

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

DALILA TUTUTI, *Applicant*

vs.

**BIG MERRYLUCK GG LLC; TECHNOLOGY INSURANCE COMPANY,
ADMINISTERED BY AMTRUST SAN DIEGO, *Defendants***

**Adjudication Numbers: ADJ11296374; ADJ11296239
San Bernardino District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration¹ in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Lien claimant PCT Medical Services (lien claimant) seeks reconsideration of the Order Dismissing Lien Claim or Lien Balance (Order Dismissing) issued on April 15, 2020, wherein the workers' compensation administrative law judge (WCJ) found that lien claimant failed to demonstrate good cause for its non-appearance at lien trial held on January 7, 2020.

Lien claimant contends its lien should be adjudicated on the merits, and that Code of Civil Procedure² section 473 allows the court to relieve lien claimant from a dismissal taken against it due to mistake, inadvertence, surprise or excusable neglect.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind the Order

¹ Commissioner Sweeney, who was a member of the panel that granted reconsideration to further study this matter, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

² All further statutory references are to the Code of Civil Procedure unless otherwise stated.

Dismissing, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

FACTS

Applicant has filed two Applications for Adjudication. In Case No. ADJ11296374, applicant claimed injury to her neck, back, hips, arms, shoulders, hands, wrists, waist, pelvis, legs, feet, head, headaches, sleep, stress, and psych, while employed as a sales representative by defendant Big Merryluck GG LLC on March 26, 2018. In Case No. ADJ11296239, applicant claimed injury to her neck, back, hips, arms, shoulders, hands, wrists, waist, pelvis, legs, feet, head, headaches, sleep, stress, and psych, while employed as a sales representative by defendant Big Merryluck GG LLC from March 26, 2017 to March 26, 2018. The parties settled both cases by Joint Compromise and Release, approved June 18, 2019. (Order Approving Compromise and Release, June 18, 2019.)

On October 4, 2019, PCT Medical Services Gilbert filed a lien for medical treatment expenses incurred by or on behalf of applicant, pursuant to Labor Code section 4600. (Notice and Request for Allowance of Lien, PCT Medical Services, October 4, 2019.)

On December 9, 2019, the parties requested a lien trial on unresolved liens, including that of PCT Medical Services.

On January 7, 2020, the parties proceeded to lien trial, at which time Ms. Airhana Hernandez ostensibly appeared on behalf of PCT Medical Services. However, Ms. Hernandez was unable to produce a Notice of Representation. The WCJ provided lien claimant's representative additional time in which to produce the required notice, but the lien representative was unable to provide the notice by the end of the morning's trial setting. The WCJ then issued a Notice of Intention to Dismiss Lien Claim or Lien Balance (NIT), which observed:

The above-named lien claimant failed to have a representative legally present. It is further asserted that although Airihana Hernandez was present purportedly on behalf of lien claimant, no compliant Notice of Representation per Title 8 CCR §10868, §10751 was filed at or before time of hearing, and thus lien claimant was deemed not to be represented and not to be present. When provided an opportunity to comply and submit a compliant Notice of Representation, Ms. Hernandez was unable to produce a compliant Notice of Representation by end of a.m. session. Also noted: no exhibits were on file in EAMS on behalf of Lien Claimant PCT Medical.

(Notice of Intention to Dismiss Lien Claim or Lien Balance, January 7, 2020.)

The WCJ ordered the matter taken off calendar. (Minutes of Hearing, January 7, 2020.)

Lien claimant filed an objection to the NIT on January 17, 2020, requesting discretionary relief pursuant to section 473(b) for mistake, inadvertence, surprise or excusable neglect. (Lien Claimant PCT Medical Services' Objection to Notice of Intention to Dismiss Lien Claim or Lien Balance, January 17, 2020, at p. 2:9.)

