

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **MARIA ELENA MENDEZ,**

5 *Applicant,*

6 **vs.**

7 **LE CHEF BAKERY; PACIFIC**
8 **COMPENSATION INSURANCE CO.,**

9 *Defendants.*

Case Nos. ADJ6509620
ADJ6509621
(Los Angeles District Office)

OPINION AND DECISION
AFTER RECONSIDERATION

10
11 On March 25, 2013, we granted the petition for reconsideration filed by lien claimant, Keivan
12 Fatolomi, M.D. (Dr. Fatolomi), to further study the factual and legal issues presented. In this case, at a
13 January 3, 2013 lien trial, the workers' compensation administrative law judge (WCJ) dismissed
14 Dr. Fatolomi's lien claim with prejudice based on his failure to pay a lien activation fee under Labor
15 Code section 4903.06.¹ Dr. Fatolomi contends that section 4903.06 does not require payment of a lien
16 activation fee prior to a lien trial and, therefore, his lien should not have been dismissed.

17 We hold that a lien claimant is not required to pay a lien activation fee prior to a 2013 *lien trial*
18 where: (1) the declaration of readiness (DOR) is filed prior to January 1, 2013; (2) the lien conference
19 takes place prior to January 1, 2013; and (3) the lien trial takes place in 2013, without any intervening
20 2013 lien conference.

21 **I.**

22 Applicant sustained industrial injuries on June 5, 2008 and April 27, 2008. She settled her claims
23 by a compromise and release approved on January 7, 2010. On April 30, 2012, Dr. Fatolomi filed a
24 medical-legal lien claim and concurrently filed a DOR requesting a lien conference. A lien conference
25 was held on June 14, 2012 and continued to July 20, 2012. The parties filed a pretrial conference
26

27 ¹ All further statutory references are to the Labor Code.

1 statement, and the case was scheduled for a December 12, 2012 trial, which was continued to January 3,
2 2013. Dr. Fatolomi did not pay a lien activation fee prior to the January 3, 2013 lien trial. The WCJ
3 concluded that, under WCAB Rule 10582, Dr. Fatolomi's filing of a DOR "activated" his lien² and that
4 the intent of section 4903.06 is that, beginning January 1, 2013, a lien claimant must pay an activation
5 fee whenever it uses the WCAB to collect on its lien, regardless of whether the first appearance in 2013
6 is at a lien conference or lien trial. Therefore, the WCJ dismissed Dr. Fatolomi's lien with prejudice for
7 failure to pay the fee.

8 II.

9 Section 4903.06(a) provides with certain exceptions that "[a]ny lien filed pursuant to subdivision
10 (b) of Section 4903 prior to January 1, 2013, and any cost that was filed as a lien prior to January 1,
11 2013, shall be subject to a lien activation fee."³

12 Section 4903.06(a)(1) provides: "The lien claimant shall pay a lien activation fee of one hundred
13 dollars (\$100) to the Division of Workers' Compensation on or before January 1, 2014"

14 Section 4903.06(a)(2) provides: "The lien claimant shall include proof of payment of the filing
15 fee or lien activation fee with the declaration of readiness to proceed."⁴

16 Section 4903.06(a)(4) provides: "All lien claimants that did not file the declaration of readiness to
17 proceed and that remain a lien claimant of record *at the time of a lien conference* shall submit proof of
18 payment of the activation fee *at the lien conference*. If the fee has not been paid or no proof of payment
19 is available, the lien shall be dismissed with prejudice." (Italics added.)

20 Section 4903.06 was enacted by Senate Bill 863 (SB 863) [Stats. 2012, ch. 363, § 64], which
21 became effective on January 1, 2013. Uncodified section 84 of SB 863 provides that "[t]his act shall
22

23 ² Rule 10582 provides, in pertinent part: "Cases in off calendar status may be restored to the active calendar
24 upon the filing and serving of a properly executed Declaration of Readiness to Proceed." (Cal. Code Regs., tit. 8,
§ 10582.)

