

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

LUIS SILVA, *Applicant*

vs.

**NANCE CORPORATION dba BOB'S TIRE CENTER;
MARKEL SERVICE, INC. dba
MARKEL INSURANCE SERVICES, *Defendants***

**Adjudication Number: ADJ13725819
Redding District Office**

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

Applicant's attorney seeks reconsideration of the Orders assessing expenses and sanctions pursuant to Labor Code¹ section 5813 (Orders) for his failure to appear at trial, issued by the workers' compensation administrative law judge (WCJ) on July 13, 2023 and July 20, 2023 respectively.

Applicant's attorney contends that he was entitled to notice and an opportunity to be heard before the imposition of sanctions.

We have not received an answer from any party.

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

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

Based on our review of the record, and for the reasons discussed below, we will grant the Petition, rescind the WCJ's July 13, 2023 and July 20, 2023 Orders, and return the matter to the WCJ.

¹ All statutory references are to the Labor Code unless otherwise noted.

BACKGROUND

We will briefly review the relevant facts.

Applicant claimed injury to various body parts, including headaches, breathing problems, lungs/respiratory system, lungs, gastrointestinal, psyche, and COVID, while employed by defendant as a manager, on July 29, 2020.

On October 14, 2020, applicant filed an Application for Adjudication (Application).

The form identifies applicant's representative as Jamey A. Teitell, of the law firm Solov Teitell.

Throughout the pendency of the case, Mr. Teitell filed various documents on applicant's behalf, including filing an objection to defendant's declaration of readiness to proceed on April 27, 2023.

According to the pre-trial conference statement (PTCS), Gerald Foster of D'Andre Law attended the May 3, 2023 mandatory settlement conference on behalf of defendant. The PTCS identifies Solov Teitell as appearing on behalf of applicant, but does not identify who appeared. The PTCS is signed by both attorneys, but the signature on applicant's signature line of the PTCS is an indecipherable scrawl. Based on that signature, it is apparent that a natural person appeared and participated in the MSC on applicant's behalf.

Subsequently, on July 12, 2023, trial proceeded. According to the minutes, applicant and defense counsel Mr. Foster appeared. The WCJ issued an order granting a continuance and noted the following:

Solov Teitell did not appear without any notice – trial will be continued and penalties and sanctions will be assessed.

(July 12, 2023 minutes, p. 1.)

On July 13, 2023, the WCJ issued an Order pursuant to Labor Code § 5813, as follows:

IT APPEARING THAT trial was scheduled for 7/12/2023 at 8:30 AM on the issues of injury arising out of and in the course of employment, attorney fees, late denial, Labor Code §3202 liberal construction and CCR §10109.

Present on the morning of 7/12/2023, as scheduled and noticed, were Applicant, who traveled from Modesto, CA; Defense Counsel, Gerald Foster, who traveled from Canoga Park, CA and the employer, who traveled from Red Bluff, CA.

Applicant's Counsel, Solov Teitell, did not appear, although Applicant had a phone discussion with his Counsel's office on the trial morning. From that

conversation, it was apparent that the Law Offices of Solov Teitell had been fully aware of the trial on 7/12/2023.

Neither the offices of the undersigned, nor Applicant, nor Defense Counsel, received any notice prior to 8:30 AM on 7/12/2023, that Applicant's Counsel had decided to not appear for the trial.

IT IS ORDERED THAT the Law Offices of Solov Teitell are herein assessed the following Labor Code §5813 sanctions for their failure to appear at trial and represent the Client they agreed to represent:

1. The sum of \$500.00 payable to Nance Corporation DBA Bob's Tire Center as reimbursement for their time and cost to attend the trial;
2. The sum of \$500.00 payable to Applicant Luis Silva as reimbursement² for his time and cost to attend the trial;
3. A sum to be assessed by Dandre Law after their calculation of the cost of having Mr. Foster attend the trial. Said cost should include Mr. Foster's lodging, if any, to be present at the trial, Mr. Foster's mileage and transportation costs to be present at the trial, and Mr. Foster's hourly fee for the time spent in travel and attendance at the trial. A copy of said billing should be forwarded both to Solov Teitell and submitted into FileNet.
4. Additionally, and pursuant to Labor Code §5813, the Law Offices of Solov Teitell are herein ordered to issue payment of \$2,500.00 to the General Fund.
5. The trial is being continued to a new date with notice to all parties as soon as possible.

