WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANGEL VILLATORO, ***Applicant,*** **vs.** **KERN LABOR CONTRACTING and CALIFORNIA INSURANCE GUARANTEE ASSOCIATION for PAULA INSURANCE, in liquidation,** ***Defendants.***	**Case No. ADJ3637976 (BAK 0135676)** **OPINION AND DECISION AFTER RECONSIDERATION**

On February 21, 2012, the Appeals Board granted reconsideration to further study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Order of September 14, 2011, the workers' compensation judge (WCJ) found, in relevant part, that: (1) on December 3, 2001, applicant sustained industrial injury to his upper extremities while employed as a farm laborer by Kern Labor Contracting, then insured for workers' compensation liability by Paula Insurance Company (Paula); (2) on December 6, 2001, lien claimant, Center for Orthopedic Surgery (COS), provided applicant with "necessary and appropriate" medical treatment for which Paula paid $1,056.25 on March 7, 2002;[1] (3) on June 21, 2002, Paula entered liquidation, with its "covered claims" adjusted by California Insurance Guarantee Association (CIGA); (4) on August 28, 2002, applicant's case-in-chief was resolved by an approved Compromise & Release (C&R); (5) on February 3, 2011, COS filed its lien claim, which was more than six months after the approved C&R, more than five years after the date of the injury of December 3, 2001, and more than one year after December 6, 2001, when COS had provided the medical treatment; and (6) CIGA is not

[1] COS provided outpatient surgery and billed Paula $7,500.00 at the time. Paula paid $1,056.25 on March 7, 2002. On February 3, 2011, COS filed a lien for the balance of $6,443.75. Thereafter it was stipulated that COS's services had a reasonable value of $6,100.00, satisfaction of which would require "new money" of $5,043.75.

estopped to assert the lien claim statute of limitations (i.e., Lab. Code, § 4903.5).[2] Pursuant to these findings, the WCJ disallowed the balance of COS's lien claim and ordered that it take nothing further.

COS filed a petition for reconsideration[3] of the WCJ's decision. COS contends that section 4904(a) tolls the time limits of section 4903.5, that "defendant's timely receipt of billings and reports per section 4904(a) obviates section 4903.5," and that "failure to serve the settlement document tolls section 4903.5."

CIGA filed an answer.

The WCJ submitted a Report and Recommendation.

For the reasons discussed below, we will affirm the WCJ's decision that COS's lien is barred by the lien claim statute of limitations under section 4903.5.[4]

BACKGROUND

Although the essential facts are contained within the WCJ's findings, it is useful to repeat them here with some additional details. On December 3, 2001, applicant sustained an admitted industrial injury to his upper extremities. On December 6, 2001, applicant received treatment at COS's outpatient surgery center, in order to close a laceration of applicant's left palm and to repair damage to his left little finger. There is no dispute that the surgery was reasonable and necessary. Although COS did not file a lien claim with the WCAB at the time, it billed Paula for $7,500.00. On March 7, 2002, Paula paid COS

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[2] All further statutory references are to the Labor Code.

[3] Because the petition was e-filed under the incorrect designation "Correspondence-Other," it did not come to the WCAB's attention until after the 25-day limit for timely filing had expired. Although incorrectly designated, the petition was timely because it was e-filed within the 25-day time limit. COS is cautioned to correctly designate its petitions for reconsideration in the future, so as to avoid having them dismissed as untimely.

[4] Our decision herein is *not* based on WCAB Rule 10770 as recently amended. Effective May 21, 2012, WCAB Rule 10770(b)(3) now provides that "[t]he service of a lien claim on a defendant, or the service of notice of any claim that would be allowable as a lien, shall not constitute the filing of a lien claim with the [WCAB] within the meaning of its rules of practice and procedure or within the meaning of Labor Code section 4903.1 et seq., including but not limited to section 4903.5." In addition, Rule 10770(b)(4) now provides that "[w]here a lien has been served on any party under Labor Code section 4903.1(b), no party shall have an obligation to file that lien with the [WCAB] if: (A) the lien has been paid in full; or (B) a good faith partial payment has been made and: (i) the lien claimant has been concurrently provided with a clear written explanation that both justifies the amount paid and specifies all additional information the lien claimant must submit as a prerequisite to additional or full payment, in conformity with the following, as applicable: (I) Lab. Code, § 4603.2(b)(1) and Cal. Code Regs., tit. 8, § 9792.5(c) for medical treatment liens; (II) Lab. Code, § 4622 and Cal. Code Regs., tit. 8, § 9794(b) & (c) for medical-legal liens; and (III) Cal. Code Regs., tit. 8, § 9795.4(a) for interpreter liens; and (ii) no additional written demand for payment is made by the lien claimant within 90 calendar days after the partial payment." (Cal. Code Regs., tit. 8, § 10770(b)(3), (4).)

the sum of $1,056.25. On June 21, 2002, Paula entered into liquidation, and its "covered claims" became the responsibility of CIGA. Neither Paula nor CIGA was ever notified that COS was seeking further recovery or that COS was unsatisfied with the payment it had received from Paula. CIGA settled applicant's claim of injury by C&R, which was approved on August 28, 2002.

