

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

LUIS TERRAZAS, *Applicant*

vs.

**S AND S FOODS, LLC;
administered by SEDWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ14315608
Anaheim District Office**

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

Applicant seeks reconsideration of the Order dismissing his case without prejudice issued by a workers' compensation administrative law judge (WCJ) on June 7, 2022. Applicant contends that he was unable to appear at the trial and that the WCJ should not have dismissed his case.

We received a Report and Recommendation from the WCJ, wherein he recommends that the Petition for Reconsideration be denied. We did not receive an answer from defendant.

We have considered the allegations of applicant's Petition for Reconsideration (Petition) and the contents of the Report of the with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the WCJ's order, and return this matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

Applicant claims injuries to multiple body parts while employed by defendant, S and S Foods, LLC, during the period May 15, 2015 - February 23, 2020. Issues were set for trial to be held on April 5, 2022.

The Minutes of Hearing dated April 5, 2022 reflect that applicant did not appear in court that day. (Minutes of Hearing (MOH), April 5, 2022.) However, a hearing representative named

Richard Castro from the Law Offices of James Harmon appeared on applicant's behalf. During trial, Mr. Castro requested that the matter be taken off calendar because applicant was "not available." (*Id.*) The WCJ denied the request and entered the following handwritten notes into the "Comments" portion of the MOH:

Applicant has not appeared without showing of any kind. A/A attempted contact to no avail. Discovery closed. Matter re-set for trial, A/A instructed to have applicant file evidence of good cause for non-appearance.

(MOH, April 5, 2022.)

The WCJ set a new trial date for May 26, 2022. (MOH, April 5, 2022.) Subsequently, during trial on May 26, 2022, no appearances were made on applicant's behalf. Defense counsel requested that the matter be taken off calendar due to applicant's failure to appear, and the WCJ granted the request. (MOH, May 26, 2022.) The same day, the WCJ issued a notice of intent (NOI) to dismiss applicant's case without prejudice that stated:

IT APPEARING THAT Applicant has failed to appear at trial, failed to comply with WCJ Order to Show Cause for non-appearance at trial, failed to appear at rescheduled trial, failed to file a joint pre-trial conference statement pre-trial, failed to respond to Defendant's multiple requests to appear, respond or state good cause for non-appearance at trial and

GOOD CAUSE APPEARING THEREFORE

NOTICE IS HEREBY GIVEN that an Order Dismissing the above entitled case pursuant to 8 CCR 10756(b), without prejudice, shall issue ten (10) days from the date of service hereof, unless good cause to the contrary is shown in writing within said time.

(NOI, May 26, 2022.)

No objection to the NOI was received. On June 6, 2022, the WCJ issued an Order Dismissing applicant's case without prejudice. (Order Dismissing, June 6, 2022.)

On January 24, 2023, applicant filed a Petition for Reconsideration (Petition) that stated, in full, "The applicant had a family emergency that he had to attend and had been out of the country. He has just now returned and wants to continue treatments and attend his case." (Petition, January 24, 2023, p. 1.)

In his Report, the WCJ recommends that we deny the Petition, as it: 1) was untimely filed; 2) fails to state any grounds for reconsideration as required by Labor Code section 5903; and 3) applicant failed to object to the NOI or show good cause as to why his case should not be dismissed.

DISCUSSION

The central issue in this case is whether the NOI was adequate to provide notice as to the bases for the Order Dismissing applicant's case.

The first reason listed in the NOI, namely, that applicant failed to appear at the April 5, 2022 trial, was not a proper basis for the NOI or the Order Dismissing. WCAB Rule 10305(c) defines an "appearance" as "a party *or* their representative's presence...at any hearing," and WCAB Rule 10752, defining "required appearances" at trial, states that "[e]ach 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, §§ 10305(c), 10752, italics added.) Although applicant was not present at trial on April 5, 2022, his non-attorney representative, Richard Castro from the Law Offices of James Harmon, appeared on his behalf. Because the applicable rules of "appearance" were complied with, good cause for the NOI or dismissal was lacking.