(July 13, 2023 Order assessing penalties and sanctions pursuant to Labor Code § 5813, pp. 1-2.)

On July 20, 2023, the WCJ issued an Order for additional penalties, as follows:

IT APPEARING THAT, and as previously detailed in the Order Assessing Penalties dated 7/12/2023, Applicant's Counsel, Solov Teitell, did not appear for the scheduled trial without prior notice to anyone, including their client. The undersigned has now received the cost breakdown from Defense Counsel, Gerald A. Foster, which total \$2,136.14.

² An injured worker's right to benefits is based on a statutory scheme, and those benefits are set forth in the Labor Code. Pursuant to section 4620, an injured worker is entitled to seek reimbursement from defendant for reasonable and necessary medical-legal costs. (See Cal. Code Regs., tit. 8, § 10545.) However, there is no provision in the Labor Code that entitles an injured worker to reimbursement for time to attend trial. If a defendant has reimbursed applicant for expenses, such as transportation costs, but believes that applicant or their attorney should bear the liability for those costs, defendant must seek recourse before the WCAB. (See Lab. Code, § 4904.) Applicant's attorney's fees are a lien against compensation and must be approved by the WCAB. (Lab. Code, §§ 4903(a), 4906.)

GOOD CAUSE APPEARING;

IT IS ORDERED THAT the Law Offices of Solov Teitell are to issue reimbursement as follows:

1. D'Andre Law LLP
P.O. Box 98517
Las Vegas, NV 89193

This order is supplemental to the previous order to pay Nance Corporation, Luis Silva and the General Fund. Payment should be issued within the next ten days.

(July 20, 2023 Order for additional penalties, p. 1.)

DISCUSSION

As a preliminary matter, WCAB Rule 10400 provides that an attorney representative shall file and serve a notice of representation, unless the information required to be included in the notice of representation is set forth on an opening document. (Cal. Code Regs., tit. 8, § 10400(a).) The required information shall include: (1) The name of the represented party; (2) The legal name and State Bar number of the attorney; and (3) The name, mailing address, email address and telephone number of the law firm or other entity's agent for service of process. (Cal. Code Regs., tit. 8, § 10400(b)(1)-(3).) Here, the opening document was the Application, which identifies Mr. Teitell as the attorney representative and the law firm of Solov and Teitell as the law firm. Based on the Application, and taken together with various other pleadings filed in this matter, Mr. Teitell is the attorney of record for applicant.

When a pleading is filed by an attorney on behalf of a party, the attorney's name and address is entered on the Official Address Record of the Workers' Compensation Appeals Board. Thereafter, the attorney remains attorney of record for that party until a subsequent fully executed substitution is filed³ or upon order of the court.⁴ (Cal. Code Regs., tit. 8, § 10402; Code Civ. Proc., §§ 284-285; *In re White & Bunch* (1981) 46 Cal.Comp.Cases 810, 812-813 (Appeals Bd. en banc).)

³ In the absence of a substitution or dismissal in the record, a new attorney will not be recognized by the court unless a substitution of attorney of record is entered. (See State Bar of California, Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1994-134 (citing *McMunn v. Lehrke* (1915) 29 Cal.App. 298, 307; *Davis v. Rudolph* (1947) 80 Cal.App.2d 397, 402; *In re Marriage of Warner* (1974) 38 Cal.App.3d 714, 720.)

⁴ We note that the California Rules of Professional Conduct prohibit an attorney from terminating a representation without first obtaining permission from the tribunal where the matter is pending if the tribunal's rules require its permission. (See Cal. Rules of Prof. Conduct, Rule 1.16(c).)

WCAB Rule 10402 requires that substitution or dismissal must be made in the manner provided by California Code of Civil Procedure sections 284, 285 and 286. (Cal. Code Regs., tit. 8, § 10402.) We note that a substitution of attorney requires the consent of both client and attorney, as well as written notice of the change. (Code of Civil Proc., §§ 284(1), 285, emphasis added.) Here, we do not see a substitution of attorney form in the record of proceedings, and therefore, Mr. Teitell remains applicant's attorney of record.

Turning to appearances at trial, WCAB Rule 10752, subdivision (a) requires that: "each applicant and defendant shall appear or have an attorney or non-attorney representative appear at all hearings pertaining to the case in chief." (Cal. Code Regs., tit. 8, § 10752(a), emphasis added.) Pursuant to WCAB Rule 10305(c), "'Appearance' means a party or their representative's presence, pursuant to section 5700, at any hearing." (Cal. Code Regs., tit. 8, § 10305(c), emphasis added.) Section 5700 provides in relevant part that: "Either party may be present at any hearing, in person, by attorney, or by any other agent...." (Lab. Code, § 5700.) These rules presume that an appearance is made by a natural person,⁵ whether licensed or not, and that an "appearance" is not made by a legal entity, such as a law firm. That is, because the statutory and regulatory scheme presumes that representation is by a natural person, the appearance requirement also presumes that an appearance is by a natural person. Hence, by the same logic, only a natural person can fail to appear.

Here, the basis for the WCJ's Orders awarding expenses and sanctions is Mr. Teitell's failure to appear at trial. Yet, the WCJ did not issue an order to applicant's attorney to appear at trial, and we find nothing in the record to indicate that any other WCJ ordered applicant's attorney to appear at trial. (Cal. Code Regs., tit. 8, § 10752(d). Moreover, applicant appeared for trial, thereby satisfying the basic requirement that applicant appear, or have a representative appear, at all hearings pertaining to the case in chief. (Cal. Code Regs., tit. 8, § 10752(a).) Consequently, there is no basis to find that Mr. Teitell "failed to appear," and as explained above, in this context a legal entity cannot fail to appear. While we appreciate the WCJ's frustration, Mr. Teitell's non-appearance at trial did not violate any orders or constitute a failure to comply with any of the WCAB's statutory or regulatory obligations.

With respect to sanctions, we note that section 5813, subdivision (a) authorizes a WCJ and/or the WCAB to "order a party, the party's attorney, or both, to pay any reasonable expenses,

⁵ We borrow the term "natural person," as distinct from a legal entity, from the holding in *Citizens United v. FEC* (2010) 558 U.S. 310.

including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Lab. Code, § 5813.) California attorneys must be licensed by the State Bar of California and must adhere to the California Rules of Professional Conduct. Under section 4907(b), non-attorney representatives appearing before the WCAB are held to the same professional standards of conduct as attorneys. (Lab. Code, § 4907(b).) Thus, because disciplinary proceedings can only be instituted against a natural person, and under the same reasoning as above, orders issued pursuant to section 5813 for a representative's bad faith or frivolous tactics must identify the natural person against whom sanctions are being issued. Consequently, even if there were a basis in this record to sanction Mr. Teitell for failure to appear, the Orders herein are void because no natural person is identified. We note that sanctions may be issued jointly and severally against a legal entity, such as a law firm, but such an order must always identify a natural person.

Finally, we observe that WCAB Rule 10421 requires that "[b]efore issuing such an order, the alleged offending party or attorney must be given notice and an opportunity to be heard." (Cal. Code Regs., tit. 8, § 10421(a).) 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].) A fair hearing is ". . . one of 'the rudiments of fair play' assured to every litigant . . ." (*Id.*, at 158.) 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.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

Determining an issue without giving the parties notice and an opportunity to be heard violates the parties' rights to due process. (*Gangwish, supra*, at 1295, citing *Rucker, supra*, at 157-158.)

Here, by virtue of applicant's attorney's absence at trial, *ipso facto*, he had neither notice or an opportunity to be heard. Moreover, the WCJ disregarded the provisions of WCAB 10421 and issued an Order assessing expenses and sanctions *sua sponte* on July 13, 2023, only one day after the purported failure to appear at trial. As such, applicant's attorney had neither notice of the WCJ's intent to assess sanctions, nor an opportunity to be heard on the matter. Thus, even if the

Orders had a proper basis, we would have rescinded them because applicant's attorney was not provided notice and opportunity to be heard.

Accordingly, we grant the Petition, rescind the WCJ's July 13, 2023 and July 20, 2023 Orders, and return the matter to the WCJ.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the July 13, 2023 and July 20, 2023 Orders is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 13, 2023 Order is **RESCINDED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 20, 2023 Order is **RESCINDED**.

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

September 29, 2023

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

**LUIS SILVA
SOLOV TEITELL
DANDRE LAW
GB AND C**

JB/oo

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