

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

JOSE ANTONIO HERNANDEZ, *Applicant*

vs.

**TECHNICON CONSTRUCTION COMPANY; BENCHMARK INSURANCE
COMPANY, administered by BENCHMARK ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ14413905
Oakland District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Joyce Altman Interpreters, Inc., through its representative Chris Alcalá (cost petitioner), seeks reconsideration of the Minute Order issued during a hearing on September 21, 2023, wherein the workers' compensation administrative law judge (WCJ): (1) granted defendant's motion to dismiss cost petitioner's Petition for Sanctions and Costs, and (2) indicated an intent to sanction Mr. Alcalá for failure to appear at trial via Lifesize video.

Cost petitioner contends that Mr. Alcalá attempted to join the hearing via Lifesize but that he was unsuccessful in his efforts. Cost petitioner argues that it was therefore denied due process, as it was denied the opportunities to: (1) be heard on the merits of its Petition for Sanctions and Costs; (2) object to any sanctions against Mr. Alcalá for his alleged failure to appear; and (3) object to WCJ Lilla J. Szelenyi as the assigned trial judge.

We have not received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report). In her Report, the WCJ recommended that reconsideration of her decision to dismiss cost petitioner's Petition for Sanctions and Costs be denied. The WCJ also recommended that the matter be returned to the trial level for a hearing before another WCJ on potential sanctions against Mr. Alcalá.

We have considered the allegations of the Petition for Reconsideration and the contents of the WCJ's Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the WCJ's decision, and return this matter to a new WCJ for further proceedings. This is not a final decision on the merits of any issues raised in the Petition for Reconsideration and any aggrieved person may timely seek reconsideration of a new decision by the WCJ.

FACTS

Cost petitioner provided interpretation services in the form of translation of a Compromise and Release on October 28, 2021. According to cost petitioner, multiple invoices for its translation services were sent to defendant in November 2021. (Petition, p. 2.) On May 9, 2022, cost petitioner filed a Petition for Costs to recover the fees for its interpretation services in the amount of \$250.00. On May 13, 2022, WCJ Szelenyi issued an Order for Interpreting Costs, ordering defendant to pay cost petitioner \$250.00 for its interpreting services pursuant to Labor Code section 5811,¹ which defendant paid.

On May 17, 2022, cost petitioner filed a section 5813 Petition for Sanctions and Costs, alleging bad faith tactics by defendant for failing to pay the interpretation services fees after receiving the invoices in November 2021. In a Declaration of Readiness to Proceed filed on June 10, 2022, cost petitioner stated: "Received payment from defendants, but because our office is seeking additional costs, it was applied as a partial payment and it was not considered full and final...Cost petitioner requests hearing on issue of costs & sanctions pursuant to 5813." (Declaration of Readiness to Proceed, June 10, 2022, p. 7.) On July 5, 2022, cost petitioner designated Mr. Alcalá as its non-attorney representative in the matter. (Notice of Representation, July 5, 2022.)

On September 21, 2023, trial was held on cost petitioner's Petition for Sanctions and Costs. (MOH, September 21, 2023.) During trial, the WCJ stated as follows:

LET THE MINUTES REFLECT that present today is defense counsel, Clara Vaquero. Missing is the hearing representative, Chris Alcalá, who is supposed to be appearing for cost petitioner, Joyce Altman.

Earlier this morning, at 8:30 a.m., we had some discussions that Mr. Alcalá demanded that we go on the record right away. I asked him to send me an e-mail

¹ Unless otherwise noted, all further statutory references are to the Labor Code.

so that I could send him a link to Lifesize. The e-mail was sent to him and he was told to appear by 9:00 a.m. this morning. Mr. Alcalá is not present.

Attorney for defendants made a motion for dismissal for the petition for cost. The petition for cost is hereby dismissed for cost petitioners' failure to appear. Notice of intent to sanction Mr. Alcalá. Mr. Alcalá had filed some questionable documents in this case, and he also failed to appear for today's hearing once he was advised to login through Lifesize Cloud.

