

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

EDUARDO CALDERON, *Applicant*

vs.

BUILDING MATERIAL HOLDING CORPORATIONS, ESIS, *Defendants*

**Adjudication Number: ADJ8462608
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to further study the factual and legal issues. This is our decision after reconsideration. Lien claimant, Dental Injury Center, seeks reconsideration of the December 15, 2021 Order wherein the workers' compensation administrative law judge (WCJ) dismissed its lien claim for non-appearance at lien conference/trial.

Lien claimant contends that the lien should not have been dismissed because lien claimant's representative requested permission to appear virtually and was unable to appear at the exact time of the November 9, 2021 lien trial because of a fall/accident.

We have reviewed defendant's answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have viewed the record in this matter. For the reasons discussed below, we will grant reconsideration, rescind the December 15, 2021 Order, and return this matter to the trial level for further proceedings and a new decision.

On July 22, 2021, a lien trial was held with both lien claimant and defendant appearing virtually. The trial was not completed and was continued to November 9, 2021. On September 1, 2021, the Division of Workers' Compensation announced via Newsline that beginning on October 1, 2021, all hearings would be held in person regardless of prior notice of virtual hearings. On November 9, 2021, defendant appeared at the continued trial in person. Lien claimant's representative Leo Howry called in to the court conference line. The WCJ, after reviewing the file and finding no request for telephonic appearance, informed the lien claimant that, unless he

appeared in person, he would be considered to have not appeared at the trial. (Report, p. 3.) Thereafter, defendant filed a request for dismissal for non-appearance. Lien claimant objected and attached a “joint request” for virtual appearance that was signed by lien claimant but was not signed by defendant. Lien claimant also objected on the basis that a different hearing representative than Leo Howry had been granted an Americans with Disabilities Act (ADA) accommodation that allowed him to make virtual appearances to avoid long distance driving. After considering lien claimant’s objection the WCJ issued the December 15, 2021 Order that is the subject of lien claimant’s petition for reconsideration.

In the report, the WCJ explained that he dismissed the lien because lien claimant failed to request permission to make a telephonic appearance. (Report, p. 4.) However, in evaluating lien claimant’s objection, it is unclear whether lien claimant attempted to submit a request to appear virtually either prior to or during the hearing. Furthermore, the WCJ did not create a record of any request for telephonic appearance during the hearing and did not document reasons for refusing to allow the telephonic appearance other than lien claimant’s failure to request the ability to appear by telephone prior to the hearing. Therefore, we will rescind the WCJ’s dismissal and return the matter to the trial level for the WCJ to either complete the lien trial or hold a hearing on whether lien claimant should be allowed to appear telephonically.

All parties in workers' compensation proceedings retain their fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157–158, [65 Cal.Comp.Cases 805].) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, [The] commission, ... must find facts and declare and enforce rights and liabilities,—in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law. (Id. at 577.)

Due process guarantees all parties the right to notice of hearing and a fair hearing. (*Rucker, supra*, at 157–158.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal. Comp. Cases 584]; *Rucker, supra*, at 157–158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4 703, 710 [57 Cal.Comp.Cases 230].) Section 5506 authorizes the Appeals Board to

relieve a defendant from default or dismissal due to mistake, inadvertence, surprise or excusable neglect in accordance with Code of Civil Procedure section 473. That relief has been extended to all parties, including lien claimants. (*Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal. App. 4th 1196 [57 Cal.Comp.Cases 149].) Code of Civil Procedure section 473(b) states, in pertinent 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.

In cases where a lien claimant argues that it is entitled to 473 relief, the lien claimant is entitled to a hearing on whether the dismissal should be set aside due to mistake, inadvertence, surprise or excusable neglect. (*Rucker, supra*, at 157–158.) This is consistent with the principle expressed in *Fox* that “it is the policy of the law to favor, whenever possible, a hearing on the merits.” (*Fox, supra*, 4 Cal.App.4th at 1205, citing *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.)

In determining whether a person’s mistake or inadvertence is excusable, “the court inquires whether ‘a reasonably prudent person under the same or similar circumstances might have made the same error.’” (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal. 4th 249, 258 citing *Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276.) It is also imperative that the party seeking relief pursuant to Code of Civil Procedure section 473(b) act with diligence in seeking relief as soon as the mistake is discovered. (*Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal. 2d 523.)

Finally, we note that, to the extent that lien claimant has engaged in bad faith tactics, they would be subject to a sanction. (Lab. Code, §5813, Cal.Code.Reg., tit. 8, §10421.) A sanction may be appropriate, for example, where a party intentionally files a pleading that includes “substantially false statements of fact” or “contains statements of fact that are substantially misleading.” (Cal.Code.Reg., tit. 8, §10421(b)(5)(A)(i) and (ii).)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 15, 2021 Order is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings and a new decision consistent with the discussion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 26, 2022

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

**COLLECTIVE RESOURCE
LAW OFFICE OF PAUL DOUGLAS**

MWH/oo

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