On April 15, 2020, the WCJ issued an Order Dismissing Lien Claim or Lien Balance, stating:

A Notice of Intention to Dismiss Lien Claim or Lien Balance in accordance with Rule 10868 & 10751 issued on 1-7-2020, and was served by the WCAB on 1-9-2020. Even though a timely objection dated 1-17-2020 was filed on 1-17-2020, this objection does not show good cause for non-appearance by lien claimant or their representative at the Lien Trial on 1-7-20. Rule 10880 unequivocally states that all lien claimants and all defendants must appear in person or by attorney or representative at all lien conferences and lien trials. Furthermore, no exhibits on behalf of PCT Medical were filed or available at the time of the Lien Trial. Rule 10868 further specifies the language and signature requirements to be included in the Notice of Representation. Although multiple notices were filed after the Lien Trial, they too do not contain the necessary requirements. Lien Claimant was provided time to cure this issue and was unable to do so.

(Order Dismissing Lien Claim or Lien Balance, April 15, 2020.)

The WCJ ordered the lien claim of PCT Medical Services dismissed with prejudice. (*Ibid.*)

Lien claimant's Petition for Reconsideration (Petition) notes that the several applicable Rules of Practice and Procedure were renumbered six days before lien trial, and renews its request for relief pursuant to section 473(b), averring lien claimant's representative's failure to have the appropriate notice of representation available at lien trial was due to mistake, inadvertence, surprise or excusable neglect. (Petition, at 3:24.) Accordingly, lien claimant requests that their lien be heard and adjudicated on the merits. (*Id.* at 6:27.)

The WCJ's Report observes that on the day of lien trial, lien claimant's representative was notified that no appropriate notice of representation had been filed, and the parties waited until the end of the morning trial setting, but lien claimant was unable to produce a Notice of Representation at trial. The WCJ further notes that while lien claimant did file a Notice of Representation later that same day, it did not list lien claimant representative Ms. Hernandez, and lien claimant failed to file its trial exhibits in a timely manner. (Report, at pp. 5-6.)

DISCUSSION

To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a “final” decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1), § 10940(a); § 10615(b) (eff. Jan. 1, 2020).) A petition for reconsideration of a final decision by a workers’ compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, § 10940(a) (eff. Jan. 1, 2020).) Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Section 5315 provides the Appeals Board with 60 days within which to confirm, adopt, modify or set aside the findings, order, decision or award of a workers’ compensation administrative law judge. (Lab. Code, § 5315.)

The Division of Workers’ Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).³ In light of the district offices’ closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.⁴ Here, the WCJ dismissed the lien claim on April 15, 2020, and lien claimant filed its Petition for Reconsideration on May 4, 2020. Therefore, our June 10, 2020 opinion granting reconsideration issued within the 60 day period.

Non-attorney representatives who appear on behalf of parties in workers’ compensation proceedings are required to file a valid notice of representation. WCAB Rule 10751, entitled “Appearances by Non-Attorney Representatives Not Identified on Notice of Representation,” provides:

(a) A non-attorney representative may appear on a party's behalf if identified on a notice of representation.

(b) A non-attorney representative who has not been identified on a notice of representation shall file a notice of appearance that includes the full legal name

³ The March 16, 2020 DWC Newslines may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-18.html>

⁴ The April 3, 2020 DWC Newslines regarding reopening the district offices for filing may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-29.html>.

of the represented party and the name, address and telephone number of the attorney or non-attorney representative and associated entity, if any.

WCAB Rule 10868, which specifies the requirements pertaining to a Notice of Representation involving lien claimants, provides as follows:

(a) Whenever any lien claimant obtains representation after a lien has been filed, or changes such representation, the lien claimant shall, within 5 days, file and serve a notice of representation in accordance with rules 10390, 10400, 10401 and 10402. If a copy of the notice of representation is not in the record at the time of the hearing, the lien claimant's representative shall lodge a copy at the hearing and shall personally serve a copy on all parties appearing. Unless a representative signs an initial lien document on behalf of a lien claimant, a notice of representation is required.

