

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

DAVID BARAJAS ROSALES, *Applicant*

vs.

**HERBACEUTICALS, INC., A NEVADA CORP.;
THE HARTFORD, *Defendants***

**Adjudication Numbers: ADJ13500562; ADJ13500563
Salinas District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant filed a "Petition for Removal and Reconsideration and to Set Aside" relating to orders that issued in case number ADJ13500562 and case number ADJ13500563: 1) an Order dismissing cases ADJ13500562 and ADJ13500563 (Order) issued by the workers' compensation administrative law judge (WCJ) on December 15, 2022; and 2) an order taking the matters off calendar (OTOC), issued by the WCJ on April 25, 2023.

Applicant contends that he was denied due process because he did not have notice and the opportunity to be heard before the WCJ dismissed cases ADJ13500562 and ADJ13500563. Applicant further contends that he was denied a fair hearing when a status conference was ordered taken off calendar without a hearing.

We received separate answers from defendant in response to each of applicant's requests for relief.

The WCJ issued a joint Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petitions be denied.

We have considered the allegations in the Petition, the answers, and the contents of the Report with respect thereto.

Based on our review of the record, and for the reasons discussed below, we will rescind the Order dismissing cases ADJ13500562 and ADJ13500563 issued by the WCJ on December 15, 2022 and return the matter to the WCJ for further proceedings.

BACKGROUND

We will briefly review the relevant facts.

In case number ADJ13500562, applicant claimed injury to unspecified body parts while employed by defendant as a laborer, during the period from June 2, 2019 to June 2, 2020.

In case number ADJ13500563, applicant claimed injury to unspecified body parts while employed by defendant as a laborer on June 1, 2016.

The address provided on each application for adjudication was 167 Heartstone Dr., American Canyon, CA, 94503, which applicant's attorney now contends is incorrect.¹

On October 20, 2022, defendant filed a petition to dismiss the cases for lack of prosecution.

On November 7, 2022, the WCJ issued a notice of intention to dismiss the cases for lack of prosecution (NIT), "unless written objection was received within thirty (30) days at the following address: Workers' Compensation Appeals Board, Division of Workers' Compensation, State of California, PO Box 429003, San Francisco, CA 94142-9003." However applicant was not served with the NIT because the address in the OAR contained the wrong street name.

On December 15, 2022, the WCJ issued an Order dismissing the cases. Applicant was not served with the Order of dismissal because the address in the OAR contained the wrong street name.

On or about December 22, 2022, applicant filed a DOR², requesting a March 2, 2023 Mandatory Settlement Conference (MSC) on various issues, stating as follows:

Applicant moves to strike QME Edward Hughes for national origin, racial and ethnic bias. Applicant objects to dismissal of application and activates case by this DOR.

(Applicant's DOR, dated December 22, 2022, p. 7 (converted from all-caps in original).)

On December 23, 2022, defendant filed an objection to applicant's DOR.

¹ In the Petition before us applicant's attorney states that applicant's address in the OAR was incorrect due to a typographical error made by applicant's attorney himself. The address provided in the application for adjudication was 167 Heartstone Dr., American Canyon, CA, 94503. The correct street name is Hearthstone Drive, with an "h" and thus the correct address is 167 Hearthstone Dr., American Canyon, CA, 94503.

² The proof of service accompanying applicant's DOR is unsigned, in violation of WCAB Rule 10625(c). (Cal. Code Regs., tit. 8, § 10625(c).) Because defendant filed an objection to applicant's DOR, we infer that that the document was served, however, we admonish counsel to comply with WCAB Rule 10625(c). Moreover, it does not appear that applicant was served.

On March 2, 2023, the parties appeared for the MSC. An OTOC issued and the minutes state: “Cases dismissed 12/15/2023 (sic) and thus Board lacks jurisdiction.” (Minutes, March 9, 2023, p. 1 (converted from all-caps in original).)

On or about March 31, 2023³, applicant filed a DOR, requesting a status conference on April 20, 2023.

On April 20, 2023, the parties appeared for status conference. Another OTOC issued and the minutes reflect the following:

Cases were dismissed in December 2022.

