

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

JULIANA ROQUE CASTRO, *Applicant*

vs.

ESPARZA ENTERPRISES, INC.;
administered by PACIFIC CLAIMS MANAGEMENT FRESNO, *Defendants*

**Adjudication Number: ADJ13756193
Bakersfield District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.¹

Applicant seeks reconsideration of the Order Dismissing Case (Order) issued on February 18, 2022, by the workers' compensation administrative law judge (WCJ), wherein the WCJ dismissed applicant's case without prejudice.

Applicant contends that she was not ordered to appear, and so did not appear at the December 23, 2021, mandatory settlement conference (MSC). She requests that the Order be set aside and wishes to continue with her case.

We did not receive an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny applicant's petition.

We have considered the allegations of the Petition, 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 rescind the WCJ's Order, and return this matter to the WCJ for further proceedings and decision consistent with this opinion.

¹ Commissioner Lowe, who was a panel member in this matter, no longer serves on the Appeals Board, and another panelist was assigned in her place.

BACKGROUND

Applicant claimed cumulative injury to her right wrist, right hand, low back, and right knee patella from August 15, 2019 to August 15, 2020, while employed by defendant as a field laborer (packer).

On July 13, 2021, defendant filed a Declaration of Readiness to Proceed (DOR) requesting assistance with discovery, specifically the scheduling of applicant's imaging diagnostic studies requested by QME, Frederic Nicola, M.D. The DOR states:

“QME DR. NICOLA STATED IN HIS MARCH 15, 2021 REPORT THAT LOW BACK X-RAY, RIGHT KNEE STANDING X-RAYS AND RIGHT KNEE MRI WERE NECESSARY TO COMPLETE REPORTING. ON MAY 11, 2021 DEFENDANTS ADVISED APPLICANT'S ATTORNEY THAT ONE CALL WAS HAVING DIFFICULTY IN CONTACTING APPLICANT TO SCHEDULE THE STUDIES. DEFENDANTS [SIC] ARE INFORMED AND BELIEVE THAT THE STUDIES HAVE NOT BEEN COMPLETED. DEFENDANTS [SIC] HAVE NOT BEEN COMPLETED. DEFENDANTS [SIC] HAVE NOT RECEIVED A RESPONSE FROM APPLICANT'S ATTORNEY.” (Declaration of Readiness to Proceed, 7/13/2021, p. 6.)

On September 23, 2021, applicant's attorney and defendant's attorney appeared at a status conference to resolve a discovery issue. The typewritten statement by the WCJ on the minutes of hearing states:

“DEF. DOR'D.(DISCO-QME DIAGS. NEEDED, BUT PROBLEMS CONTACTING APPLICANT) APPLICANT'S ATTORNEYS' COMPUTER SYSTEM WAS HACKED, SO MUCH OF THE INFO. IS NOT AVAILABLE ON IT FOR THIS CASE. DOESN'T KNOW WHEN LAST SPOKE WITH APPLICANT. CONT'D FOR APP'S APPEARANCE AT NEXT MSC TO FINALIZE DISCO.” (Minutes, 9/23/2021.)

According to the minutes, the WCJ continued the matter and set an MSC for December 23, 2021.

The proof of service by defendant reflects that defendant filed a proof of service of the minutes of hearing dated September 28, 2021, on applicant's attorney and defendant, but not on applicant. However, a review of Communications in the Electronic Adjudication Management Service (EAMS) appears to indicate that on September 28, 2021, a Notice of Hearing was served on applicant, applicant's attorney, defendant's attorney and defendant.

On December 23, 2021, an MSC was held. According to the minutes, John Orman, defendant's attorney, was the only person who appeared. The WCJ issued an order taking the

matter off calendar. Further, the minutes state in Other/Comments: “Defendant will file Petition to dismiss for applicants [*sic*] failure to appear at this MSC.” According to the proof of service, the minutes were served by the WCAB on December 29, 2021, on applicant, defendant, defendant’s attorney, and applicant’s attorney.

Also on December 23, 2021, defendant filed a petition to dismiss applicant’s case based on the failure to appear at the MSC pursuant to WCAB Rule 10755 (Cal. Code Regs., tit. 8, § 10755).

On January 21, 2022, the WCJ issued the following Notice of Intention To Dismiss Case (NIT):

“IT APPEARING THAT Defendant has petitioned to dismiss this case under Rule 10755 based on Applicant’s failure to appear at the December 23, 2021 MSC.

NOTICE IS HEREBY GIVEN that an Order Dismissing the above entitled case, 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.” (Notice of Intention to Dismiss Case, 1/21/2022, p.1.)

A review of the adjudication file in EAMS does not indicate that applicant’s attorney objected to the NIT.

On February 18, 2022, the WCJ issued an Order Dismissing Case stating:

“IT APPEARING THAT there has been no objection to the January 21, 2022, Notice of Intention.

GOOD CAUSE APPEARING;

IT IS ORDERED THAT case ADJ13756193 be, and hereby is, dismissed without prejudice.” (Order Dismissing Case, 2/18/2022.)

Applicant’s attorney alleges that he attempted to file a timely Petition for Reconsideration on March 15, 2022. Applicant’s attorney attached two print outs of what appear to be screen shots of messages from EAMS which state: “can’t reach this page.” Both are dated March 15, 2022, and one page indicates the time of the alleged attempted filing was 2:41 p.m. and the other indicates that the second alleged attempt was made at 4:33 p.m. (Petition for Reconsideration, 3/16/2022, pp. 4-5.) Applicant’s attorney appears to be trying to illustrate that the petition would have been timely filed but for EAMS not accepting the filing. Further, there is a handwritten note at the bottom of the proof of service for the Petition which states: “Attempted to timely efile Recon on

3/15/22 however WCAB system was down. Please see attached attempts on 3/15/22 at 2:41 p.m. and 4:33 p.m. Kyle Nielsen.” (Proof of Service, Petition, 3/16/2022.)

DISCUSSION

I.

There are 25 days allowed within which to file a petition for reconsideration from a “final” decision that has been served by mail upon an address in California. (Lab. Code², §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(b).)

Labor Code section 5900(b) states in pertinent part that: At any time within 60 days after the filing of an order, decision, or award made by a workers’ compensation judge and the accompanying report, *the appeals board may, on its own motion, grant reconsideration.*” (Italics added.)

Further, Labor Code section 5911 states:

Nothing contained in this article shall be construed to prevent the appeals board, on petition of an aggrieved party or on its own motion, from granting reconsideration of an original order, decision, or award made and filed by the appeals board within the same time specified for reconsideration of an original order, decision, or award.

Here, the Order was served on February 18, 2022, thus in order for the Petition for Reconsideration to be timely filed it had to have been filed no later than March 15, 2022. Despite the Petition being dated March 15, 2022, and applicant’s attorney’s efforts to file it, the Petition was filed in EAMS on March 16, 2022, one day after the due date of March 15, 2021. However, here, under our authority in Labor Code 5900(b), we granted reconsideration on our own motion.

² All statutory references are to the Labor Code unless otherwise noted.

II.

WCAB Rule 10755 states:

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.)

The WCJ may issue a notice of intention (NIT) for any proper purpose. (Cal. Code Regs., tit. 8, § 10832 (a).) A proper purpose includes, but is 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.

Pursuant to WCAB Rule 10832 (c), if an objection is filed within the time provided, the WCAB, has discretion to: (1) Sustain the objection; (2) Issue an order consistent with the notice of intention together with an opinion on decision; or set the matter for hearing. (Cal. Code Regs., tit. 8, § 10832 (c).)

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with Labor Code section 5313. A WCJ is required to “make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties. The endorsement to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (Lab. Code, §§ 5502, 5313; Cal. Code Regs., tit. 8, § 10761; see also *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Bd. en banc).)

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board En Banc).) As required by section 5313 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.” (Lab. Code, § 5313; *Hamilton*,

supra, at 475.) In *Hamilton*, we held that the record of proceeding must contain, at a minimum, “the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence.” (*Ibid.*)

The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton*, supra, at 476, citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

Moreover, 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 p. 158.) The “essence of due process is simply notice and the opportunity to be heard.” (*San Bernardino Community Hospital v. Workers. Comp. Appeals Bd. (McKernan)* 74 Cal.App.4th 928, 936 (64 Cal. Comp. Cases 986) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties’ rights to due process. (*Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584], citing *Rucker, supra*, at pp. 157-158.) 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, supra*, at p. 1295; *Rucker, supra*, at pp. 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].)

Here, on February 18, 2022, the WCJ dismissed applicant’s case without a hearing, without creating a record, and without issuing an opinion on decision.

Upon return to the trial level, we recommend that the WCJ set a conference and determine if the case should be dismissed. We note that applicant’s petition for reconsideration could also be considered as a timely filed petition to reopen under Labor Code section 5804.

Accordingly, we rescind the February 18, 2022, Order, and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Order Dismissing Case issued on February 18, 2022 by the WCJ is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 5, 2024

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

**JULIANA ROQUE CASTRO
THE NIELSEN FIRM
LAUGHLIN, FALBO, LEVY & MORESI**

DLM/oo

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