

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

JOHN FITZPATRICK, *Applicant*

vs.

**GENERAL DYNAMICS INFORMATION TECHNOLOGY; INSURANCE COMPANY
STATE OF PENN, administered by, BROADSPIRE BREA, *Defendants***

**Adjudication Number: ADJ13725703
San Diego District Office**

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

Applicant in pro per seeks reconsideration of the Order Dismissing Case (Order) issued on March 5, 2021, wherein the workers' compensation administrative law judge (WCJ) dismissed applicant's case without prejudice pursuant to the Notice of Intention (NOI) issued on January 11, 2021.

Applicant contends that the Order is premature in that his objections to dismissal should be considered after a hearing on the merits.

We received an Answer from defendant.

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

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based upon our review of the record, and as discussed below, we will grant the Petition, rescind the Order, and return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

Applicant alleges that he sustained injury to his ankle and back while employed as an electronic technician for defendant on August 28, 2018. (Application for Adjudication, September 23, 2020, p. 4.)

Applicant also alleges that he previously filed a workers' compensation claim identified as case number ADJ105331111, that he was previously disabled from work on December 11, 2015, and that his August 28, 2018 injury occurred when the doctor physically examining his right ankle to determine whether surgery was necessary hyper-extended his ankle, "causing additional injury to peroneus longus and hand numbness due to herniated cervical disc." (*Id.*, pp. 4-5.)

On December 22, 2020, the matter proceeded to a mandatory settlement conference (MSC) and the WCJ ordered the matter taken off calendar, noting as follows:

Applicant had an initial claim filed in the State of CA in 2015. Such case had concurrent jurisdiction with Longshore. Applicant pursued his claim under the Longshore Act and voluntarily dismissed this 2015 claim without prejudice. In addition and in accordance with Cal Labor Code, applicant was adequately compensated for the maximum amount of benefits of 104 weeks of temporary total disability under Cal Work Comp law. The rest of applicant's benefits under his workers' compensation claim was administered under the Longshore side of his claim.

It is applicant's contention that a doctor in which he was to see for his claim caused further injury to his foot in 2018. Applicant has filed an additional application due to this alleged injury. However, due to the timeframes of this additional injury, it would appear from what was presented today, this claim could potentially be barred due to the statute of limitations. In addition, it appears that since it was a doctor directed from the Longshore Case, applicant should and will attempt to pursue any and all remedies available to him with the Longshore ALJ. (Minutes, December 22, 2020, pp. 1-2.)

On January 4, 2021, defendant filed a petition for dismissal, alleging that applicant's claim violated all potentially applicable statute of limitations and that no good cause existed to establish grounds to reopen applicant's previous claim. (Petition for Dismissal, January 4, 2021, pp. 1-3.)

On January 12, 2021, the WCJ issued the NOI, advising the parties that the case would be dismissed unless "good cause to the contrary is shown in writing" within ten days. (Notice of Intention to Dismiss Case, January 12, 2021.)

On January 19, 2021, applicant objected to dismissal, arguing that various legal issues remained unresolved, including that defendant's statute of limitations defenses lack merit based

upon alleged fraudulent concealment of facts relating thereto. (Objection to Dismissal Petition, January 19, 2021, pp. 1-2.)

In the Report, the WCJ writes:

Applicant has two claims with the WCAB; ADJ10533111 with a date of injury 12/11/2015, and ADJ13725703 with a date of injury 08/2[8]/2018. However, despite filing two separate claims, the second claim arose out of the first claim wherein applicant's alleged injury arose out of an examination with a doctor for the first claim. . . .

[A]pplicant's injuries arose out of a claim with concurrent jurisdiction with Longshore. . . . [A]pplicant voluntarily dismissed his 2015 date of injury with the Workers' Compensation Appeals Board without prejudice on January 24, 2020. (EAMS Doc ID 72247487) As for the 2018 date of injury, defendant had petitioned to dismiss this claim at hand based on statute of limitations, this was a compensable consequence of the first injury and not a new claim, and that the alleged injury arose out of his treatment under the Longshore Case, not for any treatment under either workers' compensation claim with jurisdiction at the WCAB.

. . .

In addition, in accordance with discussions with the parties at the Mandatory Settlement Conference, it was determined that applicant had already hit a statutory maximum of 104 weeks of reimbursement in the Workers' Compensation claim for the 2015 date of injury and all other benefits were to be administered in his Longshore claim.

. . .

Again, applicant is claiming an injury to his right foot which arose out of the 2015 date of injury, which is still subject to the Longshore claim and due to actions taken to applicant from the Longshore doctors. This current case was filed beyond the statute of limitations from the alleged injury caused by the Longshore Doctor in 2016 for the 2015 date of injury, being filed in September of 2020.

Finally, it was discussed at the Mandatory Settlement Conference that any issues applicant may have with this claim, he still has a right and should pursue his remedies within the Longshore system which he fails to do.

(Report, pp. 1-3.)

DISCUSSION

Labor Code section 5502(d)¹ provides in pertinent part as follows:

(2) The settlement conference shall be conducted by a workers' compensation administrative law judge . . . At the mandatory settlement

¹ Unless otherwise stated, all further statutory reference are to the Labor Code.

conference, the . . . workers' compensation administrative law judge shall have the authority to resolve the dispute, including the authority to approve a compromise and release or issue a stipulated finding and award, **and if the dispute cannot be resolved, to frame the issues and stipulations for trial. . . .**

(3) If the claim is not resolved at the mandatory settlement conference, **the parties shall file a pretrial conference statement noting the specific issues in dispute, . . .**

(§ 5502(d)(2)-(3) [Emphasis added].)

Here, the record shows that the WCJ held an MSC at which the parties failed to settle applicant's claim. However, based upon the matters discussed at the MSC, the WCJ determined that applicant's remaining benefits could not be administered under the jurisdiction of the WCAB and that his claim herein was barred by the applicable statute of limitations. (Report, pp. 2-3; see also Minutes, December 22, 2020, pp. 1-2.) Having determined these issues, the WCJ issued the NOI and the Order instead of obtaining a pretrial conference statement from the parties, framing the issues and stipulations for trial, and holding a hearing with respect to those issues.² (Report, pp. 2-3.)

We are thus persuaded that the WCJ issued the Order without providing applicant an opportunity to be heard; and, as such, the Order violated applicant's right of due process. (See, e.g., *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 704, 711-12 [57 Cal.Comp.Cases 230] [stating that a fundamental requirement of due process in any proceeding to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections].)

We also observe that the process involving the petition for dismissal followed by the notice that applicant's claim would be dismissed unless good cause to the contrary was shown "in writing" served to terminate applicant's case in a manner akin to summary judgment. (Petition for Dismissal, January 4, 2021, pp. 1-3; Notice of Intention to Dismiss Case, January 12, 2021.) However, pursuant to WCAB Rule 10515, summary judgment proceedings are not permitted in the workers' compensation system, and contested matters are to be tried by way of hearing on the record. (See Cal. Code Regs., tit. 8, former § 10490, now § 10515.)

Accordingly, we will rescind the Order.

² Although applicant filed a document labeled as a pretrial conference statement prior to the MSC, the record in EAMS does not reveal that defendant joined in that filing or filed a pretrial conference statement after the MSC.

In addition, we observe that a decision by the WCJ “must be based on admitted evidence in the record” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc)), and must be supported by substantial evidence. (§§ 5903, 5952, subd. (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].) 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.” (*Hamilton, supra*, at p. 475.)

Here, the issuance of the Order without a hearing leaves us without a record of evidence from which we may evaluate the merits of the Petition. Nevertheless, the Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process. (See *San Bernardino Community Hosp. v. Workers’ Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *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, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].) Accordingly, we will return the matter to the trial level so that the WCJ may develop the record as to applicant’s claim and defendant’s defenses thereto.

Accordingly, we will grant the Petition, rescind the Order, and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Order Dismissing Case issued on March 5, 2021 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Order Dismissing Case issued on March 5, 2021 is **RESCINDED** and the matter **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 14, 2021

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

**JOHN FITZPATRICK
MANNING & KASS, ELLROD, RAMIREZ, TRESTER**

SRO/ara

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