(b) In addition to the requirements of rules 10390, 10400 and 10401, the notice shall:

- (1) Include the caption, the case title (i.e., the name of the injured employee and the name of the defendant or primary defendant(s)) and the adjudication case number(s) to which the notice relates; and
- (2) Set forth the full legal name, mailing address and telephone number of the lien claimant.

(c) The notice shall be verified by a declaration signed by the lien claimant and the lien claimant's representative under penalty of perjury stating:

- (1) "I declare that the named initial or new representative has consented to represent the interests of the named lien claimant and that the named lien claimant has consented to this representation.";
- (2) "This representation began on _____, _____, 20____.
 - (A) "I am not aware of any other attorney or non-attorney who was previously representing the lien claimant."; or
 - (B) "I am aware that _____ [specify person or entity] was previously representing the lien claimant. This Notice of Representation supersedes any previous Notice of Representation. I hereby certify that I have notified the previous attorney or non-attorney representative in writing.";
- (3) "By signing below, the representative affirms that they are not disqualified from appearing under Labor Code section 4907, WCAB rule 10445 (Cal. Code Regs., tit. 8, § 10445) or by any other rule, order or decision of the Workers' Compensation Appeals Board, the State Bar of California, or any court."

(d) Any violation of this rule may give rise to monetary sanctions, attorney's fees and costs under Labor Code section 5813 and rule 10421.

Here, there is no dispute that Ms. Hernandez was unable to provide a valid Notice of Representation at the time of lien trial. Following the issuance of the court's Notice of Intention, and review of lien claimant's objection, the WCJ dismissed the lien with prejudice. (Order Dismissing Lien Claim or Lien Balance, April 15, 2020.) The Order Dismissing observes that "Rule 10880 unequivocally states that all lien claimants and all defendant must appear in person or by attorney or representative at all lien conference and lien trials," and that lien claimant's failure to comply with our Rules requiring a Notice of Representation resulted in a non-appearance by lien claimant at lien trial. (*Ibid.*)

Lien claimant's Petition seeks relief under section 473(b), which provides, in relevant part:

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. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken...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. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310.

(Code of Civ. Proc., § 473(b).)

Section 473 permits the trial court to relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. A motion seeking relief under section 473 is addressed to the sound discretion of the trial court; its decision will not be overturned on appeal absent a clear showing of abuse of discretion. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 [243 Cal. Rptr. 902]; *Elston v. City of Turlock* (1985) 38 Cal. 3d 227, 233 [211 Cal. Rptr. 416].) "That discretion, however, "is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal

principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.” (*Rivercourt Co. Ltd. v. Dyna-Tel, Inc.* (1996) 41 Cal.App.4th 1477, 1480 [49 Cal.Rptr.2d 279].)

The court of appeal confirmed that the section 473(b) may afford relief to other parties to workers’ compensation proceedings in *Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196 [57 Cal.Comp.Cases 149] (*Fox*). Therein, J. Dewitt Fox, M.D., a physician and lien claimant, sought relief from an order dismissing his lien claim for failure to appear at a WCAB hearing. (*Fox, supra*, at p. 1199.) After issuing a notice of intent to dismiss the lien (it is unclear whether Dr. Fox objected to the NIT), the WCJ dismissed the lien. Lien claimant sought reconsideration 43 days later, which the WCAB denied as untimely, noting that even were the petition timely, it would have denied the petition on the merits. (*Id.* at 1200.) Thereafter, Dr. Fox sought to set aside the dismissal of the lien citing, *inter alia*, section 473. In support of the section 473 assertion, Dr. Fox stated that his nonappearance was the result of intractable back pain, a herniated disc, and the departure of a key member of his staff. (*Ibid.*) Following denial of the petition by the WCAB, lien claimant sought relief with the court of appeal, which observed:

Board rule 10562 (Cal. Code Regs., tit. 8, ch. 4.5, § 10562) may give applicants some protection in case of failure to appear, but defendants in workers’ compensation cases have more clear-cut protection in Labor Code section 5506. That section provides that defaulting defendants may apply for relief “substantially in accordance with” the procedure outlined in Code of Civil Procedure section 473. There does not appear to be any specific statutory provision for relief from default for lien claimants. Fundamental fairness requires such provision, as does the workers' compensation system, which is governed by rules subject to liberal construction by the courts, “with the purpose of extending ... benefits for the protection of persons injured in the course of their employment.” (§ 3202.) It is obviously beneficial to industrially injured employees to have the rights of those providing them with professional services adequately observed and protected.

Given the lack of any express language in the Labor Code or Board’s rules providing relief to lien claimants, we hold that lien claimants may seek relief from the consequences of a failure to appear by utilizing a procedure substantially similar to Code of Civil Procedure section 473, until such time as the matter is more specifically addressed by statutory provision or Board rule. Neither the WCJ nor the Board questioned the availability of that procedure in the instant case. We conclude that Dr. Fox chose an appropriate and timely method for seeking relief from the dismissal for his failure to appear. We note

also that the California Supreme Court, in *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 [243 Cal.Rptr. 902, 749 P.2d 339], has reaffirmed some basic principles relating to relief from default. “It is the policy of the law to favor, whenever possible, a hearing on the merits. Appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand. [Citation.] Therefore, when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default.” (*Fox, supra*, at pp. 1205-1206.)

Here, as in *Fox, supra*, lien claimant’s failure to appear at a hearing where its presence was mandated resulted in the dismissal of the underlying lien claim. And here, as in *Fox*, lien claimant seeks relief under section 473(b), averring mistake and excusable neglect in its failure to have a valid notice of representation available as a prerequisite to the appearance of a non-attorney representative at lien trial. (Petition, at 4:27.)

We observe that while WCAB Rule 10751 requires the non-attorney representative making an appearance to provide a valid notice of representation, it does not specify a remedy for failure of compliance, and it does not mandate dismissal of the underlying lien claim. (Cal. Code Regs., tit. 8, § 10751.) Similarly, WCAB Rule 10868 specifies that while violation of the rule may give rise to monetary sanctions, attorney’s fees, and costs under Labor Code section 5813 and rule 10421, the rule does not require dismissal of the lien claim itself. (Cal. Code Regs., tit. 8, § 10868(d).)

We also observe that following notice of the failure to provide the required notice of representation on the day of trial, lien claimant attempted to remedy the deficiency by filing a Notice of Representation in EAMS later that same day. (Report, at p. 4.) We acknowledge that the amended notice *still* did not name Ms. Hernandez as an authorized representative. (*Ibid.*) However, given that dismissal of the lien claim is not a mandated remedy under our Rules, and lien claimant’s prompt, albeit imperfect, attempt to remedy the deficiency, we are persuaded that the lien claim should be heard and adjudicated on the merits.

However, we also observe that our Rule 10868 specifically provides for the consideration of monetary and other sanctions, and that the WCJ is vested with wide latitude in the consideration of whether a party has engaged in bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, §10421.) We further observe that pursuant to Rule 10421(b)(4), a failure to comply with the Workers’ Compensation Appeals Board’s Rules of Practice and Procedure may be subject to sanctions “unless that failure

results from mistake, inadvertence, surprise or excusable neglect.” (Cal. Code Regs., tit. 8, § 10421(b)(4).) We defer the consideration of these issues to the sound discretion of the WCJ.

In summary, we are persuaded that lien claimant has taken reasonable action to remedy the procedural deficiencies in its trial appearance, and that lien claimant promptly sought relief from its dismissal for failure to comply with our Rules, and that the public policy in favor of disposition on the merits warrants the rescission of the dismissal of the lien claim.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 15, 2020 Order Dismissing Lien Claim or Lien Balance is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 1, 2023

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

**PCT MEDICAL SERVICES
PINNACLE LIEN
GILSON DAUB
DALILA TUTUTI
BLOMBERG BERENSON & GARRETT**

SAR/abs

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