765), a lien verification (EAMS Document ID 9562767), and a document listed as a "compliance" document (EAMS Document ID 9562766.). The "Compliance" document is of interest. It is a memorandum from the Associate Chief Judge of the Division of Workers' Compensation (DWC), dated July 24, 2012, and the subject is "Lien Documentation Place Holder for Lien Filers in the JET Trial." The memo states that because lien regulations prohibit lien claimants from filing documentation with their liens at WCAB's district offices ², and because the electronic JET filing trial is not yet able to allow for the electronic filing of lien documentation, JET filers must attach a copy of the memo to their [*7] lien as a place holder for such documentation to be filed at a later date.

¹ All statutory references hereinafter are to the Labor Code unless otherwise indicated.

² Cal. Code Regs., tit. 8. § 10770 (b)(1).

On November 19, 2015, Associated electronically filed a second Notice and Request for Allowance of Lien (lien) with regard to the treatment Keystone provided to applicant in this case. (EAMS, Document ID 16596022.) The lien contains the typed name, Jennifer Zambrana. (*Id.*) At the same time, Associated filed a declaration pursuant to section 4903.8(d), a verification pursuant to Appeals Board rule 10770.5, and proof of service demonstrating that the lien, the declaration, the verification, and the itemized billing were simultaneously served upon defendant. (EAMS Document ID 16596925, 16596024, and 16596023.) Each of these documents contains the typed name, Jennifer Zambrana.

On April 14, 2016, defendant filed a declaration of readiness to proceed requesting a lien conference with regard to outstanding liens, including Keystone's lien. (EAMS Document ID 18058258.) A lien conference was held on August 18, 2016, but there was no resolution of Keystone's lien and a trial was scheduled on notice. (EAMS Document ID 61159167.)

The Trial commenced on October 3, 2016. The disputed [*8] issues are identified as (1) Keystone's treatment lien in the amount of \$ 12,126.82, (2) Keystone's compliance with section 4903.8(d) and (e), (3) and costs and sanctions for frivolous litigation. (MOH, October 3, 2016, p. 2: 11–22.) Both parties offered multiple exhibits. The WCJ cautioned Keystone "that it was highly questionable whether they were going to be able to sustain their burden of proof on the issues raised," and asked Keystone for an explanation. The explanation, which we deem an offer of proof, states:

Keystone Medical has filed their 4903 (sic) declaration when we filed our lien, attached with the itemized billing. Associated Lien is a direct billing company for Keystone Medical, with a contract, and if we need to have Jennifer Zambrano (sic) come down and testify to her knowledge knowing that we properly filed a 4903.8 declaration, we can ask her to come down. But our position is that with the 4903 declaration, we met all or (sic) burdens and that Jennifer Zambrano (sic) had personal knowledge of the itemized billing being that she is the supervisor of the billing department for Associated Lien." (*Id.*, p. 4: 13–22.)

No witnesses were presented and the case was submitted [*9] for decision.

On October 10, 2016, the WCJ issued an Order vacating submission and setting the matter for further hearing. (EAMS Document ID61677836.) Further proceedings were held on November 28, 2016. At the hearing there was discussion as to whether Keystone's Exhibit 5 demonstrates compliance with section 4903.8. We take notice that Exhibit 5 is five-pages in length and includes an advisement by Keystone that Associated represents Keystone in all of its billing and collections functions, and is its authorized representative. Exhibit 5 also includes a declaration under penalty of perjury pursuant to section 4903.8(d) and signed by Gary Weessies, D.C., of Keystone Medical Group, that the services or products described in the attached bills were actually provided to the injured employee, and that the bills truly and accurately described the services or products that were provided to her. The declaration is dated October 23, 2013. The case was then submitted for decision. (MOH, November 28, 2016, p. 2: 12–20.)

On December 5, 2016, the WCJ issued the F&O, finding that Keystone did not comply with section 4903.8(d), and, in addition, that Keystone violated section 5813 and is liable for [*10] costs and sanctions. Keystone's lien was disallowed with prejudice in its entirety.

DISCUSSION

The lien at issue in this case is a medical treatment lien for functional restoration and therapy prescribed by applicant's treating physician as reasonable and necessary to cure or relieve the effects of her accepted industrial back injury. (See, Lab. Code, §§ 4600 and 4903(b) ³.) Keystone contends that defendant failed to pay the full

³ Section 4600 requires the employer to provide its industrially injured employee with all medical treatment, including prescriptive medications reasonably required to cure or relieve the effects of an industrially injury. Section 4903(b) authorizes the Appeals Board to allow as a lien the reasonable expense incurred by or on behalf of the injured employee to reasonable and necessary medical treatment.

amount of its billing, and asserts its entitlement to receive payment of the unpaid balance. There is no indication in the MOH or the case record that defendant is disputing that Keystone provided medical treatment to applicant.

Medical treatment liens in workers' compensation cases have been the subject of both decisional law and legislative action. In 2002 the [*11] Appeals Board issued a decision in which it held that where a lien claimant is litigating the issue of entitlement to payment for industrially-related medical treatment, the lien claimant stands in the shoes of the injured employee and must prove by a preponderance of the evidence all of the elements necessary to the establishment of its lien. (*Kunz v. Patterson Floor Company, Inc. (Kunz)* (2002) 67 Cal.Comp.Cases 1588 (Appeals Bd. en banc); see also, *Tapia v. Skill Master Staffing* (2008) 73 Cal.Comp.Cases 1338 (Appeals Bd. en banc).) As to the issue of its compliance with the requirements of section 4903.8(d), Keystone has the burden of proof. (*Kunz, Tapia, supra.*)

Controversy over the proliferation of medical treatment liens has resulted in significant legislative reform over the past several years. Senate Bill 863 (Stats. of 2012, ch. 363) and Senate Bill 1160 (Stats. of 2016, ch. 868) are two examples of such reform measures. Senate Bill 863, which became effective January 1, 2013, added two statutes that are relevant to this case. Section 4903.05(a) requires all lien claims to be filed on an approved form, accompanied by a full statement or itemized voucher supporting the lien, [*12] along with proof of service on the parties. The statute does not state that the full statement/itemized voucher must be separately signed under penalty of perjury. Subdivision (b) pertains only to medical treatment and cost liens and requires such liens to be filed electronically on an approved form. Section 4903.8(d) requires each medical treatment lien to be supported by one or more declarations. It states:

(d) At the time of filing of a lien on or after January 1, 2013, or in the case of a lien filed before January 1, 2013, at the earliest of the filing of a declaration of readiness, a lien hearing, or January 1, 2014, supporting documentation shall be filed including one or more declarations under penalty of perjury by a natural person or persons competent to testify to the facts stated, declaring both of the following:

- (1) The services or products described in the bill for services or products were actually provided to the injured employee.
- (2) The billing statement attached to the lien truly and accurately describes the services or products that were provided to the injured employee.

(e) A lien submitted for filing on or after January 1, 2013, for expenses provided in subdivision (b) of Section 4903, [*13] that does not comply with the requirements of this section shall be deemed to be invalid, whether or not accepted for filing by the appeal board, and shall not operate to preserve or extend any time limit for filing of the lien. (Senate Bill 863, Stats. 2012, ch. 363, § 70.)

The adoption of these two statutes caused the Appeals Board to amend its rules pertaining to liens⁴. Rule 10770 was amended effective October 23, 2013, to require all medical treatment liens to be filed electronically on an appropriate form in the format required by JET Filing procedures as established by the Administrative Director (AD) or by standards, policies or procedures adopted by the AD. (Cal. Code Regs., tit. 8, § 10770(b)(1)(C)(i)(ii); Register 2013, 39.) Subdivision (c)(4) of the rule specifically requires the concurrent filing of a proof of service, a verification pursuant to rule 10770.5, assignment documents pursuant to section 4903.8 (a) and (b), and the declaration pursuant to section 4903.8(d). (Cal. Code Regs., tit.8, § 10770(c)(1),(2),(3),(4).)

In this case, Associated initially [*14] attempted to file a lien on Keystone's behalf through the JET Trial process on January 31, 2013. At that time, however, the JET Trial was not yet able to accommodate electronic filing of lien documentation. (Compliance Document, EAMS Document ID 9562766.) Associated subsequently filed the lien again on November 19, 2015. By that time, the glitches in the JET Trial process had been remedied to allow the filing of documentation in support of a lien. We take notice that medical treatment lien claimants can now file a lien electronically, by one of two methods: E-Form or Jet File. (<https://www.dir.ca.gov/dwc/liens.htm>.) The procedures for these two methods are set forth in the EAMS E-Form Filing Reference Guide (https://www.dir.ca.gov/dwc/eams/EAMS_ElectronicFilingEFormFilersGuide.pdf) and in the EAMS JET file Business

⁴ The rules of the Appeals Board are set forth in the California Code of Regulations, Title 8, beginning with rule 10300.

Rules and Technical Specifications.
 (https://www.dir.ca.gov/dwc/EAMS/JetFiling/EAMS_JetFileTechnicalSpecs.html)

Here it does appear that Associated first attempted to file the lien as a JET Trial filer on January 31, 2013. It simultaneously filed the "Compliance" document (EAMS Document ID 9562766), apparently as a place holder for other documents, such as an itemized billing [*15] statement and the 4903.8(d) declaration, that could not yet be electronically filed through the JET file trial, and were not permitted to be filed at a district office. By the time the lien was subsequently filed on November 19, 2015, Associated was able to concurrently file through electronic means the 4903.8 declaration, the lien verification, and proof of service demonstrating service of the lien, the declaration, the verification, and an itemized invoice⁵ upon defendant, in compliance with rule 10770. (See EAMS Document ID numbers 16596025, 16596024, and 16596023.) The declaration pursuant to section 4903.8(d) states:

I declare under penalty of perjury under the laws of the State of California that:

- (1) The services or products described in the bill for services or products were actually provided to the injured employee.
- (2) The billing statement attached to the lien truly and accurately describes the services or products that were provided to the injured employee.

It includes the typed name, Jennifer Zambrana, which is preceded by the letter "S" and is dated November 18, 2015. (EAMS Document ID 16596025.)

The WCJ's Opinion on Decision concludes that Keystone failed to meet its burden of proof that it complied with section 4903.8 based on several deficiencies in its presentation. First, that neither the lien nor the 4903.8 declaration contains an actual signature. Second, Keystone's failure to demonstrate the competence of Jennifer Zambrana to sign the 4903.8 declaration. Third, the billing statements are not signed and do not correspond to the date the lien was filed. That is, the billing statements are not dated November 18, 2015. (Opinion on Decision, p. 4.)

It is true that the lien and 4903.8 declaration filed on November 19, 2015 do not contain actual handwritten signatures. Both documents [*17] contain what is known as an electronic, "S" signature. This is because the lien and declaration were electronically filed, as required by section 4903.05 and rule 10770(b)(1)(A), DWC's Reference and Instructional Manual for Electronic Filing (Manual) requires the party making the electronic filing to use an "S" signature on the electronic form and provides a sample of the required format that must be used, i.e.: "S John Jones." (http://www.dir.ca.gov/dwc/eams/EAMS_ElectronicFilingEFormFilersGuide.pdf, p. 41.) The Manual specifies certain documents that must be electronically filed with the "S" signature, and both liens and the lien verification are included. (*Id.*, pp. 41–42.) It does not state that itemized billing statements/invoices must be signed. The Manual further provides, "[t]he S signature shall be rebuttably presumed to be that of the individual whose name is on the document signature line." (*Id.*) The Manual instructs lien claimants as to the documents that must be included in the lien "filing package." Those documents are the Notice and Request for Allowance of Lien, the 10770.5 verification, a proof of service, the 4903.8(d) declaration or the 4903.8(a)(b) assignment. Additionally, [*18] the Manual states: "DO **NOT** FILE MEDICAL REPORTS, DEMAND LETTERS, Explanation of Benefits (EOB'S), ETC. OF ANY KIND WITH YOUR LIEN. **ONLY** file your itemized statement of charges in support of your lien. These additional documents can be filed later as trial exhibits." (Emphasis in original) (*Id.*, pp. 58–59.) The Manual also instructs the lien claimant on proper placement of the "S" signature. (*Id.*, p. 59.) Although the Manual does not specifically instruct the lien claimant to sign the 4903.8 declaration with an "S" signature, such inference is reasonable because the declaration must be concurrently filed with the lien, and the lien can only be filed electronically.⁶ Moreover, the plain and unambiguous language in section 4903.8(d) does not indicate otherwise.

⁵The invoice is 22 pages in length and lists the treatment provided by date, [*16] type, and charge, beginning June 12, 2012 and continuing through November 28, 2012. The first invoice, which is addressed to defendant, issued on September 9, 2012. Additional invoices also mailed to defendant are dated September 6, 2012; September 26, 2012; October 3, 2012; October 23, 2012; November 8, 2012; November 13, 2012; December 20, 2012, February 28, 2013; October 16, 2015; and August 11, 2016. (Exhibit 2.) We note that defendant does not contend that it was not served with the invoice.

⁶Lab. Code, § 4903.05; Cal. Code Regs., tit. 8, § 10770(b)(1)(A).

Therefore, we conclude that both Keystone's lien and declaration pursuant to section 4903.8(d) are signed by Jennifer Zambrana.

