

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

DARIA HARPER, an individual; and DANIEL  
WININGER, an individual,

Appellants,

vs.

COPPERPOINT MUTUAL INSURANCE  
HOLDING COMPANY, an Arizona corporation;  
COPPERPOINT GENERAL INSURANCE  
COMPANY, an Arizona corporation; LAW  
OFFICES OF MARSHALL SILBERBERG, P.C., a  
California Corporation; KENNETH MARSHALL  
SILBERBERG aka MARSHALL SILBERBERG  
aka K. MARSHALL SILBERBERG, an individual,

Respondents.

Electronically Filed  
Aug 04 2021 07:35 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
Case No.: 82158

**RESPONDENTS' SUPPLEMENTAL APPENDIX**

Comes now, Respondents, CopperPoint Mutual Insurance Holding Company  
and CopperPoint General Insurance Company, by and through their attorneys, the  
law firm of Hooks, Meng & Clement, and submits their Supplemental Appendix.

Dated this 4th day of August 2021.

Respectfully Submitted,

/s/ Sami Randolph

Dalton L. Hooks, Jr., Esq.

Nevada Bar. No. 8121

Sami Randolph, Esq.

Nevada Bar No. 7876

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*Attorneys for Respondents*

CopperPoint Mutual Insurance Holding Company  
and CopperPoint General Insurance Company

**I.**  
**LIST OF EXHIBITS TO BE RELIED UPON**

Arizona Industrial Commission Order dated December 27, 2020,....000001–000006

## **CERTIFICATE OF SERVICE**

Pursuant to NRAP 25, I certify that I am employee of the law firm of HOOKS MENG & CLEMENT, and on this 4<sup>th</sup> day of August, 2021, I am serving the foregoing **RESPONDENTS COPPERPOINT MUTUAL INSURANCE HOLDING COMPANY AND COPPEPOINT GENERAL INSURANCE COMPANY'S SUPPLEMENTAL APPENDIX** and that on this date I deposited for mailing at Las Vegas, Nevada, a true copy of the attached document addressed to:

JASON R. MAIER, ESQ.  
MAIER GUTIERREZ & ASSOCIATES  
8816 SPANISH RIDGE AVENUE  
LAS VEGAS, NV 89148

**and**

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**and**

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LAS VEGAS, NV 89144  
Attorneys for Defendants Shoop A Professional law Corporation and  
Thomas S. Alch

Dated this 4th day of August 2021.

/s/ Esmeralda Weinstein  
An Employee of HOOKS MENG & CLEMENT

# BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

DARIA HARPER	Applicant(s),
vs.	
ISLANDER RV RESORT	Defendant Employer (s),
COPPERPOINT GENERAL INSURANCE CO	Defendant Insurance Carrier(s),

ICA Claim No. 20142520533

Ins. Claim No. 14G01532

Date of Injury: 8/11/2014

ALJ Case No. ALJ0004659

## DECISION UPON HEARING AND FINDINGS AND AWARD FOR STATUTORY LIEN PURSUANT TO A.R.S. 23-1023

Applicant sustained a compensable industrial injury on August 11, 2014. She received benefits. Applicant subsequently filed and settled a medical malpractice claim against third parties and Defendant Carrier ("CopperPoint") has asserted a statutory lien against Applicant's medical malpractice claim recovery.

Applicant is represented by Alan M. Schiffman. Defendants are represented by Kirk A. Barberich. Formal hearing was held by teleconference in Phoenix, Arizona on August 21, 2020.

The undersigned, having fully considered the evidence presented, the file, and all matters related thereto, hereby enters Findings and Award as follows.

### FINDINGS

1. The parties stipulated that the only issues to be decided herein are whether CopperPoint has a valid A.R.S. §23-1023 lien related to Applicant's medical malpractice claim, and if so, whether any such lien is enforceable with respect to a medical malpractice claim settled in Nevada.

2. Applicant sustained a knee injury on or about August 11, 2014, for which she received treatment including surgeries in November 2014 and May 2015. In early June 2015, Applicant developed symptoms requiring hospitalization at Havasu Regional Medical Center. On June 9, 2015, Applicant was airlifted to Valley Hospital in Las Vegas, Nevada, the closest regional trauma center. While at Valley Hospital in Las Vegas, Applicant suffered complications resulting in quadriplegia.

3. On August 19, 2015, CopperPoint issued a Notice of Claim Status asserting a lien pursuant to A.R.S. §23-1023. Applicant testified that she received the Notice of Claim Status a few months later and discussed it with an attorney she had retained to pursue a third-party claim for medical malpractice, but she did not file a request for hearing or otherwise protest the Notice. On October 30, 2019, CopperPoint issued a Notice of Claim Status reasserting their lien under A.R.S. §23-1023. Applicant filed a Request for Hearing on January 23, 2020.

4. On or about June 7, 2016, Applicant filed a medical malpractice action in Nevada against numerous

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5. On August 2, 2016, the parties entered into a Compromise and Settlement Agreement (“CSA”) in which CopperPoint agreed to provide Applicant the sum of \$300,000.00 to resolve housing and housing modification disputes. Page 2, paragraph 3 of the CSA states, “On August 19, 2015, the Defendant Carrier issued a Notice of Claim Status indicating that by virtue of A.R.S. §23-1023, the Defendants had a lien against the Applicant’s recovery from the third party responsible for her injuries.” Page 3, paragraph 3 of the CSA states, “The Applicant further agrees that the \$300,000.00 settlement amount to be paid by the Defendant Carrier under this Agreement shall be included in Defendant Carrier’s subrogation lien described in paragraph three of the Factual and Procedural Background Section hereinabove.” The CSA was approved by Findings and Award issued on August 11, 2016.

6. On or about May 2, 2018, a mediation was held with respect Applicant’s medical malpractice claim in Nevada and a settlement was reached. The total settlement amount was \$6,250,000.00, less attorney’s fees and costs of \$1,255,807.

7. As part of the settlement of her medical malpractice claim, on June 7, 2018, Applicant signed a Full General Release and Indemnity Agreement. Page 5, paragraph 7 of that agreement states:

“The Releasors expressly represent and warrant that out of the proceeds paid herein the Releasors shall immediately pay any and all unpaid liens that are permitted by law including healthcare provider, insurance, **workers compensation lien**, medical liens, Medi-Care, Medi-Caid or other government agency liens, Federal IRS, State, Municipal and/or tax liens, attorney's liens or any other private governmental lien or encumbrance that: 1) they have given, placed or allowed to be placed on the monies paid hereunder; or 2) that has been placed upon the monies paid hereunder by law, statute, rules or regulations, **possibly including CopperPoint General Insurance Company, policy #-14G01532, Group #-550331283, Auth #-16043010/27446...**” [Emphasis added.]

8. As part of the settlement of her medical malpractice claim, on June 1, 2018, Applicant signed a Settlement Agreement and Release. Page 5, paragraph 4 of that release states:

“Liens and Medicare’s Interest. The Releasors expressly represent and warrant that out of the proceeds paid herein the Releasors shall immediately pay any and all unpaid liens that are permitted by law including healthcare provider, insurance, **workers compensation lien**, medical liens, Medi-Care, Medi-Caid or other government agency liens, Federal IRS, State, Municipal and/or tax liens, attorney's liens or any other private governmental lien or encumbrance that: 1) they have given, placed or allowed to be placed on the monies paid hereunder; or 2) that has been placed upon the monies paid hereunder by law, statute, rules or regulations, **possibly including but not limited to CopperPoint General**”

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**Insurance Company, policy #-14G01532, Group #-550331283, Auth #-16043010/27446....”**

[Emphasis added.]

9. A.R.S. §23-1023 states, in part:

A. If an employee who is entitled to compensation under this chapter is injured or killed or further aggravates a previously accepted industrial injury by the negligence or wrong of another person not in the same employ, the injured employee, or in event of death the injured employee's dependents, may pursue the injured person's remedy against the other person.

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D. If the employee proceeds against the other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from the other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorney fees, actually expended in securing the recovery. In any action arising out of an aggravation of a previously accepted industrial injury, the lien shall only apply to amounts expended for compensation and treatment of the aggravation. The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by this chapter for the case. Compromise of any claim by the employee or the employee's dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the insurance carrier or self-insured employer liable to pay the claim.

10. Defendants have raised the defense of res judicata regarding the existence of their entitlement to a lien under A.R.S. §23-1023. A notice of claim status becomes final and binding at the expiration of a ninety-day protest period. A.R.S. § 23-947(A)–(B). Once a notice of claim status becomes final, it is treated the same as any other final Industrial Commission Award. *County of Maricopa v. Indus. Comm’n*, 134 Ariz. 159, 162, 654 P.2d 307, 310 (App.1982). However, a carrier may “void the binding effect” of a notice of claim status by unilaterally issuing a new notice. See *Church of Jesus Christ of Latter Day Saints v. Indus. Comm’n*, 150 Ariz. 495, 498, 724 P.2d 581, 584 (App.1986).

11. It is clear that the parties acknowledged the existence of a statutory lien prior to the settlement of the Applicant’s medical malpractice claim. The parties explicitly refer to ConnerPoint’s lien in the August 2016 C.S.A.

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While the Applicant's failure to protest the August 19, 2015, Notice of Claim Status arguably would have precluded Applicant from challenging the existence of the lien, CopperPoint effectively reopened the issue when it issued the October 30, 2019, Notice, which Applicant timely protested. However, as Applicant is not challenging the existence of a lien, but is instead challenging its enforceability against the proceeds of a medical malpractice settlement finalized in Nevada, res judicata is not an issue. In her Post-Hearing Memorandum, Applicant states:

“[CopperPoint] had a valid statutory lien against any recovery [Applicant] made against Arizona healthcare providers for medical malpractice. In addition, pursuant to A.R.S. §23-1023, [CopperPoint] could have chosen to institute its own action against Arizona healthcare providers. However, pursuant to Nevada law, which is what should be used in light of choice of law principles, [CopperPoint] does not have any right with respect to [Applicant's] medical malpractice claims against Nevada healthcare providers and could not have pursued its own claims as it had, pursuant to Nevada law, no subrogation rights.”

It is thus found and determined that Applicant has conceded that CopperPoint has a valid statutory lien and it is not necessary to reach the issue of whether res judicata would apply.

12. The remaining issue is thus whether CopperPoint's statutory lien under A.R.S. §23-1023 is valid and enforceable against recovery made by Applicant against Nevada healthcare providers.

13. Applicant asserts that choice of law principles require Nevada law be applied regarding enforcement of a workers' compensation lien against medical malpractice claims and that Nevada law does not permit a workers' compensation lien to be enforced against medical malpractice recovery. CopperPoint contends that Arizona is the workers' compensation forum state and thus Arizona law regarding enforcement of a lien against medical malpractice settlements should apply.

14. The parties do not dispute that at the time of the industrial injury, the Applicant was an Arizona resident working in Arizona for an Arizona employer and that Applicant filed her workers' compensation claim under the laws of the state of Arizona. Arizona is thus the forum state for the Applicant's workers' compensation claim.

15. CopperPoint cited *Quiles v. Heflin Steel Supply Co.*, 145 Ariz. 73, 699 P.2d 1304 (Ariz. Ct. App. 1985), and *Jackson v. Eagle KMC, LLC, et al.*, 431 P.3d 1197 (Ariz. 2019). In both cases, the Arizona courts found that in disputes involving subrogation and the rights of parties in workers' compensation cases, the law of the forum state, that is, the law of the state where workers' compensation benefits were adjudicated and paid, should apply. I therefore find and conclude that CopperPoint's statutory lien is controlled by Arizona workers' compensation laws and that



CopperPoint's lien is valid and enforceable as to Applicant's claim for medical malpractice brought in the State of Nevada and to any recovery thereon.

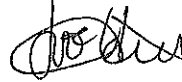
**AWARD**

**IT IS HEREBY ORDERED** that pursuant to A.R.S. §23-1023, CopperPoint has a valid and enforceable lien against Applicant's third-party medical malpractice claim brought in the State of Nevada and any recovery made thereon.

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**NOTICE:** Any party dissatisfied with this Award may file a written request for review of the same with the Administrative Law Judge Division of the Industrial Commission within THIRTY (30) DAYS after the mailing of this Award as provided by Arizona Revised Statutes ("A.R.S.") §§ 23-942(D) and 23-943(A) & (B). Unless such written request is made within the time provided, this Award is final.

The Industrial Commission of Arizona



Kenneth J. Hill  
Administrative Law Judge

Date Signed: Dec 27, 2020

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# THE INDUSTRIAL COMMISSION OF ARIZONA



## NOTICE OF SERVICE

The attached DECISION UPON HEARING AND FINDINGS AND AWARD FOR STATUTORY LIEN PURSUANT TO A.R.S. 23-1023 was placed in, and is now a part of, the Commission file, and a copy thereof was served upon all parties hereinafter named on 12/28/2020 (1) by depositing copies in the United States Mail in postage-prepaid, sealed envelopes addressed to such parties at the addresses shown below; or (2) if parties have waived service by United States Mail and specifically authorized alternative forms of service, by serving copies in the manners specifically authorized (designated below):

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