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,
§ 4903.06(a)); or (2) the lien claimant is a specified health care service plan, a group disability insurer, a self-
27 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)).

⁴ Lien filing fees, which are governed by section 4903.05, are not relevant to this case.

1 apply to all pending matters, regardless of date of injury, unless otherwise specified in this act, but shall
2 not be a basis to rescind, alter, amend, or reopen any final award of workers' compensation benefits.”
3 Therefore, as of January 1, 2013, the provisions of section 4903.06 became applicable to any case still
4 pending, except cases that were finally concluded subject only to the WCAB's continuing jurisdiction
5 under sections 5803 and 5804. (Cf., e.g., *E & J Gallo Winery v. Workers' Comp. Appeals Bd. (Dykes)*
6 (2005) 134 Cal.App.4th 1536, 1543 [70 Cal.Comp.Cases 1644]; *Rio Linda Union School Dist. v.*
7 *Workers' Comp. Appeals Bd. (Scheftner)* (2005) 131 Cal.App.4th 517, 531 [70 Cal.Comp.Cases 999];
8 *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 916 [70 Cal.Comp.Cases 787];
9 *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 285-289 [70 Cal.Comp.Cases
10 133].)

11 III.

12 Under section 4903.06, a lien claimant subject to the lien activation fee whose lien was filed
13 before January 1, 2013 must pay the fee: (1) with the DOR, if the DOR is filed on or after January 1,
14 2013 and if lien claimant is the person or entity filing it; (2) prior to the scheduled commencement time
15 of a *2013 lien conference*, if it did not file the DOR (*Figueroa v. B.C. Doering Co.* (2013) 78
16 Cal.Comp.Cases __ (Appeals Board en banc));⁵ or (3) prior to the scheduled commencement time of a
17 *2013 lien conference*, if it did file the DOR but filed it before January 1, 2013.

18 With respect to this third point, we conclude that sections 4903.06(a)(2) and 4903.06(a)(4) cannot
19 be read to mean that if a particular lien claimant filed a DOR before January 1, 2013, then that lien
20 claimant is not required to pay a lien activation fee prior to a lien conference occurring in 2013.⁶ Section
21 4903.06(a) expressly states all liens falling within its scope “shall be subject to a lien activation fee.”
22

23 ⁵ *Figueroa* initially issued as a significant panel decision (see 78 Cal.Comp.Cases __, 2013 Cal. Wrk.
24 Comp. LEXIS 47); however, the Appeals Board subsequently granted reconsideration on its own motion and
reissued *Figueroa* as an en banc decision.

25 ⁶ As discussed above, section 4903.06(a)(2) provides, “[t]he lien claimant shall include proof of payment of
26 the ... lien activation fee with the declaration of readiness to proceed,” while section 4903.06(a)(4) provides, “[a]ll
27 lien claimants that did not file the declaration of readiness to proceed and that remain a lien claimant of record at
the time of a lien conference shall submit proof of payment of the activation fee at the lien conference.”
Anecdotally, some WCJs have read these two sections together to mean that if a lien claimant filed a DOR in 2012
or earlier, the lien claimant is exempted from paying a lien activation fee before a 2013 lien conference.

1 Of course, “shall” is mandatory language. (Lab. Code, § 15; *Long Beach Police Officers Assn. v. City of*
2 *Long Beach* (1988) 46 Cal.3d 736, 743 (“the ordinary meaning of ‘shall’ or ‘must’ is of mandatory
3 effect” [internal quotation marks omitted]).) Moreover, in interpreting a statute, we must “select the
4 construction that comports most closely with the apparent intent of the Legislature, with a view to
5 promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would
6 lead to absurd consequences.” (*Estate of Griswold* (2001) 25 Cal.4th 904, 911 [internal quotation marks
7 omitted]; also, e.g., *Medrano v. Workers’ Comp. Appeals Bd.* (2008) 167 Cal.App.4th 56, 64 [73
8 Cal.Comp.Cases 1407].) It would be an absurd result, and contrary to the general purpose of section
9 4903.06, to give more favorable treatment to the lien claimant that filed a DOR and, therefore, actually
10 “activated” its lien than to a lien claimant whose lien is set for the lien conference merely because some
11 other lien claimant filed a DOR (see Cal. Code Regs., tit. 8, § 10770.1(a) [when a DOR for a lien
12 conference is filed, “all unresolved lien claims and lien issue shall be heard at the lien conference”]).

13 Accordingly, where a lien claimant is subject to a lien activation fee, section 4903.06
14 contemplates that the fee must be paid by the *earliest* of the following: (1) the date the lien claimant files
15 the DOR, if it is filed on or after January 1, 2013 (Lab. Code, § 4903.06(a)(2)); (2) prior to the scheduled
16 starting time of the lien conference, if the lien conference occurs on or after January 1, 2013, whether or
17 not the lien claimant filed the DOR (Lab. Code, § 4903.06(a)(4)); or (3) January 1, 2014 (Lab. Code,
18 § 4903.06(a)(5); see also § 4903.06(a)(1)).

19 Of course, payment of a lien activation fee was not required with a DOR filed prior to January 1,
20 2013 or at a lien conference held prior to January 1, 2013. This is because section 4903.06 was not
21 effective until that date. Therefore, Dr. Fatolomi was not required to pay a lien activation fee based on
22 his April 30, 2012 DOR or based on the June 14 or July 20, 2012 lien conferences. However, because
23 section 4903.06 applies to all cases that were not final as of its January 1, 2013 effective date (Stats.
24 2012, ch. 363, § 84), we emphasize that if Dr. Fatolomi’s pre-2013 DOR had triggered a lien conference
25 (rather than a lien trial) in 2013, he would have been required to pay the activation fee prior to the lien
26 conference, as discussed above.

1 The issue is thus whether Dr. Fatolomi was required to pay the lien activation based on the
2 January 3, 2013 lien trial. We hold that he was not required to do so.

3 Once again, section 4903.06(a)(4) expressly applies only to “lien claimants that did not file the
4 declaration of readiness to proceed and that remain a lien claimant of record *at the time of a lien*
5 *conference*” and expressly states only that such lien claimants “shall submit proof of payment of the
6 activation fee *at the lien conference*.” (Italics added.) Nowhere in section 4903.06 is the phrase “lien
7 trial” used.

8 Of course, a basic principle of statutory construction is that “[w]e are required to give effect to
9 statutes according to the usual, ordinary import of the language employed” (*DuBois v. Workers’*
10 *Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388 [58 Cal.Comp.Cases 286].) “If the language is clear and
11 unambiguous, there is ordinarily no need for judicial construction [and, therefore,] we presume the
12 Legislature meant what it said and the plain meaning governs.” (*Smith v. Workers’ Comp. Appeals Bd.*
13 (2009) 46 Cal.4th 272, 277 [74 Cal.Comp.Cases 575] [internal quotation marks omitted]; see also
14 *DuBois, supra*, 5 Cal.4th at pp. 387-388.)

15 Under the WCAB Rules, there is a clear and unambiguous distinction between a “lien
16 conference” and a “lien trial” and, in interpreting section 4903.06, we must presume that the Legislature
17 was aware of this distinction. (*Vera v. Workers’ Comp. Appeals Bd.* (2007) 154 Cal.App.4th 996, 1007
18 [72 Cal.Comp.Cases 1115] [it is presumed that, when enacting legislation, the Legislature was aware of
19 relevant regulations]; see also *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105,
20 129.) WCAB Rule 10301(u) provides: “ ‘Lien conference’ means a proceeding held for the purpose of
21 assisting the parties in resolving disputed lien claims pursuant to Labor Code section 4903 or 4903.1 or,
22 if the dispute cannot be resolved, to frame the issues and stipulations in preparation for a lien trial.” (Cal.
23 Code Regs., tit. 8, § 10301(u).) At a “lien conference,” discovery closes and the defendants and lien
24 claimants prepare, sign, and file a pretrial conference statement, which includes: (1) all stipulations;
25 (2) the specific issues in dispute; (3) all documentary evidence that might be offered at the lien trial; and
26 (4) all witnesses who might testify at the lien trial. (Cal. Code Regs., tit. 8, § 10770.1(e) & (g).) On the
27 other hand, WCAB Rule 10301(ff) provides: “ ‘Trial’ means a proceeding set for the purpose of