The second basis for dismissal listed in the NOI, namely, applicant's failure to comply with the WCJ's handwritten note in the April 5, 2022 MOH requiring him to "file evidence of good cause for non-appearance" at trial is also not good cause for dismissal. (MOH, April 5, 2022.) First, as noted above, applicant did not require good cause for non-appearance at the April 5, 2022 trial, as he was properly represented by Mr. Castro. (Cal. Code Regs., tit. 8, §§ 10305(c), 10752.) Additionally, and perhaps more importantly, the WCJ's handwritten note in the April 5, 2022 MOH lacked the force of a judgment or "order," as it failed to contain, and was not associated with, any legally enforceable consequence. (Cal. Code Regs., tit. 8, § 10832.) Thus, we reject the second reason listed in the NOI as a basis for dismissing applicant's case.

The third reason for dismissal listed in the NOI, namely, applicant's failure to appear at the rescheduled trial on May 26, 2022, is equally unconvincing. WCAB Rule 10756 states:

Where a required party, *after notice*, fails to appear at a trial 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, § 10756, italics added.)

Here, while the May 26, 2022 NOI may have provided applicant with notice that he failed to appear at trial and opportunity to explain why his case was dismissed, the NOI should have only issued for that purpose. Instead, the NOI contained the above discussed impermissible bases for the NOI and the remaining reasons listed in the NOI, namely, that applicant "failed to file a joint pre-trial conference statement pre-trial, [and] failed to respond to Defendant's multiple requests to appear, respond or state good cause for non-appearance at trial," are not supported by the record and therefore do not support a finding of good cause to dismiss applicant's case.

WCAB Rule 10832 requires:

- (a) The Workers' Compensation Appeals Board may issue a notice of intention for any proper purpose, including but not limited to:
 - (1) Allowing, disallowing or dismissing a lien;
 - (2) Granting, denying or dismissing a petition;
 - (3) Sanctioning a party;
 - (4) Submitting the matter on the record; or
 - (5) Dismissing an application.
- (b) A Notice of Intention may be served by designated service in accordance with rule 10629.
- (c) If an objection is filed within the time provided, the Workers' Compensation Appeals Board, in its discretion may:
 - (1) Sustain the objection;
 - (2) Issue an order consistent with the notice of intention together with an opinion on decision; or
 - (3) Set the matter for hearing.
- (d) Any order issued after a notice of intention shall be served by the Workers' Compensation Appeals Board pursuant to rule 10628.
- (e) An order with a clause rendering the order null and void if an objection is received is not a Notice of Intention and must be served by the Workers' Compensation Appeals Board.

(Cal. Code Regs., tit. 8, § 10832.)

Due process requires that a party be provided with reasonable notice and an opportunity to be heard. (*Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 711-712 [57 Cal.Comp.Cases 230].) As a matter of due process, an NOI must clearly state the reason(s) for

dismissal, so as to provide adequate notice and a meaningful opportunity to respond. If an NOI is issued in violation of due process, the corresponding order issued thereafter is invalid.

Here, as noted above, only one reason set forth in the May 26, 2022 NOI, namely, that applicant “failed to appear at rescheduled trial” is a potentially proper basis for issuance of the NOI. However, upon review, we believe that this statement is so brief, and so obscured among a slew of improper bases, such that the NOI is too vague to constitute proper notice or to ensure due process. (See *Connally v. General Constr. Co.* (1926) 269 U.S. 385, 391 [a law is constitutionally void on its face when, as matter of due process, it is so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application”]; see also *Smith v. Goguen* (1974) 415 U.S. 566, 582 [the void for vagueness doctrine is designed to prevent arbitrary and discriminatory enforcement].) Because the NOI was invalid, so was the Order Dismissing.

Accordingly, we grant applicant’s Petition for Reconsideration, rescind the June 6, 2022 Order Dismissing, and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the June 6, 2022 Order Dismissing is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 6, 2022 Order Dismissing is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 27, 2023

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

**LUIS TERRAZAS
LAW OFFICE OF JAMES HARMON
HITZKE & FERRAN**

AH/cs

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