AA believed that amended application was subsequently filed, but it could not be located in EAMS. No WCAB jurisdiction in light of dismissal. Parties’ attention is directed to *Nolan v. Workers’ Comp. Appeals Bd.* (1977) 70 Cal.App.3d 122, 128 [“A dismissal without prejudice has the effect of a final judgment in favor of the defendant insofar as it terminates the proceeding and concludes the right of the parties in the particular action. Such a dismissal filed within the time of the applicable statute of limitations does not bar a subsequent action on the same cause filed within the applicable statutory period.” (Internal citations omitted)].

(Minutes, April 25, 2023, p. 1-2.)

On May 1, 2023, applicant’s attorney filed a request to change applicant’s address to 167 Hearthstone Drive, American Canyon, CA, 94503.

DISCUSSION

A petition for reconsideration may only be taken from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a “threshold” issue that is fundamental to the claim for benefits. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Here, the December 15, 2022 Order dismissing case number ADJ13500562 and case number

³ The proof of service accompanying applicant’s DOR is again unsigned, in violation of WCAB Rule 10625(c). It does not appear that applicant was served.

ADJ13500563 is likely a final order. As such, we will treat applicant's petitions collectively as a petition for reconsideration.

WCAB Rule 10615 defines "filing" a document as filing with the WCAB. WCAB Rule 10615 (Cal. Code Regs., tit. 8, § 10615) provides in relevant part that "... all documents . . . shall be filed only in EAMS or with the district office having venue." While Rule 10615 also allows a WCJ to make orders regarding filing, here, the NIT did not refer to filing and instead used the term "received" at a post office box. With respect to determining a filing date, subdivision (b) provides that a "document is deemed filed on the date it is received," and subdivision (c) states that the WCAB "shall affix on it an appropriate endorsement as evidence of receipt." (Cal. Code Regs., tit. 8, § 10615.) Thus, even though a document is "received," it is not formally accepted into the WCAB's adjudication file until it has been processed by an endorsement on a paper document or through EAMS. (Cal. Code Regs., tit. 8, § 10803.) Moreover, treating the filing date as the operative date promotes certainty in the court system and ensures due process. Under the circumstances set forth in the NIT, there is simply no way to reconcile the requirement that documents be "filed" with an order requiring "receipt" at an unattended post office box where an actual date of receipt is called into question. Requiring written objection, if any, be sent to a post office box deprives applicant of the opportunity to file a document directly with the district office, a violation of due process. Thus, the NIT was *void ab initio*.

As the WCJ notes, it is a party's duty to maintain an accurate mailing address with the Board, in part to effectuate service of documents. (Cal. Code Regs., tit. 8, §§ 10205.5.) While we are sympathetic to the WCJ's observation that several of the issues before us arise from applicant's attorney's failure to provide an accurate mailing address for his client, all 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].)

Applicant's counsel has stated in verified pleadings that applicant did not receive the NIT from the WCAB, which raises procedural due process concerns as to whether the required notice was received by applicant. It is one of the basic tenets of jurisprudence that a party must be provided notice and an opportunity to be heard before his case is dismissed. (See, e.g., *San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986].) Thus, the failure to serve applicant with NIT his cases is not only

a violation of WCAB Rules; it constitutes a fundamental violation of applicant's due process rights, rendering the resulting December 15, 2022 Order Dismissing Cases ADJ13500562 and ADJ13500563 void on its face.

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].)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*).) As required by Labor Code section 5313⁴ and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at 475.) The purpose of this requirement is to enable "the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]" (*Hamilton, supra*, at 476, citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350].)

Accordingly, we must return this matter to the trial level for further proceedings. Upon return to the trial level, we recommend that the WCJ hold a hearing to allow the parties to frame the issues, submit evidence, call witnesses, if necessary, and make their legal arguments. The WCJ may then decide the petition for dismissal, based on a complete evidentiary record. Any party newly aggrieved may thereafter seek reconsideration.

⁴ All statutory references are to the Labor Code unless otherwise noted.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Order dismissing case number ADJ13500562, issued by the WCJ on December 15, 2022 is **RESCINDED**.

IT IS FURTHER ORDERED that the Order dismissing case number ADJ13500563, issued by the WCJ on December 15, 2022 is **RESCINDED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 19, 2024

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

**DAVID BARAJAS ROSALES
KENNETH D. MARTINSON
LAW OFFICES OF LAKEESHA T. JEMERSON**

JB/cs

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