

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

HAZEL HARPER, *Applicant*

vs.

**KAISER;
ATHENS ADMINISTRATOR, *Defendants***

**Adjudication Number: ADJ11666325
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant's attorney, on his own behalf, seeks reconsideration of the October 21, 2019 Findings and Order issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ denied petitioner's Petition for Attorney Fees finding that Labor Code¹ section 4903.2 precludes applicant's attorney from receiving a fee from the Employment Development Department (EDD)'s recovery stemming from the May 15, 2019 Stipulations and Order.²

Applicant's attorney contends that the WCJ erred in denying his petition for attorney fees arguing that the WCJ's reliance on the holding of *Soils v. Swift Transportation Company* (1978) 43 Cal.Comp.Cases 83 (Appeals Board en banc) was in error where *Soils* fails to engage in proper statutory analysis of section 4903.2 and where the term "participation" is not synonymous with "attendance."

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

² The May 15, 2019 Stipulations and Order contains the parties' stipulation that defendant accepted injury AOE/COE and agreed to reimburse EDD the amount of \$13,829.04, less 15% attorney fees to be held in trust pending adjudication of applicant's attorney's petition for attorney fees.

We received an Answer from EDD. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that we grant reconsideration and allow the requested attorney fees.

We have considered the Petition for Reconsideration, the Answer, the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the October 21, 2019 Findings and Order.

Applicant filed an Application for Adjudication of Claim (Application) on February 26, 2019 claiming injury to her upper extremities as a result of cumulative trauma from August 15, 2017 through August 15, 2018. Defendant denied the claim on November 16, 2018. (Exhibit 1.) EDD filed a lien on November 19, 2018. On March 8, 2019, applicant's attorney served EDD with notice of hearing to occur on April 17, 2019. (Exhibit 2.) Applicant's attorney also put EDD on notice of his intention to request attorney fees by letter dated March 12, 2019. (Exhibit 3.) On March 26, 2019, EDD objected to applicant's attorney request for attorney fees.

The parties and EDD appeared at a hearing on May 15, 2019. At that time, the WCJ issued a Stipulations and Order wherein defendant accepted the claim and agreed to reimburse EDD for benefits paid in the amount of \$13,829.04, withholding 15% attorney fees requested by applicant's attorney to be held in trust. A representative for EDD was present and signed the Stipulations and Order. On May 20 2019, applicant's attorney filed a petition for attorney fees. A lien conference took place on July 10, 2019 and a trial on September 9, 2019, both on the sole issue of applicant's attorney entitlement of attorney fees from EDD's recovery.

On October 21, 2019, the WCJ issued the Findings and Order subject to reconsideration herein.

DISCUSSION

Section 4903.2, enacted in 1980, effective as of January 1, 1981, and amended in 1983, currently states in its entirety as follows:

Where a lien claimant is reimbursed pursuant to subdivision (f) or (g) of Section 4903 or Section 4903.1, for benefits paid or services provided, the ***appeals board may award an attorney's fee*** to the applicant's attorney out of the lien claimant's recovery ***if the appeals board determines that all of the following occurred:***

(a) The lien claimant received notice of all hearings following the filing of the lien and received notice of intent to award the applicant's attorney a fee.

(b) An attorney or other representative of the lien claimant *did not participate* in the proceedings before the appeals board with respect to the lien claim.

(c) There were bona fide issues respecting compensability, or respecting allowability of the lien, such that the services of an attorney were reasonably required to effectuate recovery on the claim of lien and were instrumental in effecting the recovery.

(d) The case was not disposed of by compromise and release.

The amount of the attorney's fee out of the lien claimant's recovery shall be based on the extent of applicant's attorney's efforts on behalf of the lien claimant. The ratio of the amount of the attorney's fee awarded against the lien claimant's recovery to that recovery shall not exceed the ratio of the amount of the attorney's fee awarded against the applicant's award to that award.

(Lab. Code, § 4903.2, emphasis added.)

The issue in this case turns on the meaning of the word “participate” as used in section 4903.2 subdivision (b). Applicant's attorney contends that the WCJ should not have relied on the Appeals Board en banc decision in *Soils* arguing that it lacks proper statutory analysis of section 4903.2 and that the term “participation” requires more than “attendance.”

First, we note that *Soils* was decided in 1978 before the enactment of section 4903.2 in 1980 and, therefore, cannot have engaged in statutory construction of that section. Second, while the WCJ mentioned *Soils* in the Opinion on Decision, it does not appear that she relied on it, citing instead to *Wyche v. Blood Bank of Alameda Contra Costa* (1993) 58 Cal.Comp.Cases 42 (Appeals Board en banc) and *Isham v. Workers' Comp. Appeals Bd.*, (2000) 66 Cal.Comp.Cases 766 (writ den.). Based on our review of existing relevant case law, we find that the WCJ properly denied applicant's attorney's request for attorney fees.

As noted by WCJ in the Opinion on Decision, the *Wyche* 1993 en banc decision noted that, with the enactment of section 4903.2, the Legislature “intended to limit the equitable principle of the ‘common fund’ where the service of the attorney for the active litigant required that a passive beneficiary be ordered to pay a proportionate share of the fee of the active litigant. That is, the practice of allowing an attorney fee from a lien claimant's recovery was to be curtailed and allowed only under very limited authority delineated in Labor Code section 4903.2.” (Opinion on Decision,

at p. 3.) *Wyche* also noted that section 4903.2 fees are discretionary. (*Wyche, supra*, 58 Cal.Comp.Cases at p 46.)

Although not specifically citing to section 4903.2, the Court of Appeal's decision in *Dressler v Workers' Comp. Appeals Bd.* (1981) 127 Cal.App.3d 292 [46 Cal.Comp.Cases 1346] also provides guidance as to the meaning of "participation." In *Dressler*, the Court of Appeal denied the petition of an applicant's attorney who sought to annul a decision of the Workers' Compensation Appeals Board (WCAB) allowing the liens filed by two insurance carries but finding the applicant's attorney not entitled to an attorney fee from those liens. The Court of Appeal posed the issue before it as: "The present case requires us to consider how much participation the attorney for the lien claimant must make in order to avoid a fee charge against his client payable to the attorney for the worker." In answering this question, the Court noted:

The attorney for the lien claimants prepared and filed the lien claims and also filed amendments to those claims. She entered an appearance in the proceedings and attended the hearings on the claim. However she did not introduce evidence beyond the filed liens, did not examine or cross-examine any witness, and made no argument to the hearing officer. We conclude that that was sufficient activity to insulate her client from any fee payable to the worker's attorney.

In this case, it developed that no opposition to the liens arose -- the hearing being devoted only to the employer's contention that the injury was not industrially caused. However, a lien claimant cannot be sure, prior to the hearings, that its lien will be allowed in full if the worker secures an award. It is entitled to have its own attorney present in the event that its claim is attacked, either in amount or in full. Here, the lien claimants, having retained and paid their own attorney to be present and be prepared to protect their interest if necessary, clearly did not rely on petitioner to protect such interest. The fact that the appearance proved to have been unnecessary does [not] mean that the lien claimants had abandoned their claims to the skill of the worker's attorney.

(*Dressler, supra*, (1981) 127 Cal.App.3d at p. 294.)

Several Court of Appeal writ denied cases specifically interpreting section 4903.2 have equated the appearance or presence of a lien claimant's representative in proceedings to "participation." (*Moore v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 656 (writ den.) ["[A] lien claimant's representative, who filed the lien, appeared in the WCAB proceedings, and attended the WCAB hearings, sufficiently participated in the proceedings before the WCAB so as to insulate the lien claimant from liability to the applicant's attorney, even though the lien

claimant did not actively participate in the trial”]; *Mastagni v. Workers’ Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 894 (writ den.) [WCAB affirmed WCJ’s holding that applicant’s attorneys were not entitled to fee out of lien claimants’ recovery, when WCJ found all requirements of Lab. C. § 4903.2 were not met because both lien claimants were represented at WCAB pre-trial conference]; *Amschel v. Workers’ Comp. Appeals Bd.* (2000) 65 Cal.Comp.Cases 608 (writ den.) [Lien claimant’s attorney appeared at MSC and at close of trial on injury AOE/COE issue and these appearances satisfied requirement of section 4903.2(b) that lien claimant “participate” in WCAB proceedings barring applicant’s attorney from recovering fee out of lien claimant’s recovery.]; *Ghitlerman v. Workers’ Comp. Appeals Bd.* (2000) 65 Cal.Comp.Cases 724 (writ den.) [The representative of EDD attended a mandatory settlement conference (MSC), attended a trial and attended a post-trial conference and was at all times present to protect the EDD’s interests. EDD therefore participated in the proceedings and applicant’s attorney did not meet the requirement of section 4903.2(b)]; *Isham v. Workers’ Comp. Appeals Bd.* (2000) 66 Cal.Comp.Cases 766 (writ den.) [Appeals Board reversed the WCJ and found that EDD’s presence at trial constituted participation to defeat an award of attorney fees pursuant to section 4903.2.].) While writ denied cases are not binding precedent, they are citable and we find the reasoning in these cases persuasive. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal. Comp. Cases 365, 366 (Appeals Board en banc).)

In this case, EDD filed a lien on November 19, 2018 and a representative for EDD attended the hearing on May 15, 2019. We find that to be sufficient participation within the meaning of section 4903.2 and consistent with the cases cited above. We further note that section 4903.2 attorney fees are discretionary and not mandatory and we find the WCJ was within her discretion to deny them.

While applicant’s attorney’s urges us to rely on the decision in *Hoffman v. Best Overnight Express, Inc., Tower Select Insurance*, 2013 Cal.Wrk.Comp.P.D.LEXIS 110, Appeals Board panel decisions are not binding precedent. (*Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].) In addition, we find *Hoffman* distinguishable from the facts in this case because, in *Hoffman*, EDD’s representative received notice of a December 14, 2011 mandatory settlement conference (MSC) and a February 13, 2012 expedited trial but did not send a representative to those proceedings. Applicant’s attorney’s reliance on the case of *Luque v. Herrera* (2008) 81 Cal.App.4th 558 [65 Cal.Comp.Cases 812] is also misplaced

as that decision addresses the allocation of attorney fees out of a settlement fund for a subrogation claim pursuant to section 3860, a statute which is “based on the common fund doctrine.” (*Luque, supra*, at p. 562.) As noted above, the Legislature’s intention in enacting section 4903.2 was to limit the application of the “common fund” doctrine where a lien claimant is reimbursed pursuant to subdivision (f) or (g) of section 4903 or section 4903.1.

Accordingly, for the reasons stated herein, we affirm the WCJ’s October 21, 2019 Findings and Order.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the October 21, 2019 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 5, 2021

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

**GEARHEART & SONNICKSEN
RONALD NEACH LAW FIRM
EMPLOYMENT DEVELOPMENT DEPARTMENT**

PAG/abs

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