It is my intent to sanction Mr. Alcalá the sum of \$2,000. This matter will be set for sanction trial before myself. Notice will be provided, unless Mr. Alcalá provides a reasonable explanation as to why he should not be sanctioned. Matter is taken off calendar.

(MOH, September 21, 2023, p. 2.)

Cost petitioner filed a timely petition for reconsideration of the WCJ's Minute Order, alleging various due process violations.

DISCUSSION

1. *Order dismissing cost petitioner's petition for sanctions and costs*

Cost petitioner first contends that its due process rights were violated by the order dismissing its Petition for Sanctions and Costs. Cost petitioner contends that it was not provided the opportunity to be heard on the issue and requests that the matter be returned to the trial level so that its petition may be tried on the merits.

Parties to a workers' compensation proceeding retain the 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].) The essence of due process is notice and the opportunity to be heard. (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986].) In *Carstens v. Pillsbury* (1916) 172 Cal. 572, the Supreme Court of California observed "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 p. 577.) 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. (Gangwish)* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

As relevant in this case, the principles of due process require the issuance of a notice of intent (NIT) to dismiss a petition as a condition precedent to dismissal, thereby affording the interested party or parties an opportunity to be heard. (*Fortich v. Workers' Comp. Appeals Bd. (Fortich)* (1991) 233 Cal.App.3d 1449, 1452-1453 [56 Cal.Comp.Cases 537].) The Appeals Board has adopted various rules governing notices of intent that should be followed by WCJs. First, WCAB Rule 10755 provides:

Where a required party, after notice, fails to appear at a mandatory settlement conference in the case in chief:

(a) If good cause is shown for failure to appear, the workers' compensation judge may take the case off calendar or may continue the case to a date certain.

(b) If no good cause is shown for failure to appear, the workers' compensation judge may issue a notice of intention pursuant to rule 10832, take the case off calendar or continue the case to a date certain.

(Cal. Code Regs., tit. 8, § 10755.)

Additionally, WCAB Rule 10832 provides, in relevant part: "The Workers' Compensation Appeals Board may issue a notice of intention for any proper purpose, including but not limited to: ...dismissing a petition...." (Cal. Code Regs., tit. 8, § 10832(a)(2).)

Here, if Mr. Alcala failed to appear for trial on September 21, 2023, as the WCJ stated in the Minute Order and her Report, then, pursuant to WCAB Rule 10755, the WCJ could have taken the case off calendar, continued the case to a date certain, or, in the absence of good cause, issued an NIT to dismiss cost petitioner's Petition for Sanctions and Costs. Here, the WCJ chose to dismiss the Petition for Sanctions and Costs, and, as a result, the WCJ should have issued an NIT to dismiss, pursuant to WCAB Rule 10832(a)(2). Because an NIT was not issued, we cannot reach the merits or issue our own findings on the merits of the Petition for Sanctions and Costs without running afoul of the parties' rights to due process. (*Fortich, supra*, 233 Cal.App.3d at pp. 1452-1453; *Gangwish, supra*, 89 Cal.App.4th at p. 1295.) As a result, we will rescind the WCJ's decision to dismiss cost petitioner's Petition for Sanctions and Costs and return the matter to the trial level for further proceedings consistent with this opinion.

2. *Potential sanctions against Mr. Alcalá for alleged failure to appear at trial*

Cost petitioner next asserts that it was not afforded the opportunity to object to any potential sanctions against Mr. Alcalá for his alleged failure to appear for the September 21, 2023 trial. During trial, the WCJ stated:

Notice of intent to sanction Mr. Alcalá....It is my intent to sanction Mr. Alcalá the sum of \$2,000. This matter will be set for sanction trial before myself. Notice will be provided, unless Mr. Alcalá provides a reasonable explanation as to why he should not be sanctioned. Matter is taken off calendar.

