

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 Case No. ADJ4281782 (OXN 0129881)

5 **KATHY CAPONE,**

6 *Applicant,*

7 vs.

8 **FIRST BANK & TRUST; CHUBB GROUP,**

9 *Defendants.*

10  
11 **ORDER DENYING**  
12 **RECONSIDERATION**

13 We have considered the allegations of the Petition for Reconsideration and the contents of the  
14 report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on  
15 our review of the record, and for the reasons stated in said report which we adopt and incorporate, we  
16 will deny reconsideration.

17 We observe that lien claimant cured the verification defect to its petition.

18 The WCJ may consider sanctions for lien claimant's failure to appear.

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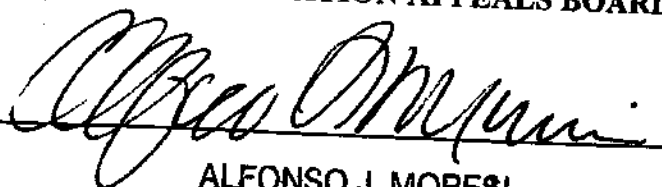
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1 For the foregoing reasons,

2 **IT IS ORDERED** that said Petition for Reconsideration be, and it hereby is, **DENIED**.

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5 **WORKERS' COMPENSATION APPEALS BOARD**

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8 **ALFONSO J. MORESI**

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11 **I CONCUR,**

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13 **FRANK M. BRASS**

14  **DEPUTY**  
15 **CAROL S. BERMAN**



16  
17 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

18 **JUN 07 2012**

19  
20 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**  
21 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

22 **HEPPS PHARMACY**  
23 **FLOYD SKEREN**

24 

25  
26 **abs**

27 **CAPONE, KATHY**

CASE ID: ADJ4281782  
(A1488EDB-28E3-4AC5-81E5-E7438F5EEC8E)

STATE OF CALIFORNIA  
Division of Workers' Compensation  
Workers' Compensation Appeals Board

CASE NUMBER: ADJ4281782

KATHY CAPONE

-vs.-

FIRST BANK & TRUST;  
CHUBB GROUP LOS  
ANGELES;

*Hepps Pharmacy, lien claimant,  
and Real Party in Interest.*

WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE: Bonita A. Edelberg

DATE: April 19, 2012

**REPORT AND RECOMMENDATION**  
**ON LIEN CLAIMANT'S PETITION FOR RECONSIDERATION**

**I**

**INTRODUCTION AND FACTS**

Pursuant to the Electronic Adjudication Management System, the matter was set for lien conference on January 31, 2012. Lien claimant, Hepps Pharmacy, was a lien claimant of record at that time and was served with notice of the hearing by the Workers' Compensation Appeals Board. Hepps Pharmacy failed to appear at the conference and a ten (10) day Notice of Intent to Dismiss the lien under Title 8, California Code of Regulations 10241 was issued by the undersigned.

The Notice of Intent was served by defendant under a proof of service dated February 2, 2012. Objection was due on or before February 17, 2012 but was not filed until February 27, 2012 per the Electronic Adjudication Management System.

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{A14E8EDB-28E3-4AC5-81E5-E7438F5EEC8E}

An Order Dismissing the lien was served on March 22, 2012 based on the fact that the objection was not timely and based on the determination that the objection did not state good cause.

It is from this Order that lien claimant, Hepps Pharmacy, hereinafter petitioner, has filed a timely but unverified Petition for Reconsideration.

## II

### PETITIONERS' CONTENTIONS

In addition to the statutory contentions, petitioner argues that:

1. it did not receive a call from the defendant on the day of the status conference;
2. the failure to appear was nothing more than inadvertence;
3. it is entitled to a hearing on the merits of its claim.

## III

### DISCUSSION AND CONCLUSIONS

It is the opinion of the undersigned that none of the above contentions are supported by the facts of this case or by applicable law. It is also noted that the Petition for Reconsideration is based on the same self-serving interpretation of the law as was the untimely objection. Further, the undersigned recently issued a Report and Recommendation on Reconsideration in response to a Petition for Reconsideration filed by the instant petitioner on a similar fact pattern raising the same contentions as set forth above and using the same boiler plate "Points and Authorities" most of which are, in the opinion of the undersigned, without sufficient relevance to the facts of the case to be noteworthy or helpful. (INT144666).

