

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

DALILA LOPEZ, *Applicant*

vs.

**TRI-STATE EMPLOYMENT SERVICES;
CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, for LUMBERMEN'S
UNDERWRITING ALLIANCE, in liquidation, *Defendants***

**Adjudication Number: ADJ9602230
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision after Reconsideration.

The Prescription Center Pharmacy (lien claimant) seeks reconsideration of the Order Dismissing Lien issued by the workers' compensation administrative law judge (WCJ) on December 26, 2019. The WCJ found that no objection to the August 1, 2019 Notice of Intention to Dismiss Lien for Non-Appearance at Lien Conference (NIT) was filed. Thus, the WCJ dismissed lien claimant's lien.

Lien claimant contends that it filed a timely objection to the NIT on September 6, 2019. Additionally, lien claimant seeks relief pursuant to Code of Civil Procedure section 473. (Code Civ. Proc., § 473.)

Defendant did not file an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and for the reasons discussed below, we will affirm the Order Dismissing Lien.¹

¹ All further statutory references are to the Labor Code unless otherwise stated.

FACTUAL BACKGROUND

On May 8, 2019, a Declaration of Readiness to Proceed was filed, and a lien conference was set for August 1, 2019.

On August 1, 2019, lien claimant did not appear at the lien conference. (Minutes of Hearing, August 1, 2019, p. 2.)

Additionally on August 1, 2019, the WCJ issued the NIT unless lien claimant provided in writing good cause within 10 days of service of the NIT. According to the proof of service, defendant served the NIT on lien claimant via mail on August 8, 2019.

On September 6, 2019, lien claimant served and filed its Objection to the Notice of Intention to Dismiss Lien.

On December 26, 2019, the WCJ issued an order dismissing lien claimant's lien based on lien claimant's failure to objection to the August 1, 2019 NIT.

On January 17, 2020, lien claimant timely filed its Petition for Reconsideration.

DISCUSSION

In the NIT, the WCJ allowed lien claimant to file a written response to the NIT to establish good cause for failing to appear at the August 1, 2019 lien conference. The WCJ required lien claimant to file its response within 10 days of service of the NIT with an additional five days pursuant to former WCAB Rule 10507(a)(1). (Cal. Code Regs., tit. 8, former § 10507(a)(1).)² Defendant served the NIT via mail on August 8, 2019. Thus, lien claimant had until August 23, 2019, to file its Objection to the NIT.

Here, lien claimant filed its Objection to the NIT on September 6, 2019, which is untimely by 14 days. Thus, lien claimant failed to respond timely to the NIT, and the December 26, 2019 Order Dismissing Lien was proper.³

“A lien claimant may seek relief from the consequences of a failure to appear by utilizing a procedure substantially similar to Code of Civil Procedure section 473 . . .” (*Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196, 1205-1206.) Code of Civil Procedure section 473(b) states, in pertinent part:

² Effective January 1, 2020, former WCAB Rule 10507 is now 10605.

³ We note that lien claimant argues that its Objection to the NIT, which was filed on September 6, 2019, was timely. (Petition, *supra*, p. 2:1.) The basis for this assertion is unclear. We simply remind the parties of WCAB Rule 10421(b)(5)(iv). (Cal Code Regs., tit. 8, § 10421(b)(5)(iv).)

The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.

...

Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties.

(Code Civ. Proc., § 473(b).)

The burden of proof rests on the party with the affirmative of the issue. (Lab. Code, § 5705.) "All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence." (Lab. Code, § 3202.5.) Lien claimant thus holds the burden of proof to establish all elements necessary to establish its claim. (See *Torres v. AJC Sandblasting* (2012) 77 Cal.Comp.Cases 1113, 1117 [2012 Cal. Wrk. Comp. LEXIS 160] (Appeals Board en banc).)

Here, lien claimant seeks relief pursuant to Code of Civil Procedure section 473(b). Thus, lien claimant has the burden of proof of its alleged mistake, inadvertence, surprise, or neglect with a sworn affidavit. (See Code Civ. Proc., § 473(b).) Lien claimant failed to submit a sworn affidavit explaining why it failed to attend the August 1, 2019 lien conference. Thus, lien claimant failed to meet its burden of proof pursuant to Code Civil Procedure section 473(b).

Accordingly, we affirm the Order Dismissing Lien.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 26, 2019 Order Dismissing Lien is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 13, 2021

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

**DALILA LOPEZ
CIGA
PATRICO HERMANSON
COLLECTIVE RESOURCES**

SS/abs

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