(MOH, September 21, 2023, p. 2.)

Similar to an NIT to dismiss a petition, WCAB Rule 10832 requires a WCJ to issue an NIT to sanction to ensure that the interested parties are afforded due process. Here, although the WCJ verbally announced an intent to sanction Mr. Alcalá during the September 21, 2023 trial, the record does not contain evidence that a proper NIT to sanction Mr. Alcalá was issued and/or served in accordance with WCAB Rule 10832. (Cal. Code Regs., tit. 8, § 10832(a)(3); see also Cal. Code Regs., tit. 8, §§ 10610, 10615, 10625, 10628; Lab. Code, § 5316.) We have recently stressed that “[d]ue process requires *effective* notice of the intended action along with the opportunity for the affected party to be heard on the issue.” (*Murillo v. Smith & Roan, Inc.* (October 13, 2023, ADJ3499491) [2023 Cal. Wrk. Comp. P.D. LEXIS 285] [emphasis in original].) Effective notice, in turn, requires service upon each affected party in order to notify them of the contemplated action in advance thereof. WCJ Szelenyi’s verbal indication that an NIT *may* issue at some point in the future was insufficient and did not provide the interested parties with sufficient notice or due process such that the issue could move forward.

We note that, in her Report, the WCJ recommended that we return the matter to the trial level so that a “hearing regarding [her] notice of intention to sanction Mr. Alcalá can be scheduled before another judge.” (Report, p. 6.) This portion of the Report is based on the WCJ’s assumption that she issued an NIT to sanction Mr. Alcalá on September 21, 2023, such that an evidentiary hearing on the issue at the trial level would be proper. As discussed above, however, the WCJ is incorrect in this regard. Because an NIT to sanction Mr. Alcalá was never issued and served, a hearing on the matter is not permissible, and we reject the WCJ’s statements to the contrary.

3. *Assignment of a new WCJ*

Cost petitioner asserts that, had it received the opportunity during trial on September 21, 2023, it would have objected to WCJ Szelenyi’s continued assignment as the trial judge in its case.

Although the WCAB Electronic Adjudication Management System (EAMS) does not contain any evidence that cost petitioner moved to disqualify WCJ Szelenyi from the proceeding, WCJ Szelenyi has alternatively offered to recuse herself from cost petitioner's case. (Report, p. 5.) We emphasize that a WCJ should not recuse themselves lightly. (*Robbins v. Sharp Healthcare* (2006) 71 Cal.Comp.Cases 1291, 1311 (*Robbins*)). In *Robbins*, the Appeals Board explained that allocation of our scarce judicial resources and orderly administration of our system depend upon the cooperation of the WCJ and all parties, and that all litigants and WCJs have a responsibility to refrain from interactions sufficient to establish grounds for disqualification or recusal. (*Id.* at p. 1311.) However, under the specific circumstances of this case, where WCJ Szelenyi does not object to, and indeed, agrees with, cost petitioner's request for reassignment, we believe it would serve the interests of justice to assign a new WCJ to cost petitioner's case upon return to the trial level. (Cal. Code Regs., tit. 8, § 9721.12(a)(10).)

For the foregoing reasons,

IT IS ORDERED that cost petitioner's Petition for Reconsideration of the September 21, 2023 Minute Order is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the September 21, 2023 Minute Order is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

IT IS FURTHER ORDERED that Workers' Compensation Administrative Law Judge Szelenyi is hereby **RECUSED** in Case Number **ADJ14413905**, and this case is **RETURNED** to the Presiding Workers' Compensation Administrative Law Judge for reassignment to a new Workers' Compensation Administrative Law Judge.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 20, 2023

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

**JOYCE ALTMAN INTERPRETERS
ALCALA & ASSOCIATES
COLEMAN CHAVEZ & ASSOCIATES**

AH/cs

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