

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

RUTH YBARRA, *Applicant*

vs.

**MACY'S INC.;
SEDGWICK, CMS, *Defendants***

**Adjudication Number: ADJ8782333
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION FOR
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 deny reconsideration.

The WCJ's report, moreover, cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313. (*City of San Diego v. Workers' Comp. Appeals Bd. (Rutherford)* (1989) 54 Cal.Comp.Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 1026 (writ den.).)

Defendant filed a May 27, 2021 proof of service (EAMS Doc #36866230, also exhibit C to defendant's Opposition to Lien Claimants' Objection to Notice of Intention to Dismiss Lien Claim) showing service of the May 19, 2021 Minutes of Hearing and the May 24, 2021 Notice of Intent to Dismiss Lien on petitioner at its address as listed on the Official Address Record.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 13, 2021

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

**GOLDEN STATE SPORTS INJURY
TESTAN LAW**

PAG/abs

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**

I
INTRODUCTION

Lien claimant, Golden State Sports Injury Northridge ("Petitioner") filed a timely verified Petition for Reconsideration on July 12, 2021, of the June 14, 2021, Order Dismissing Lien of Golden State Sports Injury issued by the undersigned on the following grounds: 1) WCJ acted without or in excess of her powers; 2) The evidence does not justify the Finding of Fact; 3) The Findings of Fact do not support the Order; and 4) The Order fails to set forth clearly and concisely the reason for the decision and is vague and ambiguous.

II
STATEMENT OF FACTS

This case involves a cumulative trauma claim in which Applicant claimed to have sustained injury to her wrist, hand, upper extremity, knee, back, neck, and multiple. Applicant's claim was settled by way of Compromise & Release and Order approving on September 26, 2019. (OACR, EAMS Doc. Id. #71247142.) Petitioner filed a lien claim on July 26, 2013, for \$2,359.05. (Notice & Request for Allowance of Lien, EAMS Doc. Id. #10531598.) On February 6, 2020, Petitioner filed a Declaration of Readiness to Proceed ("DOR") on its lien. (DOR, EAMS Doc. Id. #31554549.) A lien conference was heard before Judge Stringfellow on March 30, 2021, and Rick Alvarez, represented Petitioner. (MOH, EAMS Doc. Id. #74022816.) The lien conference was continued to May 19, 2021, to allow time for bill review. *Id.*

On April 1, 2021, a Notice of Hearing ("NOH") was sent to Petitioner and other parties on the Official Address Record electronically through EAMS. Additionally on April 1, 2021, Defendant served via proof of service ("POS") the MOH from March 30, 2021, and the NOH dated April 1, 2021, on Petitioner. (POS, EAMS Doc. Id. #36156591.)

A lien conference was set before this Judge on May 19, 2021. Defendant was present, but there was no appearance by Petitioner. (MOH 5/19/2021, EAMS Doc. Id. #74209584.) A Notice of Intention to Dismiss ("NOI") the lien was issued by this Judge on May 24, 2021, and served by Defendant with POS on May 27, 2021. (POS, EAMS Doc. Id. #36866230.) In said NOI, Petitioner was to show good cause *within ten* (10) days after service plus additional mailing time pursuant to Title 8 Cal. Code Regs. §10605, for failure to appear. On June 14, 2021, the undersigned issued an Order dismissing the lien of Petitioner. (Order Dismissing Lien, EAMS Doc. Id. #74323831.)

Petitioner filed an untimely response to the NOI received by the court on June 14, 2021¹ (Objection to NOI, EAMS Doc. Id. #74336811.) In its response, Petitioner acknowledged its presence at the lien conference on March 30, 2021, and its knowledge of the scheduling of a

¹ Petitioner's untimely objection was received via U.S. Mail by the court on June 14, 2021, and uploaded into EAMS for review after the Order of Dismissal had issued.

continued lien conference. *Id.* Petitioner further denied receipt of notice of the hearing from the WCAB or Defendant, seeking relief under "Section 473".

III

DISCUSSION

If a lien claimant fails to appear at a lien conference, the WCJ may issue a notice of intention to dismiss consistent with CCR §10888. A party that fails to attend a hearing must present good cause for the failure to appear. *Paula Insurance Co. v. WCAB*, (1983) 48 CCC 888 (writ denied). The term "good cause" is not defined in the statute or the regulations, and is up to the WCJ to determine. Good cause does not exist unless there is a legitimate reason or excuse such as illness or accident. *Lechner v. Solar Turbines, Inc.*, (1992) 57 CCC 366,372 (appeals board en banc).

Here, Petitioner has failed to show good cause for the non-appearance at the lien conference on May 19, 2021. Petitioner's alleged lack of knowledge of the hearing holds no merit for various reasons. First, Petitioner was the moving party for the lien conference. Next, Petitioner acknowledged being present at the hearing on March 30, 2021, and knew that it was to be continued. Additionally, NOH was issued by the WCAB.² Finally, Defendant also served with POS a dated and verified declaration identifying that the MOH and NOH was served upon Petitioner. Defendant's POS creates a presumption of receipt and pursuant to California Evidence Code §641, a letter correctly addressed and properly mailed is presumed to have been received. It is highly unlikely that Petitioner would not have received any of the notices mailed by the Court and Defendant.

Furthermore, even arguendo, both notices were not received; a party's failure to receive notice of a hearing will not excuse a failure to attend if a party was present when the hearing was scheduled. *Benschine v. National Lift Fleet Leasing & Sales*, 2014 Cal. Wrk. Comp. P.D. LEXIS 312. Here as in the *Benschine* case, Mr. Alvarez was present for the lien conference on March 30, 2021, and had actual knowledge of the continued hearing. As such, Petitioner was in a position to know and/or reasonably could have ascertained the continued conference date.

With respect to Petitioner's contention that excusable neglect should prevent the dismissal of its lien as prescribed in Labor Code §5506 in a procedural manner similar to Code Civ. Proc. § 473, it should be noted that "when a lien claimant seeks relief utilizing this procedure, the WCAB's authority to grant such relief is *permissive*, not mandatory." [*Benschine*] *supra* at 9. As put in the *Benschine* case, "this procedure cannot be used indiscriminately as a 'perfect escape hatch' to undo dismissal of a lien." *Id.* Based on the facts outlined *supra*, it is the undersigned's position that Petitioner's failure to appear constitutes an error within its control and falls below the standard of reasonableness to constitute excusable neglect. *See Davis v. Kay*, (1973) 34 Cal. App. 3d 680 (finding that defendant's failure to calendar a hearing on the plaintiff's motion for summary judgment was deemed inexcusably neglectful). Moreover, even after its failure to appear, Petitioner did not timely respond to the court's NOI.

² CCR §10628 and CCR § 10629 establish the rules for service by the appeals board, one of which is electronically through EAMS. It is presumed that the appeals board's service has been duly performed and that the notice was received in the course of regular mail. *Idaho Maryland Mines Corp. v. IAC (Hattox)* (1959) 24 CCC 238, 239.

With respect to Petitioner's argument that the WCJ failed to clearly and concisely state the reason for the decision in as much as its objection was not acknowledged, the undersigned points out that said objection was received untimely and after issuance of the Order dismissing the case. Petitioner attempts to place form over substance. The facts remain that Petitioner failed to appear at a duly noticed hearing, objected untimely to the NOI, and has not set forth good cause for its failure to appear.

To allow Petitioner to continue to prosecute its lien wherein the only reason given for failure to appear, is a lack of receipt of two duly served notices of hearing and notwithstanding having been present at the first conference and having knowledge of its continuance, would open a floodgate of Petitions to vacate dismissals and would create an undue burden on the limited assets of the Appeals Board.

IV
RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

DATE: 7/16/2021

Josephine Broussard
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE