

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

**DAVID DARLING, *Applicant***

**vs.**

**DEPARTMENT OF CORRECTIONS  
INSTITUTE FOR MEN, STATE OF CALIFORNIA;  
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ10981839; ADJ10981842  
Riverside District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration.

Labor Code section 4905 provides that:

Except with regard to liens as permitted by subdivision (b) of Section 4903, if it appears in any proceeding pending before the appeals board that a lien should be allowed if it had been duly requested by the party entitled thereto, the appeals board may, without any request for such lien having been made, order the payment of the claim to be made directly to the person entitled, in the same manner and with the same effect as though the lien had been regularly requested, and the award to such person shall constitute a lien against unpaid compensation due at the time of service of the award.

(Lab. Code, § 4905.)

Moreover, it is long-settled law that an applicant's attorney's appearance in a matter is tantamount to the filing of a lien claim because it puts the defendant on notice that a fee will be claimed. (E.g., *Rocha v. Puccia Construction Co.* (1982) 47 Cal.Comp.Cases 377, 380 (Appeals Board en banc); *Sierra Pacific Industries v. Workers' Comp. Appeals Bd. (Lewis)* (1979) 44

Cal.Comp.Cases 573 (writ den.); *State Comp. Ins. Fund v. Workmen's Comp. Appeals Bd. (Chester)* (1971) 36 Cal.Comp.Cases 678 (writ den.).)

In *Lewis, supra*, defendant advanced applicant's permanent disability benefits without withholding monies for applicant's attorney's fee. When the court determined that defendant had overpaid applicant's permanent disability benefits, the WCJ opined that applicant's attorney could bill his client to collect his fee as a result of the overpayment. However, the Appeals Board rescinded the WCJ's decision, concluding that because defendant was on notice of the attorney's appearance in the case and hence on notice of the attorney's lien, defendant was required to pay the attorney's fees even though this would result in double liability. (*Lewis, supra*, at p. 574.) The Appeals Board reasoned that, having been put on notice of the attorney's appearance, defendant had a duty to withhold funds sufficient to pay the lien that would follow - and the appeals court denied review. (*Id.*)

In this case, as in *Lewis*, it is undisputed that defendant issued applicant's permanent disability benefits without withholding funds sufficient to pay the attorney's fee. It is also clear that for the entire pendency of this action defendant has been on notice that applicant was represented by an attorney because the Application for Adjudication of Claim indicates that applicant is represented and identifies that applicant's attorney by name. The Application for Adjudication of Claim was served on defendant by proof of service dated August 10, 2017. Consequently, pursuant to *Lewis*, defendant was required to withhold funds to pay applicant's attorney's fees and is therefore subject to liability for failing to do so.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR



/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

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

**FEBRUARY 4, 2022**

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

**DAVID DARLING  
MALLERY & STERN  
STATE COMPENSATION INSURANCE FUND**

**PAG/abs**

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

## **REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION**

### **I INTRODUCTION**

<u>Date of Injury:</u>	12/1/1995-7/20/2015
<u>Age on DOI:</u>	59
<u>Occupation:</u>	Maintenance Mechanic
<u>Parts of Body Injured:</u>	Internal, left knee, lower back & left hip
<u>Identity of Petitioner:</u>	Defendant
<u>Timeliness:</u>	The petition was timely filed on 12/6/2021
<u>Verification:</u>	The petition was verified
<u>Date of Order:</u>	11/12/2021
<u>Petitioner's Contentions:</u>	Petitioner contends the WCJ erred because: <ol style="list-style-type: none"><li>1. The evidence does not justify the findings of fact.</li><li>2. The findings of fact do not support the order, decision or award.</li></ol>

Petitioner, Defendant, filed a timely verified Petition for Reconsideration on December 6, 2021, challenging the Findings and Order dated November 12, 2021. In its Petition for Reconsideration, Petitioner argues that the evidence does not justify the Findings of Fact, and the Findings of Fact do not support the Order allowing attorney's fees.

Applicant, Respondent, filed an Answer on December 7, 2021, providing factual details of the cases and the procedural history from the onset of filing the applications, the panel QME reporting, and to the issuance of payments. Respondent also provided a public policy and legal analysis with reference to the trial briefs. Respondent concludes with a request to deny Petitioner's reconsideration.

The court issued a Finding and Order allowing attorney's fees of 12% (\$2,048.22) and denied defendant's request to dismiss the cases.

Petitioner only contests the attorney's fee order, and it is recommended that reconsideration be denied.

### **II DISCUSSION**

Petitioner's facts as stated in the Petition for Reconsideration is accurate. The main issue is whether or not applicant's attorney is allowed and/or entitled to attorney's fees from the permanent disability advancements issued pursuant to Labor Code section 4650.

The employer paid compensation consisting of permanent disability advancements at \$290.00 per week from February 21, 2019 to April 21, 2020; the parties agree the total sum of permanent disability issued was \$17,068.57. The court ordered 12% (\$2,048.22) of this permanent disability advancement to applicant's attorney.

The court found limited resources to base its decision and sided on the principles of public policy. At trial, State Fund asserted applicant's attorney was not entitled to a fee according to the case of *Price v. WCAB* (1992) 10 Cal.App.4th 959 (writ denied). The court distinguished this only cited case because the case at hand involves an applicant who died while permanent disability advancements were being issued. In *Price*, applicant's attorney's fees were contingent upon the completion of the Stipulations with request for Award which stated the fees would derive from the far end of the award; and this element never triggered because applicant died, and no Award was ever issued.

Petitioner now asserts a new issue that another requirement is needed before the issuance of attorney's fees in its Petition for Reconsideration. (Petition for Reconsideration dated 12/6/21, p. 3.) Petitioner asserts applicant's attorney's fees are derived from a lien on the benefits awarded to applicant; and per Labor Code section 4903(a), the fees are payable out of applicant's recovery, once an award for benefits is issued. (*Id.*, p. 3:18-23.) Such new assertion should be precluded at this reconsideration level and dismissed per Labor Code section 5502, subsection (d)(3), because this issue was not raised at the mandatory settlement conference or at trial. Nonetheless, the court still maintains applicant's attorney should be allowed a fee based on the advancements issued to date.

#### Lien against Compensation?

Petitioner's interpretation of Labor Code section 4903(a) erroneously adds the extra requirement of "once an award for benefits is issued" to limit payments of attorney's fees (Petition for Reconsideration dated 12/6/21 p. 3:22-23). The court does not see such restriction; Labor Code section 4903(a), provides that the liens that may be allowed to include a reasonable attorney's fee for legal services pertaining to any claim for compensation either before the appeals board or before any of the appellate courts, and the reasonable disbursements in connection therewith.

Petitioner cites the case of *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (La Favor)* (1981) 46 C.C.C. 347, asserting the case provides the authority that attorney's fees are a lien on benefits. (Petition for Reconsideration dated 12/6/21, p. 3:18-27.) However, this application was used when the court had applied penalties due to State Fund's delay of paying attorney's fees; and State Fund only wanted to pay the penalties on the attorney fees and not the entire species of permanent disability. The court limited the 10% penalty to only the attorney's fees and concluded:

We conclude that for the purpose of applying the penalty provision of Labor Code section 5814, attorneys' fees are a separate "class of benefit." Any other conclusion would result in excessive penalties which are not justified or required by the language of the pertinent statutes.

Award for Benefits:

Petitioners next argument is an applicant's attorney can only be entitled to fees upon an issuance of an award for benefits. (Petition for Reconsideration dated 12/6/21, p. 4 et seq.) The court acknowledges that all fees must be reasonable and approved by the Board. And in this case, applicant was paid benefits in the form of permanent disability advancements pursuant to Labor Code section 4650. These payments were paid benefits issued by defendant directly to applicant, and the court determined 12% of the paid benefits was reasonable as attorney's fees. Defendant knew applicant was represented by counsel and could have withheld 15% of the advancements in anticipation of an award. And to satisfy the issuance of the award element, the court awarded the fees in the Order dated November 12, 2021.

Public Policy:

In this case, public policy should be afforded to the applicant's attorney who represents the applicant without reservation of the applicant's frailty or fitness. Applicant's counsel represented the applicant and filed these workers' compensation cases. Applicant then died while defendant was paying permanent disability advancements. Applicant's attorney now seeks a fee based on these advancements. Paying the attorney's fees based on advancements encourages retention of cases.

On the other hand, Petitioner discredits the court's public policy by asserting there is a breakdown of the agreement to get the benefits of the bargain. (Petition for Reconsideration dated 12/6/21, p. 5 et seq.) Petitioner distorts the facts by asserting the court's decision "fails to consider the ramifications of allowing an attorney to be awarded a fee prior to obtaining an award for his client as outlined in the fee agreement." (*Id.*, p. 5:26-27 to 6:1.) However, in this case, applicant did indeed receive permanent disability advancements totaling \$17,068.57. This sum was part of the amount defendant felt was a reasonable estimated of permanent disability applicant sustained based on the medical reporting and was paid according to Labor Code section 4650. The court does not see Petitioner's position that there was a breakdown of the agreement.

**RECOMMENDATION**

It is respectfully recommended that Defendant's Petition for Reconsideration be denied.

Respectfully submitted,

DATE: December 14, 2021

**Eric Yee**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE