

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

MARK SHAFFER, *Applicant*

vs.

**XCEL MECHANICAL SYSTEMS INC./ACCO ENGINEERED SYSTEMS;
LIBERTY MUTUAL INSURANCE COMPANY;
ZURICH AMERICAN INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ16953633; ADJ16953634; ADJ16953635
Los Angeles District Office**

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

Defendant Zurich American Insurance Company (Zurich) filed an Objection to Order of Joinder of Zurich and Petition for Reconsideration (Petition) seeking review of the order issued by a Workers' Compensation Administrative Law Judge (WCJ) on January 3, 2023. Therein, the WCJ ordered Zurich joined as a party defendant in case no. ADJ16953635 and further ordered Liberty Mutual Insurance Company (Liberty Mutual) dismissed as a party defendant.

Zurich contends Labor Code¹ section 5804 proscribes its joinder more than five years from the date of injury.

We have not received an Answer from any party. We have received the WCJ's Report and Recommendation on Petition for Reconsideration (Report), recommending that the petition be denied.

We have considered the allegations of the Petition for Reconsideration, and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant the Petition, rescind the January 3, 2023 Order, and return this matter to the trial level for further proceedings.

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

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.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, "the commission...must find facts and declare and enforce rights and liabilities - in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law." (*Id.* at p. 577.) 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].)

Section 5313 also requires the WCJ to "make and file findings upon all facts involved in the controversy and [make and file] an award, order, or decision stating the determination as to the rights of the parties ... [and include] a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313.) The WCJ's decision "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Bd. en banc)), and the decision must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) In *Hamilton*, we held that the record of proceedings must contain, at a minimum, "the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence." (*Hamilton, supra*, at p. 475.)

Accordingly, any decision to join or dismiss a party defendant should be based upon an adequate record after providing the parties an opportunity to be heard, in the same manner as any other order touching on the parties' due process rights. (Lab. Code § 5313; Cal. Code Regs., tit. 8, § 10382; *Hamilton, supra*, at p. 476; *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

Here, Zurich seeks reconsideration² of an Order joining it as party defendant in case ADJ16953635, and further dismissing Liberty Mutual. (Petition, at p. 2:5.) However, there is no record upon which to address the WCJ's decision to order the joinder of Zurich. Without an evidentiary record, we are unable to determine whether the WCJ's decision is supported by substantial evidence. (*Hamilton, supra*, at p. 476.)

We note that here, one of the procedural options available to the WCJ was the issuance of a Notice of Intention (NIT). WCAB Rule 10832 describes the process by which a WCJ may issue an NIT, and provides a framework designed to afford the parties with their "fundamental rights to due process." (*Rucker, supra*, at pp. 157-158.) Rule 10832 provides that following the filing of a petition, the WCJ may, "for any proper purpose," provide notice of its intended action, and thereafter provide the parties with corresponding opportunity to respond to the notice. (Cal. Code Regs., tit. 8, § 10832(a).) The process of issuing a Notice of Intention thus provides both notice to the parties of the court's intended course of action, and the opportunity for those parties to be heard. (See also *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986] [the essence of due process is notice and opportunity to be heard].) Issuing a notice of intention clearly sets out the next steps required of the parties and the WCJ, and encourages the creation of a complete record which reflects the evidentiary and the legal bases for the WCJ's determination. (*Evans v. Workmen's Comp. Appeals Bd., supra*, at p. 755.)

² As the WCJ's Report observes, the January 3, 2024 order joining Zurich issued under case no. ADJ16953635, yet Zurich's petition was filed in case no. ADJ16953633. Pursuant to Workers' Compensation Appeals Board (WCAB) Rule 10517 (Cal. Code Regs., tit. 8, § 10517), "pleadings may be amended by the Workers' Compensation Appeals Board to conform to proof." Similarly, WCAB Rule 10617 provides considerable latitude in accepting nonstandard pleadings, so long as the pleadings contain "a combination of information sufficient to establish the case or cases to which the document relates. (Cal. Code Regs., tit. 8, § 10617.) Here, for the reasons discussed *infra*, we are rescinding the Order of Joinder and returning this matter to the trial level to amplify the evidentiary record. However, were we considering the petition on the merits, we would deem the petition amended to reflect the correct case number of ADJ16953635, pursuant to Rule 10517.

Here, counsel for Liberty Mutual served an Amended Petition for Dismissal of Liberty Mutual for Lack of Coverage and Petition for Joinder of Zurich on December 8, 2023. The WCJ issued a corresponding Order of Joinder and Order Dismissing Party Defendant on January 3, 2024. The WCJ thus issued the order joining Zurich 26 days after the filing of the petition for joinder, without providing the parties with notice of intention under rule 10832 or setting the matter for further hearing, and accordingly, there is an insufficient basis upon which to evaluate the issues raised in Zurich's Petition. (Cal. Code Regs., tit. 8, § 10832.)

Therefore, we will grant defendant's Petition, rescind the January 3, 2024 Order of Joinder and return this matter to the trial level for the WCJ to prepare a record of the proceedings in accordance with section 5313 and *Hamilton, supra*. When the WCJ issues his decision, any person aggrieved thereby may seek reconsideration or removal.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the January 3, 2024 Order of Joinder is **GRANTED**.

IT IS FURTHER ORDERED that as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 3, 2024 Order of Joinder is **RESCINDED** the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 20, 2024

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

**MARK SHAFFER
WORK COMP LAW GROUP
LAW OFFICE OF JENNIFER DRUMMOND
WOOLFORD ASSOCIATES
STOCKWELL HARRIS VENTURA**

SAR/abs

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