1 receiving evidence.” (Cal. Code Regs., tit. 8, § 10301(u).) At a “trial,” the evidence that is actually being
2 offered and admitted is listed and identified and any testimony presented is transcribed and summarized.
3 (Lab. Code, §§ 5313, 5700, 5701, 5703, 5704, 5708; Cal. Code Regs., tit. 8, §§ 10566, 10580.)⁷

4 Our interpretation that the lien activation fee is payable prior to a 2013 lien conference, but not a
5 2013 lien trial, is consistent with Administrative Director Rule 10208(a) (Cal. Code Regs., tit. 8,
6 § 10208(a)), which is an emergency regulation that became operative January 1, 2013. It is the
7 Administrative Director of the Division of Workers’ Compensation that has the responsibility for
8 collecting the lien activation fee. (Lab. Code, § 4903.06(a)(1).) Rule 10208(a) provides in relevant part:
9 “Any lien filed pursuant to Labor Code section 4903(b) filed prior to January 1, 2013, and any cost filed
10 as a lien prior to January 1, 2013, shall be subject to a lien activation fee in the sum of one hundred
11 dollars (\$100.00), payable to the Division of Workers’ Compensation prior to filing a Declaration of
12 Readiness to Proceed for a lien conference by that party, *prior to appearing at a lien conference for a*
13 *case*, or on or before January 1, 2014, whichever occurs first.” (Italics added.) Like section 4903.06,
14 Rule 10208(a) makes no mention of a lien activation fee being payable prior to a lien trial.

15 In this case, Dr. Fatolomi filed a DOR in 2012 and participated in a lien conference in 2012.
16 He was not required to pay the lien activation fee prior to either of those events. However, the trial on
17 his lien claim did not occur until January 3, 2013. Accordingly, there was no requirement that a lien
18 activation fee be paid prior to the lien trial in this case and the WCJ should not have dismissed
19 Dr. Fatolomi’s lien.

20 We observe, however, that section 4903.06(a)(5) provides: “Any lien filed pursuant to
21 subdivision (b) of Section 4903 prior to January 1, 2013, and any cost that was filed as a lien prior to
22 January 1, 2013, for which the filing fee or lien activation fee has not been paid by January 1, 2014, is
23 dismissed by operation of law.” (See also Lab. Code, § 4903.06(a)(1) [“The lien claimant shall pay a lien
24 activation fee of one hundred dollars (\$100) to the Division of Workers’ Compensation on or before
25

26 ⁷ Of course, under limited circumstances, evidence may be received at a lien conference (Cal. Code Regs.,
27 tit. 8, § 10770.1(i); see also § 10353(a)), but this does not convert the lien conference into a lien trial.

1 January 1, 2014.”].) Therefore, if a lien subject to the lien activation fee is not resolved or withdrawn by
2 January 1, 2014, the lien activation fee must be paid by that date, or the lien will be dismissed by
3 operation of law.

4 For the foregoing reasons,

5 **IT IS ORDERED**, as the Decision After Reconsideration of the Appeals Board, that the
6 January 3, 2013 order dismissing the lien claim of Dr. Keivan Fatolomi with prejudice is **RESCINDED**
7 and the matter is **RETURNED** to the trial level for further proceedings and decision by a WCJ.

8 **WORKERS’ COMPENSATION APPEALS BOARD**

9
10 /s/ Marguerite Sweeney

11 **I CONCUR,**

12
13
14 /s/ Alfonso J. Moresi

15
16 /s/ Ronnie G. Caplane

17
18 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

19 4/25/2013

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 **DURDEN AND ASSOCIATES**
24 **KEIVAN FATOLOMI**
25 **PACIFIC COMP CLAIM LIT**

26
27 NS/abs