On February 3, 2011, COS filed a lien claim with the WCAB dated January 27, 2011, in the amount of $6,443.75. This filing occurred more than six months from August 28, 2002, the date on which the WCJ issued the order approving C&R, more than five years from the date of the injury of December 3, 2001 for which COS's services were provided, and more than one year from December 6, 2001, the date COS provided the services. CIGA did not provide COS with a copy of the approved C&R until April 7, 2011.

COS's lien advanced to trial on June 15, 2011. At that time, the parties stipulated to "submit the lien for adjudication on the sole issue of LC §4903.5, subject to points and authorities to be filed by the parties." The parties also stipulated that "the reasonable value for the lien of [COS] for expenses incurred 12/06/2001 is: $6,100 total compensation with $5,043.75 new money[.]" In the Minutes of Hearing, the WCJ remarked and ordered as follows: "Stip re: reasonable value received. Statute of limitations and related issues to be submitted on post-trial points and authorities. Case will be submitted for decision on the close of the court's business day on August 1, 2011."

On September 14, 2011, the WCJ issued the decision disputed here. In relevant part, the WCJ found that "lien claimant [COS] filed its lien claim on February 3, 2011, which was more than six months after the resolution of primary proceedings via the approved [C&R], more than one year after the date of service, and more than five years after the date of the injury of December 3, 2001." The WCJ also found that "defendant [CIGA] was not shown to be estopped to assert the lien claim Statute of Limitations[,]" and ordered, in his Opinion on Decision, that "[t]he lien claim of [COS] has been disallowed pursuant to Lab.C. §4903.5."

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DISCUSSION

Under section 4903(b), the appeals board may determine, and allow as liens against any sum to be paid as compensation, the reasonable expense incurred by or on behalf of the injured employee, as provided by Article 2 (commencing with Section 4600) and, to the extent the employee is entitled to reimbursement under Section 4621, medical-legal expenses as provided by Article 2.5 (commencing with Section 4620) of Chapter 2 of Part 2. Thus, liens for medical treatment and liens for medical-legal expenses are two different kinds of liens which may be determined and allowed by the WCAB.

The first sentence of section 4904(a) states that "[i]f notice is given in writing to the insurer, or to the employer if uninsured, setting forth the nature and extent of any claim that is allowable as a lien, the claim is a lien against any amount thereafter payable as compensation, subject to the determination of the amount and approval of the lien by the appeals board." Thus, a medical provider's bill that sets "forth the nature and extent of any claim that is allowable as a lien" constitutes a lien in proceedings before the Appeals Board.

In this case, COS furnished treatment on December 6, 2001 and billed Paula shortly thereafter, which gave notice in writing to the insurer setting forth the nature and extent of a claim allowable as a lien. Thus COS's billing effectuated a lien pursuant to the first sentence of section 4904(a). On March 7, 2002, Paula paid COS the sum of $1,056.25. As explained below, the result of Paula's partial payment is that COS had to take further action to protect its lien rights or be subject to losing them due to the expiration of the time limits of section 4903.5(a).

Section 4903.5(a) states as follows:

> "No lien claim for expenses as provided in subdivision (b) of Section 4903 [i.e., liens for medical treatment or medical-legal expenses] may be filed after six months from the date on which the appeals board or a [WCJ] issues a final decision, findings, order, including an order approving compromise and release, or award, on the merits of the claim, after five years from the date of the injury for which the services were provided, or after one year from the date the services were provided, whichever is later."

Section 4903.5(a) thus allows a lien claim for medical treatment or medical-legal expense to be filed within the latest of three limitation periods: (1) six months from the date on which the Appeals Board or

a [WCJ] issues a final decision on the merits of the injured worker's claim, including an award or OACR; (2) five years from the date of the injury for which the services were provided; or (3) one year from the date the services were provided.

Section 4903.5 was enacted in 2002 and became effective on January 1, 2003. (Stats. 2002, ch. 6, § 70 (AB 749).) Before then, for cases like this one in which an Application for Adjudication of Claim was timely filed by the injured employee, there was no statutory time limit for filing a lien claim. (2 Hanna, *Cal. Law of Employee Injuries and Workers' Compensation* (rev. 2d ed., 2011) Liens and Lien Enforcement, § 30.21[2][a], p. 30-26, citing *Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196 [57 Cal.Comp.Cases 149] and *Bethlehem Steel Corp. v. Workers' Comp. Appeals Bd.* (*Gras*) (1985) 50 Cal.Comp.Cases 186 (writ den.).)

Here, COS asserted a valid lien in late 2001 or early 2002, before section 4903.5 became effective on January 1, 2003. As explained below, however, the statute applies to the lien prospectively, after the statute's effective date, because COS had a "reasonable time" in which to timely file its lien.

In *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, the Supreme Court concluded that transfer of initial jurisdiction over Meyers-Milias-Brown Act (MMB) unfair practice charges from the superior courts to the Public Employment Relations Board (PERB) shortened the limitations period from three years to six months. PERB contended that this shortened period could not be applied retrospectively to unfair practices occurring before July 1, 2001, the legislation's effective date. In denying the contention, the Supreme Court explained at 35 Cal.4th 1091-1092:

> "Legislation that shortens a limitations period is considered procedural and is applied retroactively to preexisting causes of action, so long as parties are given a reasonable time in which to sue. (*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 437 [186 Cal. Rptr. 228, 651 P.2d 815]; *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122–123 [47 P.2d 716]; *Carlson v. Blatt* (2001) 87 Cal.App.4th 646, 650–651 [105 Cal. Rptr. 2d 42].) When necessary to provide a reasonable time to sue, a shortened limitations period may be applied prospectively so that it commences on the effective date of the statute, rather than on the date the cause of action accrued. (*Rubinstein v. Barnes* (1987) 195 Cal. App. 3d 276, 281–282 [240 Cal. Rptr. 535]; *Niagara Fire Ins. Co. v. Cole* (1965) 235 Cal. App. 2d 40, 42–43 [44 Cal. Rptr. 889].)"

The Supreme Court then affirmed the Court of Appeal's conclusion that the legislation vesting PERB with jurisdiction over MMBA unfair practice charges, effective July 1, 2001, shortened the applicable limitations period from three years to six months, and that this shortened limitations period applied retroactively to MMBA unfair practice charges based on conduct that occurred before July 1, 2001, provided that the parties were given a reasonable time in which to file such charges with the PERB. The Supreme Court also affirmed the Court of Appeal in concluding that six months was a reasonable time in this context, and in holding that for MMBA unfair practices occurring before July 1, 2001, a charge filed with the PERB was timely if brought within three years of the occurrence of the unfair practice, or within six months of July 1, 2001 (i.e., before January 1, 2002), whichever was sooner.

The Appeals Board applied the foregoing principles when it addressed the expiration of the right to vocational rehabilitation in *Weiner v. Ralphs Company* (2009) 74 Cal.Comp.Cases 736 (en banc). Citing *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122–123, the Board stated: "By providing in April 2004 that section 139.5 would not be repealed until January 1, 2009, the Legislature, in effect, "saved" both pending and impending vocational rehabilitation claims for a period of nearly five years. This gave affected employees a *reasonable time* within which to avail themselves of vocational rehabilitation before the repeal would take effect." (74 Cal.Comp.Cases at 749, italics added.)

In the instant case, there are three possible deadlines within which COS needed to file its lien: (1) on or about February 28, 2003, i.e., six months after the August 28, 2002 OACR and a few months after the effective date of section 4903.5; (2) December 3, 2006, i.e., five years after the injured worker's date of the injury for which COS's services were provided and nearly four years after the effective date of section 4903.5; and (3) December 6, 2002, i.e., one year after the date COS provided services and a few weeks before section 4903.5 became effective. The statute provides that the latest of the three dates, December 3, 2006, is controlling.

We noted above that section 4903.5(a) established the limitation period for medical treatment and medical-legal liens, and that COS created a valid medical treatment lien before the statute's effective date of January 1, 2003. However, Legislation that establishes a limitations period is considered procedural and is applied retroactively to preexisting causes of action, so long as parties are given a reasonable time

in which to sue. (*Coachella Valley* and *Rosefield Packing, supra.*) Here we conclude that the four years between January 1, 2003 and December 3, 2006 gave COS a "reasonable time" within which to timely file its lien. Since COS did not file its lien until February 3, 2011, i.e., more than four years after a "reasonable time" had expired, COS's lien is time-barred absent a compelling reason not to apply the statute.

COS first contends that by virtue of section 4904(a), Paula (and thereafter CIGA) had notice of COS's lien in late 2001 or early 2002, and therefore, when COS finally filed its lien with the WCAB on February 3, 2011, CIGA was estopped from asserting the statute of limitations of section 4903.5(a).

We reject the contention. In order to apply the doctrine of equitable estoppel, four elements must be present: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. (*Honeywell v. Workers' Comp. Appeals Bd.* (*Wagner*) (2005) 35 Cal.4th 24, 37 [70 Cal.Comp.Cases 97, 106].)

In this case, elements two, three and four are not present. Regarding element two, there is no evidence that the party to be estopped, CIGA, had any intent to deny that it had notice of COS's lien under section 4904(a). Regarding element three, the other party, COS, asserted a valid lien by billing Paula shortly after COS furnished treatment, so there is no basis for concluding that COS was ignorant of the facts. Regarding element four, there is no evidence that COS relied on CIGA's conduct to COS's detriment. (See *American Can Co. v. Industrial Acc. Com.* (*Wright*) (1962) 204 Cal.App.2d 276, 278–279 [27 Cal.Comp.Cases 137, 139] [employer not estopped to assert statute of limitations where no evidence applicant relied on conduct or words of employer's agents to delay claim].)

In reference to detrimental reliance, we again note that not long after December 6, 2001, when COS billed Paula Insurance Company for $7,500.00 and "set forth the nature and extent of its claim," Paula, CIGA's predecessor, paid COS the sum of $1,056.25 on March 7, 2002. Though Paula paid COS a relatively small portion of its bill, the payment appears to have been made in good faith, and COS never

notified Paula or CIGA that it was demanding more. Under these circumstances, Paula and CIGA could reasonably believe that the payment resolved the lien asserted by COS.

Furthermore, it would be unreasonable to require Paula or CIGA to notify COS that it needed to serve and file with the Appeals Board a lien for the alleged balance. In 2002, former Administrative Director Rule 9792.5(d)(4) required a claims administrator objecting to any part of a bill for medical treatment to notify the provider within 60 days after receipt of the bill that the provider may adjudicate the issue of the contested charges before the WCAB. COS does not allege that Paula or CIGA failed to comply with that rule. (Cal. Code Regs., tit. 8, § 9792.5, operative September 25, 1995.) Estoppel is applied defensively and is intended to prevent one party from taking unfair advantage of another. It is not intended to give an unfair advantage to the party seeking to invoke the doctrine. (*Varela v. Board of Police Commissioners* (1951) 107 Cal.App.2d 816, 822.) Thus we reject COS's contention that "defendant's timely receipt of billings and reports per section 4904(a) obviates section 4903.5."[5]

COS also contends that section 4904(a) tolls the time limits of section 4903.5. We again reject the contention. Under the doctrine of equitable tolling, the limitations period may be suspended if it is established that (1) there was timely notice to the defendant in filing the first claim; (2) there is a lack of prejudice to defendant in gathering evidence to defend against the second claim; and, (3) good faith and reasonable conduct by the lien claimant in filing the second claim. (*Javor v. Taggart* (2002) 98 Cal.App.4th 795, 803 [67 Cal.Comp.Cases 564, 568].) Here the third element is not satisfied because it was not good faith and reasonable conduct by COS to wait almost nine years to file its lien[6] after Paula

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[5] In asserting the doctrine of equitable estoppel, COS relies on various Appeals Board panel decisions which, in circumstances allegedly similar to those presented here, did not find the lien in question time-barred by section 4903.5(a). We decline to follow the panel decisions cited by COS. Panel decisions of the Appeals Board are citable to the extent they point out the contemporaneous interpretation and application of the workers' compensation laws by the Board. (*Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145, 147, fn. 2].) Although such panel decisions may be considered by other panels of the Board to the extent they find their reasoning persuasive, panel decisions are not binding precedent and have no stare decisis effect. (*Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 [Appeals Board En Banc], citing *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].)

