

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

IDA MONTELONGO, *Applicant*

vs.

**GELSONS MARKET;
EVEREST NATIONAL INSURANCE COMPANY, administered by
AMERICAN CLAIMS MANAGEMENT, *Defendants***

**Adjudication Number: ADJ2193346
Marina Del Rey District Office**

**OPINION AND ORDER
DISMISSING PETITION FOR RECONSIDERATION**

Lien claimant Charles Schwarz, M.D., seeks reconsideration of the Findings of Fact Regarding Liens issued on September 1, 2021 by a workers' compensation administrative law judge (WCJ). The WCJ found that lien claimant was required to file a declaration pursuant to Labor Code¹ section 4903.05, but failed to do so, and thus, that lien claimant's lien is invalid.

Lien claimant contends that he was not required to file a declaration pursuant to section 4903.05 because the lien was filed in 2003 and was thus, never subject to a filing fee under section 4903.05, subdivision (c)(2).

Defendant filed an Answer to Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration (Report). The WCJ recommends that the Appeals Board denies the Petition for Reconsideration.

We have reviewed the record in this case, the allegations of the Petition for Reconsideration and the Answer, as well as the contents of the Report. Based on the reasons set forth below, we dismiss the Petition for Reconsideration.

¹ All further references are to the Labor Code unless otherwise noted.

DISCUSSION

Section 4903.05 states in pertinent part, as follows:

(1) **For liens filed on or after January 1, 2017**, any lien claim for expenses under subdivision (b) of Section 4903 that is subject to a filing fee under this section shall be accompanied at the time of filing by a declaration stating, under penalty of perjury, that the dispute is not subject to an independent bill review and independent medical review under Sections 4603.6 and 4610.5, respectively, that the lien claimant satisfies one of the following:

...

(2) Lien claimants shall have until July 1, 2017, to file a declaration pursuant to paragraph (1) **for any lien claim filed before January 1, 2017**, for expenses pursuant to subdivision (b) of Section 4903 that is subject to a filing fee under this section.²

(3) **The failure to file a signed declaration under this subdivision shall result in the dismissal of the lien with prejudice by operation of law.** Filing of a false declaration shall be grounds for dismissal with prejudice after notice. (Lab. Code, § 4903.05(c)(2)-(3), emphasis added.)

In this case, there appears to be no dispute that lien claimant filed a lien pursuant to section 4903, subdivision (b), on December 23, 2003. (Petition for Reconsideration, p. 2; Answer, p. 2.) Lien claimant produced evidence from the Electronic Adjudication Management System (EAMS) that a fee of \$100 was “paid” (Lien Claimant Exh. 201), and that the fee was paid on November 10, 2015 (Lien Claimant, Exh. 201).³ However, there is no evidence in the record, or produced at trial that lien claimant ever filed a lien declaration pursuant to section 4903.05,

² Paragraph (1) requires “a declaration stating, under penalty of perjury, that the dispute is not subject to an independent bill review and independent medical review under Sections 4603.6 and 4610.5, respectively, that the lien claimant satisfies one of the following: (A) Is the employee’s treating physician providing care through a medical provider network. (B) Is the agreed medical evaluator or qualified medical evaluator. (C) Has provided treatment authorized by the employer or claims administrator under Section 4610. (D) Has made a diligent search and determined that the employer does not have a medical provider network in place. (E) Has documentation that medical treatment has been neglected or unreasonably refused to the employee as provided by Section 4600. (F) Can show that the expense was incurred for an emergency medical condition, as defined by subdivision (b) of Section 1317.1 of the Health and Safety Code. (G) Is a certified interpreter rendering services during a medical-legal examination, a copy service providing medical-legal services, or has an expense allowed as a lien under rules adopted by the administrative director.” (Lab. Code, § 4903.05(c)(1).)

³ We note that lien claimant’s payment on November 10, 2015 was timely. (*Eduardo Alberdin Lead Consol. Case v. State Comp. Ins. Fund*, 2016 Cal.Wrk.Comp. P.D. LEXIS 516, *17-18, citing *Angelotti Chiropractic v. Baker* (9th Cir. 2015) 791 F.3d 1075.)

subdivision (c)(1). As a result, lien claimant's lien was dismissed with prejudice by operation of law as of Monday, July 3, 2017 at 5:01 p.m.⁴

Even so, lien claimant contends that it was not subject to the requirement to file a lien declaration because section 4903.05, subdivision (c)(2), only requires declarations be filed for those liens "subject to a filing fee under this section," and *not* to those liens subject to "activation fees" pursuant to section 4903.06. (Petition for Reconsideration, p. 2.) In essence, lien claimant requests an exemption from the declaration requirement for all liens filed between July 12, 2006 and January 1, 2013.⁵ We cannot grant lien claimant's request.

Sections 4903.05 and 4903.06 were added by Senate Bill (SB) 863 in 2012, and became effective January 1, 2013. Section 4903.05 was amended in 2016 by SB 1160 to add subdivision (c), the declaration requirement. The declaration requirement was described as an "anti-fraud measure." (Sen. Rules Com., Off. of Sen. Floor Analysis, Analysis of Sen. Bill No. 1160 (2015-1016 Reg. Sess.), as amended August 29, 2016, p. 4.) The anti-fraud measures in SB 1160 were described as follows:

14) Requires, for liens filed on or after January 1, 2017, a lien filer to specify in the lien filing the basis upon which the lien is authorized.

15) Requires these same data elements to be added to pre-existing liens, but allows until July 1, 2017, for lien filers to comply.

16) Provides that the failure to comply with the requirements noted above results in a dismissal of the lien with prejudice (*Ibid.*)

The Analysis of SB 1160 commented on the anti-fraud measures contained in the bill as follows:

In a recent letter to the Commission on Health and Safety and Workers' Compensation, the author of SB 1160 identified fraud in the workers' compensation system as a fundamental challenge. Specifically, the letter cited

⁴ Lien claimants had until Monday, July 3, 2017 at 5:00 p.m., to file a lien declaration. (*Henkel Corporation v. Workers' Comp. Appeals Bd. (Hernandez)* (2018) 3 Cal.Comp.Cases 1424, 1426 [2018 Cal.Wrk.Comp. LEXIS 64] (Appeals Bd. en banc) (writ den.); *Rodriguez v. Garden Plating Co.* (2017) 82 Cal.Comp.Cases 1390 [2017 Cal.Wrk.Comp. LEXIS 124] (Appeals Bd. en banc).)

⁵ Former section 4903.05, which was in effect on December 23, 2003 when the lien in this case was filed, required "[a] filing fee of one hundred dollars (\$100) shall be charged for each initial lien filed by providers pursuant to subdivision (b) of Section 4903." (Former Lab. Code, § 4903.05(a), added stats 2003.) Former section 4903.05 was repealed as of July 12, 2006 (Repealed Stats 2006 ch 69 § 25 (AB 1806), effective July 12, 2006). Thus, a filing fee was required under section 4903.05 between January 1, 2003 and July 12, 2006.

the recent press coverage by the Center of Investigative Reporting, which detailed more than \$1 billion in fraudulent activity by a variety of medical providers. The schemes have one common feature: the use of the workers' compensation lien system to monetize the fraud. Despite the criminal charges, medical bills and workers' compensation liens from doctors charged or even convicted of medical fraud continue to be pursued. Please see Senate Labor and Industrial Relations Committee policy analysis for an example of these schemes.

Overall, DWC places the dollar amount of liens held by providers who have been charged or convicted of workers' compensation fraud at \$600 million – or 17% of all liens in the system.

SB 1160 addresses fraud in the workers' compensation lien process in three ways:

...

Second, SB 1160 requires all lien claimants to file a declaration as to which specific category provided under existing law allows the claimant to file a lien. As the statute that provides the specific categories for filing a lien is unchanged by SB 1160, the causes for filing a lien under existing law remain unchanged by SB 1160 – including denied industrial injuries. **The only change is that a lien claimant must now file a declaration to support an assertion of rights.** (*Id.*, at p. 6, italics in the original, bold added.)

The legislative intent for the amendment of section 4903.05 to add the declaration requirement was to impose that requirement on “all lien claimants.” (*Ibid.*) Section 4903.05(c)(1) addresses the declaration requirement for those liens filed after January 1, 2017, and section 4903.05(c)(2) addresses the declaration requirement for those liens filed before January 1, 2017.

Moreover, and contrary to lien claimant's contention, the purpose of the lien filing fee of section 4903.05 and the lien activation fee of section 4903.06 are not qualitatively different. They were both enacted to deter the filing of frivolous liens:

One of the reforms recommended by the Commission Report is the institution of a lien filing fee **in order to deter the filing of liens generally, and particularly to deter the filing of frivolous liens.**

SB 863 imposes a \$150 filing fee for all liens filed on or after January 1, 2013. Cal. Lab. Code § 4903.05(c)(1). Plaintiffs do not challenge the filing fee in this action. More pertinently, SB 863 imposes a \$100 “activation fee” for pending liens filed prior to January 1, 2013... **The purpose of these fees, according to a report of the State Assembly's Committee on Insurance, is to “provide a disincentive to file frivolous liens.”** (*Angelotti Chiropractic v. Baker* (9th Cir. 2015) 791 F.3d 1075, 1079 [80 Cal.Comp.Cases 672], emphasis added.)

Therefore, we will not – and cannot upset the legislative intent of the declaration requirement as requested by lien claimant.

It is a cardinal rule of statutory construction that courts will choose that interpretation which most nearly effectuates the purpose of the Legislature. (Code Civ. Proc., § 1859.) ““Once a particular legislative intent has been ascertained, it must be given effect “even though it may not be consistent with the strict letter of the statute.” [Citation.]” (*Southland Mechanical Constructors, Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 430 [173 Cal.Rptr. 917].) “The courts resist blind obedience to the putative ‘plain meaning’ of a statutory phrase where literal interpretation would defeat the Legislature’s central objective.” (*Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 614 [200 Cal.Rptr. 575], fn. omitted.) (*Graham v. Workers’ Comp. Appeals Bd.* (1989) 210 Cal.App.3d 499, 507.)

Accordingly, lien claimant was subject to the requirement to file a declaration pursuant to section 4903.05(c)(2), and had until 5:00 p.m. on Monday, July 3, 2017 to do so. (See Footnote 4, *supra*.) As a result, lien claimant’s lien was dismissed with prejudice by operation of law as of Monday, July 3, 2017 at 5:01 p.m.

To be timely, a petition for reconsideration must be filed and received by the Appeals Board within 20 days of the service of the final order, plus an additional five days if service of the decision is by any method other than personal service, including by e-mail or mail, upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10507(a)(1).) The petition for reconsideration can be filed at any district office of the WCAB. (Cal. Code Regs., tit. 8, § 10840(a).) If the last day to file a petition for reconsideration falls on a weekend or a holiday on which the Workers’ Compensation Appeals Board is closed, the deadline moves to the next business day. (Cal. Code Regs., tit. 8, § 10508.)

Accordingly, lien claimant’s petition for reconsideration of the dismissal of its lien claim for failure to comply with the declaration requirement of section 4903.05(c)(2), was due Monday, July 24, 2017 (20 days after July 3, 2017 fell on Sunday, July 23, 2017). Lien claimant’s Petition for Reconsideration was filed on September 10, 2021.

The time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers’ Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com.*

(*Hinojoza*) (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].) We must therefore dismiss the Petition for Reconsideration as untimely.

For the foregoing reasons,

IT IS ORDERED that lien claimant's Petition for Reconsideration of the Findings of Fact Regarding Liens issued on September 1, 2021 by a workers' compensation administrative law judge is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 11, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**CHARLES SCHWARZ, M.D.
TEDS MEDICAL SERVICES, ATTN: DOUG WAKEFIELD
NEWLUN INSURANCE SERVICES, INC.**

AJF/abs

I certify that I affixed the official seal of the
Workers' Compensation Appeals Board to this
original decision on this date. *abs*