

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

**JULIO IBANEZ, *Applicant***

**vs.**

**EDNA COMPANY INC.;**  
**administered by COMPWEST NEWPORT BEACH, *Defendants***

**Adjudication Numbers: ADJ13427485; ADJ13452043  
Oxnard District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.<sup>1</sup>

Applicant seeks reconsideration of the Joint Order Dismissing Cases (Order) dated October 6, 2022, wherein the workers' compensation administrative law judge (WCJ), dismissed both of applicant's cases without prejudice.

Applicant contends that he has always been ready and willing to proceed with his claim, and was ill during the last trial and his cases should not have been dismissed.

Defendant did not file an Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending the Petition be denied as untimely.

We have considered the allegations of the Petition for Reconsideration, and the contents of the Report of the WCJ 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 consistent with this decision.

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<sup>1</sup> Commissioner Sweeney, 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 to have sustained injury to various body parts after a pallet fell on his foot on July 17, 2020, while employed by defendant as a storer.

Eventually, trial was set for July 14, 2022, and the minutes list applicant's attorney, James Harmon's hearing representative, Richard Castro, as appearing for applicant. Applicant is marked as not present. The WCJ ordered that the matter be taken off calendar.

Also, on July 14, 2022, for Case Number ADJ13427485 and Case Number ADJ13452043 the WCJ issued a Joint Notice of Intention to Dismiss Cases (NIT) pursuant to WCAB Rules 10756 and 10832. (Cal. Code Reg., tit. 8, §§10756 and 10832.) The NIT states:

**“IT APPEARING THAT applicant, JULIO IBANEZ failed to appear despite notice for the 10th trial setting in these matter [sic]**

**NOTICE IS HEREBY GIVEN** that an Order Dismissing the above entitled cases, 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.” (NIT, 7/14/2022.)

On July 19, 2022, the court served the NIT via US Mail on applicant's attorney, applicant, and defendant as indicated by the proof of service at the bottom of the NIT. (NIT, 7/19/2022.) As directed by the court, defendant's attorney served the NIT (Proof of Service, 8/1/2022) and minutes of hearing dated July 14, 2022 on August 1, 2022, on applicant, applicant's attorney, and defendant's insurance carrier. (Proof of Service, 8/1/2022.)

Also, there is a Proof of Service dated August 9, 2022, filed in the Electronic Adjudication Management System (EAMS) stating that defendant's attorney served Minutes of Hearing (MOH) dated August 9, 2022<sup>2</sup> and Notice of Hearing (NOH) for the Rescheduled trial: 9/9/2022 on applicant, applicant's attorney and defendant's insurance carrier. (Proof of Service, 8/9/2022.)

A review of the record in EAMS for Case Numbers ADJ13427485 and Case Number ADJ13452943 does not reflect that any party filed an objection to the NIT.

On September 6, 2022, applicant's attorney filed an Objection To Petition To Dismiss Case (Objection) for Case Number ADJ13452043 dated and served on September 5, 2022, wherein

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<sup>2</sup> A review of the record in the Electronic Adjudication Management System (EAMS) for both ADJ13427485 and ADJ13452043 does not reflect that there are Minutes of Hearing dated August 9, 2022, in the system for either case. The Notice of Hearing for the rescheduled Trial is attached to the Proof of Service but is not filed separately in EAMS in either case.

applicant through his attorney objected to the Petition<sup>3</sup> to dismiss his case alleging that applicant was ill on the day of trial.

On October 6, 2022, the WCJ issued and served an Order Dismissing Case Number ADJ13427485 and Case Number ADJ13452943 without prejudice pursuant to the NIT which issued on July 14, 2022, and was filed and served on July 19, 2022, by the workers' compensation appeals board.

## **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. Code<sup>4</sup>, §§ 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).)

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.*” (Lab. Code §5900(b), 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 dismissing was issued by the WCJ on October 6, 2022, and the proof of service reflects that defendant served the same on October 19, 2022. On November 8, 2022, applicant's attorney filed a Petition for Reconsideration dated November 7, 2022, the Petition was untimely since it was filed beyond the allowable time period. Thus, pursuant to our authority under §5900 (b), we granted reconsideration on our own motion.

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<sup>3</sup> A review of the record in EAMS does not indicate that a Petition To Dismiss Case Number ADJ13452043 was filed.

<sup>4</sup> All further statutory references are to the Labor Code, unless otherwise noted.

## II.

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. (Rucker)* (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].) 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. (*Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

## III.

The WCJ may issue a Notice of Intention (NIT) for any proper purpose. (*Id.*, § 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. (*Ibid.*)

Pursuant to WCAB Rule 10756:

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.)

Pursuant to WCAB Rule 10752 (a): “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), italics added.) WCAB Rule 10305(c) defines appearance as: “. . . a party or *their representative’s* presence, pursuant to Labor Code section 5700, at any hearing.” (Cal. Code Regs., tit. 8, § 10305(c), italics added.)

Here, applicant’s attorney’s hearing representative, Richard Castro appeared on applicant’s behalf at the July 14, 2022 trial, as shown by the minutes dated July 14, 2022. Applicant’s representative’s appearance at the July 14, 2022 trial, satisfied the appearance requirement under WCAB Rule 10305(c) so that the basis for the NIT was invalid, the NIT is void, and therefore the order is also void.

Thus, the cases were improperly dismissed.

Accordingly, we rescind the Order dismissing and return the matter to the trial level.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 6, 2022, Joint Order of Dismissal is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**May 14, 2024**

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

**JULIO IBANEZ  
LAW OFFICE OF JAMES HARMON  
MALMQUIST, FIELDS & CAMASTRA**

**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*