

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

CALVIN BOYKINS, *Applicant*

vs.

**KAISER PERMANENTE, Permissibly Self-Insured;
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ11351343
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.

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, we will affirm the August 17, 2020 Findings and Order.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the August 17, 2020 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 4, 2021

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

**EMPLOYMENT DEVELOPMENT DEPARTMENT
LAW OFFICES OF JEREMY SMITH
ALBERT AND MCKENZIE
RESOLUTION PARTNERS**

PAG/pc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Terri Ellen Gordon, Workers' Compensation Judge, hereby submits her Report and Recommendation on the Petition for Reconsideration filed herein.

INTRODUCTION

Applicant Calvin Boykins (hereinafter referred to as "applicant") petitions for reconsideration of the Findings and Order and Opinion that issued in this case on 08/17/2020 wherein I found counsel for applicant is not entitled to an attorney's fee out of the Stipulation and Order resolving the lien of Employment Development Department (hereinafter referred to as "EDD") dated 09/23/2019.

Applicant contends I acted without or in excess of my discretion, that the evidence does not justify the findings of fact and that the findings of fact do not support the Findings and Order. Applicant specifically contends that it is incorrect to say that the requirements of Labor Code section 4903.2(a) through (d) were not met, in particular (c) and (d). Applicant further submits that there were bona fide issues as to compensability in this matter and that without applicant's counsel's services there would be no recovery by EDD or by applicant. Applicant further claims that more weight should be given to paragraph (c) of Labor Code section 4903.2

Applicant's Petition for Reconsideration was timely filed on 08/28/2020 and is accompanied by the verification required under Labor Code section 5902. As of 09/08/2020, EDD has not timely filed an Answer.

A review of EAMS reflects the following. Applicant filed an Application on 06/13/2018. EDD filed a lien and served a lien on 07/06/2018. Applicant filed a Declaration of Readiness on or about 01/09/2019 identifying a number of issues but did not serve EDD. The matter was set for a mandatory settlement conference on 02/25/2019. Applicant, defendant Kaiser Permanente permissibly self-insured and administered by Sedgwick (hereinafter referred to as "defendant"), and EDD appeared at the 02/25/2019 mandatory settlement conference and all participated in the preparation and signing of the pretrial conference statement. The pretrial conference statement identified multiple issues including EDD's lien. Trial proceeded on 05/15/2019 at which injury arising out of and in the course of employment and date of injury were the only issues. I issued Findings, Order and Opinion on Decision on 06/20/2019 in which I found applicant sustained industrial injury to his left upper shoulder while working for defendant on 10/11/2017. Thereafter, applicant filed a Declaration of Readiness on 08/06/2019 and did not serve EDD. At the mandatory settlement conference on 09/23/2019, applicant, defendant, and EDD appeared and resolved a temporary disability dispute and EDD's lien. The 09/23/2019 Stipulation and Order, judicially approved on that same date, reflects the following:

“Defendant to issue retro-TD to applicant for period of 10/14/2017 to 10/19/2017 in the amount of \$736.04 less \$110.41 for AA fees. Defendant owes retro-temporary disability for the period of 10/27/2017 to 10/20/2018 at \$736.04 per week. This leaves a balance of \$38,379.23. From this balance, Defendant to issue payment to EDD within 30 days in the amount of \$32,622.35. Remaining balance of \$5,756.88 is to be held in trust by defendants until Applicant’s attorney and EDD resolve dispute or there is a finding. Penalties and interest waived if paid within 30 days of Award. *Parties stipulate to using AME Dr. William Campbell on both ADJ11351343 and ADJ11874572.”

At that same mandatory settlement conference on 09/23/2019, applicant, defendant, and EDD all participated in and signed the pretrial conference and the matter was set for trial in front of me on the sole issue counsel for applicant’s request for an attorney’s fee out of the Stipulation and Order resolving the lien of EDD over EDD’s objection. Defendant was excused from appearing at the trial.

EDD filed an Objection to applicant’s request for an attorney’s fee on 10/17/2019. That Objection reflects that EDD was not aware of any work related injuries to the injured worker as he stated on his initial disability application that he did not intend of filing for workers’ compensation; EDD then received a cross match from EAMS that an application had been filed with the board well after the 52 weeks EDD had paid benefits. The Objection further reflected that EDD was present at the 09/23/2019 pretrial conference statement thus making EDD an active participant to protect its lien rights and verbally objected to any requests by applicant counsel and not meeting the conditions of Labor Code section 4903.2 as EDD was present at the proceedings and listed on the pretrial conference statement.

Counsel for applicant and EDD both appeared at and participated in the 07/15/2020 trial.

Labor Code section 4903.2 provides 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 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 allow ability of the lien, such that he 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 a compromise and release.

In the instant case, EDD appeared at the mandatory settlement conference on 02/25/2019 and participated in and signed the pretrial conference statement on that date. EDD participated in the 09/23/2019 mandatory settlement conference at which it resolved its lien with defendant. EDD participated in and signed the pretrial conference statement on 09/23/2019. EDD participated in the 07/15/2020 trial. The case-in-chief has not yet been resolved. In my Findings and Order and Opinion on Decision that issued on 08/17/2020, based on my review of the evidence, the relevant law, and the above analysis, I concluded that the requirements set forth in Labor Code section 4903.2 (a) through (d) were not met and found counsel for applicant was not entitled to an attorney's fee out of the Stipulation and Order resolving the lien of Employment Development Department dated 09/23/2019 over Employment Development Department's objection.

Counsel for applicant did successfully litigate the issue of injury arising out of and in the course of employment at the 05/15/2019 trial that resulted in a finding of industrial injury. At the mandatory settlement conference on 09/23/2019, applicant, defendant, and EDD resolved a temporary disability dispute and EDD's lien and pursuant to a stipulation and order of that date, applicant counsel received a fee for retroactive temporary disability from 10/14/2017 to 10/19/2017. However, Labor Code section 4903.2 provides that 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 out of the lien claimant's recovery if the appeals board determines that all of (a) through (d) occurred. Here, EDD appeared at the mandatory settlement conference on 02/25/2019 and participated in and signed the pretrial conference statement on that date. EDD participated in the 09/23/2019 mandatory settlement conference at which it resolved its lien with defendant. EDD participated in and signed the pretrial conference statement on 09/23/2019. EDD participated in the 07/15/2020 trial. Contrary to applicant's claim, Labor Code section 4903.2 does not provide that more weight should be given to paragraph (c).

RECOMMENDATION

For the foregoing reasons, I recommend that Applicant Calvin Boykin's Petition for Reconsideration, filed on 08/28/2020, be DENIED.

DATE: 09/09/2020

Terri Ellen Gordon

WORKERS' COMPENSATION

ADMINISTRATIVE LAW JUDGE