In his Report, the WCJ questions whether Jennifer Zambrana is a competent declarant. We agree that section 4903.8(d) requires the declarant to be competent to testify to the matters asserted in the declaration. Although section 4903.8 does [*19] not define exactly what is meant by the phrase, "competent to testify," we find guidance in Evidence Code section 702, which provides, in relevant part:

Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

Therefore, the person making the 4903.8(d) declaration must have personal knowledge of the matters set forth in the declaration. For our purposes, the declarant must have personal knowledge that the billing statement accurately describes the services/products provided to applicant, and that those services/products were actually provided. We cannot, however, make the assumption, as the WCJ did, that because Jennifer Zambrana is a billing clerk for the company Keystone uses for billing its medical treatment services, she is incompetent to make the declaration required by section 4903.9(d). The Offer of Proof requested by the WCJ suggests otherwise. (See MOH, October 3, 2016, p. 4:13–22.) The declaration made by Jennifer Zambrana is under penalty of perjury and asserts [*20] that the billing statement(s) served with the lien truly and accurately reflect the services that Keystone provided to applicant and that those services were actually provided. On its face, the declaration complies with the required language in subdivision (d) of section 4903.8.

We turn to Code of Civil Procedure section 2015.5 for guidance on the weight to be given to Jennifer Zambrana's declaration. That section states:

Whenever, under any law of this state or under any rule, regulation, order or requirement made pursuant to the law of this state, any matter is required or permitted to be supported, evidenced, established, or provided by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same ... such matter may with like force and effect be supported, evidenced, established or provided by the unsworn statement, declaration, verification, or certificate, in writing of such person which recites that it is certified or declared by him or her to be true under penalty of perjury, is subscribed by him or her, and (1), if executed within this state, states the date and place of execution, or (2) , if executed at any place, within [*21] or without this state, states the date of execution and that is so certified or declared under the laws of the State of California. . . .

The rationale for permitting a declaration under penalty of perjury in lieu of testimony under oath is to help ensure that declarations contain a truthful factual representation and are made in good faith. The fact that criminal sanctions of perjury might apply where material facts declared to be true are, in fact, not true or are not known to be true provides such insurance. (*In re Marriage of Reese & Guy* (1999) 73 Cal.App.4th 1214; *Ancora-Citronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 150.) A declaration under penalty of perjury signed and executed in California, even if incompetent, is sufficient to establish fact and support an order or judgment where the declaration is received without a proper objection or motion to strike. (*Nalley's, Inc. v. Corona Processed Foods, Inc.* (1966) 240 Cal.App.2d 948.) Further, although a declaration under penalty of perjury contains hearsay and mere conclusions, it is competent evidence if received without objection. (*Waller v. Waller* (1970) 3 Cal.App.3d 456.)

The offer of proof accepted by the WCJ in this [*22] case establishes that Jennifer Zambrana is Associated's billing clerk and that Associated is the billing agent for Keystone. Defendant does not dispute that Keystone provided medical treatment to applicant or that it received bills (invoices) with regard to the medical treatment provided. (See Exhibits 2 and 3.) Exhibits 10, 11, 12, and 13 are medical reports that corroborate the medical treatment applicant received from Keystone, beginning June, 2012. Exhibit 14 shows various dates of treatment provided to applicant, and appears to contain the actual signature of applicant on each corresponding date. Exhibits 10 through 14 provide corroboration that applicant actually received treatment from Keystone, as set forth in the declaration signed by Jennifer Zambrana. All of these factors taken together demonstrate Jennifer Zambrana's competence as the declarant in this case. Accordingly, the declaration signed by Jennifer Zambrana makes a prima

facie showing of the truth of the matters asserted therein pursuant to Code of Procedure section 2015.5. The burden of proof thus shifts to defendant to demonstrate Jennifer Zambrana's lack of competence. It failed to do so in this case.

The WCJ [*23] found that Keystone violated section 5813 and Appeals Board rule 10561 by failing to produce the evidence necessary to prove its compliance with section 4903.8(d). (Report, p. 5.) For the reasons discussed above, we disagree with that conclusion. Although section 5813 empowers a WCJ to order a party to pay reasonable expenses and costs, including attorney fees, and to impose sanctions on a party for bad faith actions or tactics that are frivolous or solely intended to cause delay, on the record before us we cannot say that Keystone has asserted a claim that is indisputably without merit. For this reason and for all of the reasons discussed above, as our decision after reconsideration, we will rescind the F&O and return this matter to the trial level for further proceedings and decision thereon from which any aggrieved party can timely petition for reconsideration.

For the foregoing reasons,

IT IS HEREBY ORDERED that as our Decision After Reconsideration, the December 5, 2016 Findings and Order is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings and decision thereon.

WORKERS' COMPENSATION APPEALS BOARD

Chair Katherine Zalewski

I concur,

Commissioner Jose H. [*24] Razo

Commissioner Marguerite Sweeney

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