[6] Section 4903.1(c) provides: "Any lien claimant under Section 4903...shall file its lien with the appeals board in writing upon a form approved by the appeals board. The lien shall be accompanied by a full statement or itemized voucher supporting the lien and justifying the right to reimbursement and proof of service upon the [parties], and the respective attorneys or other agents of record." This provision goes to the form in which a lien must be filed. It does not afford the lien claimant additional rights and it does not limit the WCAB's jurisdiction over medical liens. (See Lab. Code, § 4905.)

made a partial payment in March 2002. Under these circumstances, the time limitations of section 4903.5 were not equitably tolled.

We also reject COS's contention that CIGA's "failure to serve the [OACR of August 28, 2002] tolls section 4903.5." Section 4903.1(b) requires that "[w]hen a compromise of claim or an award is submitted to the appeals board, arbitrator, or settlement conference referee for approval, the parties shall file with the appeals board, arbitrator, or settlement conference referee any liens served on the parties." (Italics added.) This requirement is echoed in WCAB Rule 10886: "Where a lien claim is on file with the Workers' Compensation Appeals Board or where a party has been served with a lien, and a compromise and release agreement or stipulations with request for award or order is filed, a copy of the compromise and release agreement or stipulations shall be served on the lien claimant. [℗] No lien claim shall be disallowed or reduced unless the lien claimant has been given notice and an opportunity to be heard." (Cal. Code Regs., tit. 8, § 10886.) The foregoing provisions are intended to make the WCJ aware of the full scope of issues, including "unresolved liens," which may be involved when the parties are submitting a proposed settlement. (See Cal. Code Regs., tit. 8, § 10888, which provides in relevant part: "Before issuance of an [OACR] that resolves a case or an award that resolves a case based upon the stipulations of the parties, if there remain any liens that have not been resolved or withdrawn, the parties shall make a good-faith attempt to contact the lien claimants and resolve their liens.")

However, the foregoing provisions do not trump section 4903.5(a). First, section 4903.5 is more specific than section 4903.1(b) as to the time limits within which a medical lien must be filed, and section 4903.5, as the more specific statute, controls. (See *Tapia v. Pohlmann* (1998) 68 Cal.App.4th 1126, 1133. [Where a general statute conflicts with a specific statute, the specific statute controls the general one.]) Second, where earlier enacted and later enacted statutes cannot be harmonized, "the more recent enactment prevails as the latest expression of the legislative will." (2B *Sutherland*, Statutory Construction (5th ed. 1992) § 51.02, p. 122; see also *City of Petaluma v. Pac. Tel. & Tel. Co.* (1955) 44 Cal.2d 284, 288 ["the latest legislative expression will be held controlling when there are conflicting statutory provisions"]; *Stafford v. L.A. County Employees' Retirement Bd.* (1954) 42 Cal.2d 795, 798 ["if [any] conflict exists between the provisions of ... Labor Code section [3751] and those of [Government

Code] sections 32080 and 32081, the latter sections, being later in time, must be held to prevail"].) Here, the provision of section 4903.5(a), enacted in 2002 and effective January 1, 2003 (Stats. 2002, ch. 6, § 70 (AB 749)), which gives medical treatment and medical-legal lien claimants certain time limits within which to file their liens, is inconsistent with the provision of section 4903.1(b), enacted in 1990 (Stats. 1990, ch. 1550, § 45 (AB 2910)), which requires that the parties shall file any liens served on them whenever a C&R or request for Stipulated Award is submitted. If the section 4903.1(b) provision were applied to medical treatment and medical-legal liens, it would revive any such liens that would otherwise be barred by section 4903.5(a), which would be inconsistent with the purpose of the statute of limitations for medical treatment and medical-legal liens.

Finally, we note in reference to section 4903.1(b) and WCAB Rule 10888 that when CIGA settled the injured worker's case-in-chief on August 28, 2002, it was reasonable for CIGA to believe that there was no need to disclose COS's lien, because it had been "resolved" by Paula's partial payment on March 7, 2002. COS did nothing more and continued to sit on its rights for another nine years. We affirm the WCJ's disallowance of the balance of COS's lien based on expiration of the time limits set forth in section 4903.5(a).

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For the foregoing reasons,

IT IS ORDERED, as the Appeals Board's Decision After Reconsideration, that the Findings and Order of September 14, 2011 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

ALFONSO J. MORESI

I CONCUR,

DEPUTY

RICK DIETRICH

CONCURRING, BUT NOT SIGNING

FRANK M. BRASS

WORKERS' COMPENSATION APPEALS BOARD EUREKA SEAL

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUL 17 2012

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

WOLF & ASSOCIATES
WILLIAM WOLFF
ANGEL VILLATORO
CENTER FOR ORTHOPEDIC SURGERY
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN

JTL/bea