

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

JOSUE RAMOS, *Applicant*

vs.

**D & F AGRICULTURAL ENTERPRISES, INC.;
ZENITH INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ12785180
Fresno District Office**

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

Applicant seeks reconsideration of the January 26, 2022 Order Dismissing Application in Inactive Case (order dismissing) issued by the workers' compensation administrative law judge (WCJ) on January 26, 2022.

Applicant contends that he has sought medical treatment for his industrial injuries as recently as December, 2021, and that the notice of intent to dismiss his case was not received "from the WCAB" by his attorney. (Petition for Reconsideration (Petition), at 1:24.)

We received an answer from the defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (report) recommending that we deny the petition.

We have considered the allegations of applicant's Petition, defendant's answer, and the contents of the WCJ's report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant the Petition, rescind the January 26, 2022 Order Dismissing and return this matter to the trial level for further proceedings.

FACTS

On August 9, 2019, applicant filed an application for adjudication, claiming injury to the head, hernia, psyche, digestive system and "multiple" body parts while employed as a driver by defendant D&F Agricultural Enterprises from June 10, 2018 to June 10, 2019. Applicant alleged

injury due to repetitive work and verbal abuse. (Application for Adjudication, dated August 9, 2019.)

On October 20, 2021, defendant filed a Petition to Dismiss Inactive Case, indicating that the case had not been activated for more than 12 months following the initial filing of the application. (Petition to Dismiss Inactive Case, dated October 20, 2021, at 1:24.) The petition appended two letters regarding defendant's intention to seek dismissal, addressed to both applicant and his attorney of record, both dated August 23, 2021. The petition also appends a verified proof of service of both 30-day letters on applicant and applicant's attorney of record. (Petition for Dismissal, dated October 20, 2021.)

The WCJ issued a Notice of Intention to Dismiss Inactive Case (NIT) on November 17, 2021, indicating the case would be dismissed without prejudice absent receipt of a timely objection demonstrating good cause within twenty days of service of the NIT. The WCJ then designated service of the NIT to defendant pursuant to WCAB Rule 10629. (Cal. Code Regs., tit. 8, § 10629.)

On January 7, 2022, defendant filed a letter requesting dismissal of the case, and appending proof of service of the November 17, 2021 NIT on applicant, applicant's counsel, and the employer. (Letter to the WCAB, dated November 22, 2021.)

On January 26, 2022, the WCJ issued the order dismissing applicant's case, noting no objection to the NIT of November 22, 2021. Service was effectuated by the WCAB on the parties on January 31, 2021. (Order Dismissing, dated January 26, 2022.)

On February 17, 2022, applicant filed the instant Petition stating that after a review of applicant's attorney's file and case notes, applicant's counsel did not see the NIT "from the WCAB." (Petition, at 1:24.) The petition further avers that applicant's counsel discovered that applicant "is treating for his industrial [injuries] as recent[ly] as December, 2021." (*Id.* at 1:26.)

Defendant's answer of March 7, 2022 notes their compliance with the WCAB Rule 10550, governing dismissal of inactive cases, and applicant's failure to respond to their 30-day letter, petition for dismissal, or the WCJ's notice of intent. (Answer, at 2:11.)

The WCJ observes in her report that pursuant to Evid. Code section 641, a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. (Report, p.3, para. 1; Evid. Code. § 641.) Accordingly, the WCJ found applicant's bare assertion of non-receipt to be unpersuasive. (*Ibid.*)

DISCUSSION

The WCAB Rules of Practice and Procedure, section 10550, provide that “[u]nless a case is activated for hearing within one year after the filing of the Application for Adjudication of Claim or the entry of an order taking off calendar, the case may be dismissed after notice and opportunity to be heard. Such dismissals may be entered at the request of an interested party or upon the Workers' Compensation Appeals Board's own motion for lack of prosecution.” (Cal. Code Regs., tit. 8, § 10550, subd. (a).) Although Rule 10550 authorizes dismissal of an inactive case upon demonstration of the conditions that allow dismissal under the rule, and after affording the applicant notice and an opportunity to be heard, dismissal is discretionary, not mandatory. (*Roth v. Workers' Comp. Appeals Bd.* (1971) 20 Cal.App.3d 452 [36 Cal.Comp.Cases 604].) There is a strong public policy favoring disposition of cases on their merits rather than on procedural grounds. (*Bland v. Workers Comp. Appeals Bd.* (1970) 3 Cal.3d 324 [35 Cal.Comp.Cases 513]; *Marino v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 485 [67 Cal.Comp.Cases 1273].)

Here, the defendant has complied with the procedural requirements set forth under WCAB Rule 10550, and the WCJ has appropriately responded with the required notice to the parties of the proposed dismissal.

Applicant has raised the issue of whether he is actively treating for his industrial injuries, averring treatment as recently as December, 2021. (Petition, at 1:26.) This argument raises substantive due process concerns arising out of applicant’s possible active involvement in his case. Additionally, applicant’s counsel has stated in verified pleadings that they did not receive the “Notice of Intent to Dismiss from the WCAB.” (*Id.* at 1:24.) This argument raises procedural due process concerns, as to whether the required notice of a dismissal was received by applicant.

Article XIV, section 4 of the California Constitution mandates that the workers’ compensation law shall be carried out “...to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character...”

Based on the constitutional mandate to accomplish substantial justice, the Board has a duty to develop an adequate record. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal. Comp. Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1120 [63 Cal.Comp.Cases 261].) Moreover, “[t]he Board ‘is bound by the due process clause of the Fourteenth Amendment to the United States Constitution to give the parties before it a fair and

open hearing...[a]ll parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents *and to offer evidence in explanation or rebuttal.* (*Rucker v. Workers' Comp Appeals Bd.* (2000) 85 Cal.App.4th 151 [65 Cal.Comp.Cases 805] (*emphasis added*).)

Finally, we note that pursuant to *Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196, 1205-1206 [57 Cal.Comp.Cases 149], a party may seek relief from the consequences of a procedural failure by utilizing a procedure substantially similar to Code of Civil Procedure section 473(b), which provides 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.

Given the strong public policy in favor of adjudication on the merits, and the due process rights of the parties, both substantively and procedurally, we conclude that “a failure to allow full development of the evidentiary record to complete adjudication of the issues is not consistent with due process.” (*Tyler, supra*, 56 Cal.App.4th 389; *McClune, supra*, 62 Cal.App.4th 1117, 1120.) Thus, the Appeals Board, “...may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence.” (*Kuykendall v. Workers' Comp. Appeals Bd. (Kuykendall)* (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264].)

Accordingly, we will grant applicant’s petition, and return this matter to the trial level for further proceedings. This will allow applicant and his counsel to present evidence of ongoing treatment, if any, and evidence regarding applicant’s counsel’s verified avowal of non-receipt of the notice of intent. Defendant may, of course, present any appropriate, responsive evidence. The WCJ may then decide the petition for dismissal, based on a complete evidentiary record. Any party newly aggrieved may thereafter seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant’s Petition for Reconsideration of the Order Dismissing Application in Inactive Case of January 26, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of December 21, 2021 is **RESCINDED**, and the matter returned to trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER



DEIDRA E. LOWE, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 18, 2022

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

**JOSUE RAMOS
THE NIELSEN FIRM
CHERNOW & LIEB**

SAR/abs

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