

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

3
4 **Case No. ADJ3274228 (AHM 0120365)**

5 **ELIEZER FIGUEROA,**

6 *Applicant,*

7 **vs.**

8 **B.C. DOERING CO.; EMPLOYERS
COMPENSATION INSURANCE CO.,**

9 *Defendants.*

**OPINION AND DECISION
AFTER RECONSIDERATION**

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11 On March 25, 2013, we granted the Petition for Reconsideration filed by lien claimant Orthomed
12 LLC (Orthomed) in order to allow sufficient opportunity to further study the factual and legal issues
13 presented. In this case, at a January 9, 2013 lien conference, the workers' compensation administrative
14 law judge (WCJ) dismissed Orthomed's medical treatment lien claim with prejudice based on its failure
15 to pay the lien activation fee required by Labor Code section 4903.06.¹ Orthomed contends that
16 defendant's failure to serve required documents and failure to engage in settlement negotiations prior to
17 the lien conference excuses Orthomed from paying the lien activation fee required by section 4903.06.

18 We hold that, where a lien claim falls within the lien activation fee requirements of section 4903.06:

- 19 1. the lien activation fee must be paid prior to the commencement of a lien conference, which is
20 the time that the conference is scheduled to begin, not the time when the case is actually
21 called;
- 22 2. if the lien claimant fails to pay the lien activation fee prior to the commencement of a lien
23 conference and/or fails to provide proof of payment at the conference, its lien must be
24 dismissed with prejudice;

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27 ¹ Unless otherwise specified, all statutory references are to the Labor Code.

3. a breach of the defendant's duty to serve required documents or to engage in settlement negotiations does not excuse a lien claimant's obligation to pay the lien activation fee; and
4. a notice of intention is not required prior to dismissing a lien with prejudice for failure to pay the lien activation fee or failure to present proof of payment of the lien activation fee at a lien conference.

Applicant, while employed as a machine operator on June 25, 2004, sustained an industrial injury to his back, neck and psyche. On April 15, 2011, the WCJ filed a Findings, Award & Order, awarding benefits. On July 30, 2012, a lien claimant, not Orthomed, filed a Declaration of Readiness to Proceed (DOR) requesting a lien conference.

The lien conference was set for January 9, 2013, at 8:30 a.m. Orthomed did not appear at the conference. Because Orthomed did not submit proof of prior timely payment of the lien activation fee, and because the WCJ reviewed the record and determined that the lien activation fee had not in fact been paid, the WCJ dismissed Orthomed's lien with prejudice, without first issuing a notice of intention.

On reconsideration, Orthomed contends that the activation fee is not payable where defendant has not served supporting documents, thus depriving lien claimant of the opportunity to resolve the lien. Orthomed also contends that "the new lien regulations lacks [sic] latitude in allowing certain circumstances that are not just black and white." Orthomed does not claim on reconsideration that it paid the lien activation fee. We have not received an answer from defendant.

Section 4903.06, effective January 1, 2013, provides that with certain exceptions "[a]ny lien filed pursuant to subdivision (b) of Section 4903 prior to January 1, 2013, and any cost that was filed as a lien prior to January 1, 2013, shall be subject to a lien activation fee." (Lab. Code, § 4903.06(a).)² The lien activation fee is \$100. (Lab. Code, § 4903.06(a)(1).) A lien claimant that files a DOR must include proof of payment of the fee with the DOR. (Lab. Code, § 4903.06(a)(2).): In relevant part, section 4903.06

² The exceptions to payment of the lien activation fee are if: (1) the lien claimant proves it had paid the filing fee that was in effect from 2004 through 2006 under former section 4903.05 (Lab. Code, § 4903.06(a)); or (2) the lien claimant is a specified health care service plan, a group disability insurer, a self-insured employee welfare benefit plan, a Taft-Hartley health and welfare fund, or a publicly funded program providing medical benefits on a nonindustrial basis (Lab. Code, § 4903.06(b)).

1 further provides: “All lien claimants that did not file the declaration of readiness to proceed and that
2 remain a lien claimant at the time of a lien conference shall submit proof of payment of the activation fee
3 at the lien conference. If the fee has not been paid or no proof of payment is available, the lien shall be
4 dismissed with prejudice.” (Lab. Code, 4903.06(a)(4).)

5 Administrative Director Rule 10208(a) (Cal. Code Regs., tit. 8, § 10208(a)), which is an
6 emergency regulation that became operative January 1, 2013, provides in relevant part: “Any lien filed
7 pursuant to Labor Code section 4903(b) filed prior to January 1, 2013, and any cost filed as a lien prior to
8 January 1, 2013, shall be subject to a lien activation fee in the sum of one hundred dollars (\$100.00),
9 payable to the Division of Workers’ Compensation prior to filing a Declaration of Readiness to Proceed
10 for a lien conference by that party, prior to appearing at a lien conference for a case, or on or before
11 January 1, 2014, whichever occurs first.”

12 We interpret the payment “at the lien conference” language of section 4903.06(a)(4) and the
13 payment “prior to appearing at a lien conference” language of emergency Rule 10208(a) to mean that a
14 lien activation fee must be paid prior to the commencement of a lien conference, which is the time that
15 the conference is scheduled to begin, not the time when the case is actually called. Any payment made
16 after the noticed hearing time is not timely. Therefore, the lien of Orthomed was correctly dismissed
17 with prejudice.

18 Furthermore, section 4903.06(a)(4) mandates that a lien “shall” be dismissed with prejudice
19 where the fee has not been paid or where no proof of payment is submitted. This obligation is not
20 excused by the breach of defendant’s duty to serve documents or to conduct settlement negotiations.

21 Finally, we note that where a lien claimant has failed to pay the lien activation fee or to present
22 proof of payment of the fee prior to the commencement of a lien conference, there is no requirement that
23 dismissal of the lien be preceded by a notice of intention to dismiss the lien. Section 4903.06(a)(4)
24 requires that the lien claimant submit proof of payment of the lien activation fee at the lien conference. If
25 a lien claimant fails to do so, dismissal with prejudice of the lien is mandatory without the necessity of
26 any intervening procedure.

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1 For the foregoing reasons,

2 **IT IS ORDERED**, as the Decision After Reconsideration of the Appeals Board, that the January
3 9, 2013 order dismissing the lien claim of Orthomed LLC with prejudice is **AFFIRMED**.

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5 **WORKERS' COMPENSATION APPEALS BOARD**

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7 /s/ Deidra E. Lowe

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9 **I CONCUR,**

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11
12 /s/ Ronnie G. Caplane

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14
15 /s/ Frank M. Brass

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18 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

19 4/5/2013

20
21 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
22 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

23 **INNOVATIVE MEDICAL MANAGEMENT ORANGE**
24 **ORTHOMED LLC**
25 **ROBERTO BOHM SANTA ANA**
26 **TOBIN LUCKS SANTA ANA**

27 **MR/ara**