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

**STEPHANIE NEAL,**

*Applicant,*

vs.

**LOWE'S';  
SEDGWICK 14450 LONG BEACH,,**

*Defendants.*

Case Nos. **ADJ1571027 (LAO 0858249)**  
**ADJ2009911 (LAO 0858250)**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

Lien claimant, Dr. Darrell H. Burstein, M.D. ("petitioner") seeks reconsideration of the Order Dismissing Lien of August 24, 2011, in which the workers' compensation judge (WCJ) dismissed petitioner's lien. The Order was based on the WCJ's statements that petitioner did not address his failure to appear at multiple other conferences before August 2, 2011, that defendant served a Notice of Intent (NIT) to dismiss petitioner's lien on August 5, 2011, that petitioner filed a timely objection on August 12, 2011 addressing only his failure to appear at the duly noticed conference of August 2, 2011, and that petitioner's objection, based on clerical error, is not a good faith objection.

Petitioner contends, in substance, that he should be granted relief from default under California Code of Civil Procedure section 473, that his failure to appear was not intentional, and that he has the right to be heard pursuant to WCAB Rule 10866. (Cal. Code Regs., tit. 8, § 10866, WCAB Rules of Practice and Procedure.)

Defendant filed an answer.

This case involves an applicant's claim of internal injury and other body parts. Petitioner alleges that he was applicant's Qualified Medical Evaluator (QME), issuing a medical-legal report on August 19, 2005 as well as supplemental reports at the request of applicant's attorney. Defendant alleges that despite its denial of applicant's claim, petitioner "chose to treat applicant anyways." In any event, applicant's case-in-chief was resolved by Order Approving Compromise and Release (OACR) on March

1 23, 2009. Petitioner was a lien claimant of record at the time of the OACR, and he was listed on the  
2 Affidavit of Resolution of Liens attached to the settlement documents.

3 A Lien Conference took place at the Los Angeles District Office on August 13, 2009, and  
4 petitioner made no appearance at that time, though the Pre-Trial Conference Statement included him as a  
5 lien claimant of record. Thereafter the matter was set for trial on September 22, 2009, and petitioner  
6 again failed to appear. The matter was taken off calendar. After a Declaration of Readiness to Proceed  
7 (DOR) was filed in August 2010, the matter returned to hearing at the Oxnard District Office on August  
8 2, 2011. Petitioner again failed to appear at that time. The WCJ granted a request by defendant to issue  
9 a NIT to dismiss petitioner's lien on August 2, 2011. The NIT listed June 22, 2009, August 13, 2009,  
10 September 22, 2009 and August 2, 2011 as the various hearings at which petitioner failed to appear.  
11 Petitioner concedes that he received the NIT of August 2, 2011. Petitioner filed a timely objection based  
12 on clerical error, but petitioner did not explain his failures to appear at the various hearings mentioned  
13 above. The WCJ found that petitioner's objection did not state good cause, and on August 24, 2011 the  
14 WCJ issued the Order of Dismissal disputed by petitioner herein.

15 Based on our review of the record and applicable law, we agree that the WCJ properly dismissed  
16 petitioner's lien. Therefore, we will deny Dr. Burstein's Petition for Reconsideration.

17 Petitioner became a party to the instant proceedings after the OACR issued on March 23, 2009.  
18 (Cal. Code Regs., tit. 8, § 10210(y), Rules of the Court Administrator; Cal. Code Regs., tit. 8, §  
19 10301(x), WCAB Rules of Practice and Procedure.) Therefore, petitioner was required to appear, or  
20 have a representative appear, at all MSCs and lien conferences. (Cal. Code Regs., tit. 8, § 10240(b),  
21 Rules of the Court Administrator.)

22 In his petition for reconsideration, as well as in his objection to the August 2, 2011 NIT,  
23 petitioner alleges that he had good cause not to appear at the August 2, 2011 hearing. Even if we were to  
24 accept that allegation at face value, we note that the August 2, 2011 NIT stated that petitioner's lien was  
25 being dismissed because of his failure to also appear at other previous hearings, including the hearings of  
26 June 22, 2009, August 13, 2009, and September 22, 2009. However, petitioner has not offered any good  
27 cause for those multiple failures to appear. Petitioner's contention that he has the right to notice and

1 opportunity to be heard under WCAB Rule 10886 is unpersuasive, because he had notice and opportunity  
2 to be heard on several prior occasions but failed to appear, without explanation.

3 Finally, we are not persuaded by petitioner's reliance on *Fox v. Workers' Comp. Appeals Bd.*  
4 (1992) 4 Cal.App.4th 1196 [57 Cal.Comp.Cases 149]. In that case, the Court of Appeal held that lien  
5 claimants may seek relief from the consequences of a failure to appear by utilizing a procedure  
6 substantially similar to Code of Civil Procedure section 473. Subdivision (b) of the statute provides, in  
7 relevant part, that "[t]he court *may*, upon any terms as may be just, relieve a party or his or her legal  
8 representative from a judgment, dismissal, order, or other proceeding taken against him or her through  
9 his or her mistake, inadvertence, surprise, or excusable neglect." (Emphasis added.) Thus, when a lien  
10 claimant seeks relief utilizing a procedure substantially similar to Code of Civil Procedure section 473,  
11 the Board's authority to grant such relief is permissive, not mandatory.

12 In this case, we are not persuaded that petitioner has made a valid showing of mistake,  
13 inadvertence, surprise, or excusable neglect. As mentioned above, petitioner offered no specific excuses  
14 or explanations whatsoever for his failure to appear at several prior hearings. Furthermore, though  
15 petitioner claims that financial hardship has made it difficult for him to retain qualified staff to properly  
16 calendar hearings, he also alleges that "there was always a lien representative with settlement authority  
17 immediately available by telephone on all the dates mentioned on the Notice of Intent to Dismiss."  
18 These allegations fail to persuade us because, if petitioner had sufficient staff standing by to deal with his  
19 lien on the dates and times of the various hearings noted above, the staff must have been aware of those  
20 hearings, i.e., they must have been calendared within petitioner's office. Thus, petitioner's allegation  
21 that he didn't have sufficient staff to properly calendar WCAB hearings is unconvincing. It also appears  
22 that petitioner had sufficient staff, but they stayed in the office instead of personally appearing at the  
23 hearings, as required by the rules of the Court Administrator and by the WCAB's Rules of Practice and  
24 Procedure.

25 For the foregoing reasons,

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1 IT IS ORDERED, that the Petition for Reconsideration filed on behalf of lien claimant, Dr.  
2 Burstein, is DENIED.

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4 WORKERS' COMPENSATION APPEALS BOARD

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7 I CONCUR,

*Susan V Hamilton* DEPUTY  
SUSAN V. HAMILTON

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10 *Alfonso J. Moresi*  
ALFONSO J. MORESI

11  
12 *Neil P. Sullivan* DEPUTY  
13 NEIL P. SULLIVAN



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15 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

16 NOV 02 2011

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

19 WAI & CONNOR  
20 DARRELL BURSTEIN, M. D.

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22 JTL/ebc

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24 *[Handwritten signature]*  
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