

1 *Bd.* (2010) 182 Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; *Larch v. Workers' Comp. Appeals*
2 *Bd.* (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.) The lien activation fee issue is time-
3 limited, given that section 4903.06(a)(5) provides that all liens subject to the activation fee will be
4 dismissed by operation of law if the fee has not been paid by January 1, 2014. However, to ensure
5 uniform application of the law concerning payment of the lien activation fee and consequences for failure
6 to do so, the Appeals Board has voted to grant reconsideration of our prior decision on Board motion
7 (Lab. Code, § 5911; see also §§ 5900(b), 5906, 5315) and the Chairwoman of the Appeals Board, upon a
8 majority vote of its members, has reassigned this case to the Appeals Board as a whole for an en banc
9 decision. (Lab. Code, § 115.)² As our Decision After Reconsideration, we rescind the April 5, 2013
10 significant panel decision and issue the following as an en banc decision, wherein we hold that where a
11 lien claim falls within the lien activation fee requirements of section 4903.06:

- 12 1. the lien activation fee must be paid prior to the commencement of a lien conference,
13 which is the time that the conference is scheduled to begin, not the time when the case is
14 actually called;
- 15 2. if the lien claimant fails to pay the lien activation fee prior to the commencement of a
16 lien conference and/or fails to provide proof of payment at the conference, its lien must
17 be dismissed with prejudice;
- 18 3. a breach of the defendant's duty to serve required documents or to engage in
19 settlement negotiations does not excuse a lien claimant's obligation to pay the lien
20 activation fee; and
- 21 4. a notice of intention is not required prior to dismissing a lien with prejudice for
22 failure to pay the lien activation fee or failure to present proof of payment of the lien
23 activation fee at a lien conference.

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25 ² En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs.
26 (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126
27 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th
1418 [67 Cal.Comp.Cases 236].) In addition to being adopted as a precedent decision in accordance with Labor
Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent
decision in accordance with Government Code section 11425.60(b).

1 FACTUAL AND PROCEDURAL BACKGROUND

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

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

10 Orthomed filed a petition for reconsideration contending that the activation fee is not payable
11 where defendant has not served supporting documents, thus depriving lien claimant of the opportunity to
12 resolve the lien. Orthomed also contends that “the new lien regulations lacks [sic] latitude in allowing
13 certain circumstances that are not just black and white.” Orthomed does not claim on reconsideration
14 that it paid the lien activation fee. We have not received an answer from defendant.

15 On March 25, 2013, we granted the Petition for Reconsideration in order to allow sufficient
16 opportunity to further study the factual and legal issues presented. On April 5, 2013, we issued our
17 significant panel decision. We now incorporate that opinion and adopt it as follows as an en banc
18 decision.

19 DISCUSSION

20 Section 4903.06, effective January 1, 2013, provides that with certain exceptions “[a]ny lien filed
21 pursuant to subdivision (b) of Section 4903 prior to January 1, 2013, and any cost that was filed as a lien
22 prior to January 1, 2013, shall be subject to a lien activation fee.” (Lab. Code, § 4903.06(a).)³ The lien
23 activation fee is \$100. (Lab. Code, § 4903.06(a)(1).) A lien claimant that files a DOR must include proof
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25 ³ The exceptions to payment of the lien activation fee are if: (1) the lien claimant proves it had paid the
26 filing fee that was in effect from 2004 through 2006 under former section 4903.05 (Lab. Code,
27 § 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 of payment of the fee with the DOR. (Lab. Code, § 4903.06(a)(2).): In relevant part, section 4903.06
2 further provides: “All lien claimants that did not file the declaration of readiness to proceed and that
3 remain a lien claimant at the time of a lien conference shall submit proof of payment of the activation fee
4 at the lien conference. If the fee has not been paid or no proof of payment is available, the lien shall be
5 dismissed with prejudice.” (Lab. Code, 4903.06(a)(4).)

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

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

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

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

1 For the foregoing reasons,

2 **IT IS ORDERED** that reconsideration of the April 5, 2013 significant panel decision in this
3 matter is **GRANTED** on the Appeals Board's own motion (en banc).

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