While most of the facts set forth by petitioner are technically correct, they have little relevancy to the pertinent facts that supported the Notice of Intention to Dismiss the lien and the

subsequent Order to Dismiss. Nevertheless, there is no record in the Electronic Adjudication Management System of a hearing on November 8, 2011

Petitioner makes no excuse for the fact that it failed to appear but again rather cavalierly dismisses its failure to appear as nothing more than inadvertence. The undersigned disagrees and is of the opinion that an appearance and settlement authority is the threshold obligation of a lien claimant who claims entitlement to legal process. Alternatively, the undersigned may infer that petitioner is requesting relief under California Code of Civil Procedure section 473 which would permit the undersigned to relieve petitioner from the Order of Dismissal because of the claimed inadvertence. The undersigned does not grant this request because there is no showing of the nature of the inadvertence. Rather, the undersigned is of the opinion that petitioner's failures to appear are a pattern. Should the Workers Compensation Appeals Board decide to grant relief, the undersigned would impose the penalty of \$1,000.00 under California Code of Civil Procedure section 473 (c).

Pursuant to Title 8, California Code of Regulations 10210 (y), petitioner was a "party" of record at the time of the conference.

Section 10562, cited by petitioner, states in pertinent part that where a lien claimant is served with notice of a conference and fails to appear in person or by attorney/representative and fails to have a person with settlement authority available by phone, the Workers' Compensation Administrative Law Judge may, among other choices, issue a Notice of Indentation to Dismiss. (emphasis added). The undersigned is of the opinion that this sentence, written in the conjunctive, requires both an appearance and available settlement authority by phone as with any other party.

Title 8, California Code of Regulations 10240, also cited by petitioner, sets forth the conditions for required appearances. Subsection (3) states that lien claimants not defined as a party under 10201 (y)(3) with liens less than \$25,000.00 shall be available by telephone and shall notify

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defendant of the telephone number at which lien claimant may be reached. (emphasis added). The undersigned is of the opinion that petitioner herein was a defined party at the time of the lien conference and does not come within the exception of subsection (3). Even if it can be concluded that petitioner does come within this exception, petitioner has made no showing that it notified defendant of its intention not to appear and/or provided the requisite telephone number.

There is nothing in Title 8, California Code of Regulations which permits a lien claimant not to appear or mandates a call from the defendant.

Petitioner does not claim that it did not receive notice of the conference. It simply did not appear and now argues that it was defendant's duty to contact them. Further, petitioner makes no excuse for the untimely filing of its objection. Petitioner states, as usual, that it appears at over 60 calendared board appearances per month. Petitioner does not appear to keep track of how many it misses due to "nothing more than inadvertence".

It appears correct that after the Notice of Intention to Dismiss the lien issued, petitioner appeared at a status conference on March 13, 2012 and participated in preparation of the Pre Trial Conference Statement raising the Notice of Intention to Dismiss the lien as an issue for trial. This conference did not take place before the undersigned. Pursuant to the Electronic Adjudication Management System, the liens are now set for trial on May 8, 2012 before another Workers' Compensation Administration Law Judge. Nevertheless, the undersigned is of the opinion that the Notice of Intention to Dismiss the lien, listed as an issue by petitioner in the Pre Trial Conference Statement, is not a triable issue. Since the undersigned issued said Notice of Intention to Dismiss the lien and subsequent Order, petitioner's remedy is the filing of the instant Petition for Reconsideration.

WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE

The undersigned agrees that the law favors resolution of disputes on the merits of the case. The law also favors and demands diligent and timely prosecution of the claim by the party taking the affirmative position. This burden is on petitioner herein. Due process was afforded petitioner. Petitioner failed to appear after proper notice and failed to file a timely objection. The claim of inadvertence in connection with two different appearances on two different cases on two different dates before the undersigned along with two untimely objections and two unverified Petitions for Reconsideration does not lend credibility or provide justification for either failure.

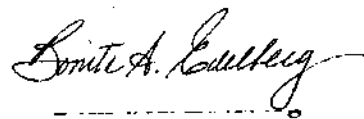
The undersigned is of the opinion that the "phalanx of authorities" (Petition for Reconsideration, page 18) referred to by petitioner, word for word in both cases, is so without relevancy to either of the cases and so clearly boilerplate that it has no value and no purpose but to needlessly increase litigation costs and is an abuse of process to support a meritless and frivolous position. One does not need to be anything more than a "pedestrian" reader to understand that sanctions are intended to have a chilling effect on inappropriate behavior, frivolous actions and/or bad faith tactics under Labor Code Section 5813 and Title 8, California Code of Regulations, 10561. A party armed with relevant legal arguments supported by correct and relevant facts need have no concern about any chilling effect on rightful entitlements.

IV.

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the Petition for Reconsideration be DENIED and that sanctions be imposed.

DATE: April 19, 2012

  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE