

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

LORENA ZAVALA, *Applicant*

vs.

**RED ROBIN BURGER & SPIRITS EMPORIUMS;
SAFETY NATIONAL CASUALTY adjusted by BROADSPIRE, *Defendants***

**Adjudication Number: ADJ12475830
Stockton District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration to further study the legal and factual issues raised by the Petition for Reconsideration filed by defendant.¹ This is our Opinion and Decision After Reconsideration.

Defendant Red Robin Burger & Spirits Emporiums and Safety National Casualty adjusted by Broadspire (hereinafter “defendant”) seek reconsideration of the September 6, 2022, Findings of Fact and Order (F&O) issued by a workers’ compensation administrative law judge (WCJ). The WCJ found in pertinent part that applicant, while employed as a cook on May 29, 2019, sustained an admitted specific injury to her low back and that good cause exists to reinstate applicant’s industrial injury claim.

Defendant contends that applicant’s claim should not have been reinstated, and that the order dismissing the claim for lack of prosecution should not have been vacated.

We received an Answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny the petition.

We have considered the allegations of defendant’s Petition, applicant’s Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on our review of the record, and for the reasons stated in the WCJ’s Report and Opinion on Decision, both of which we adopt and incorporate, as our decision after reconsideration, we will affirm the F&O.

¹ Commissioner Sweeney, who was on the panel that issued this decision, no longer serves on the Appeals Board. Another panelist was appointed in her place.

We have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s). (*Id.*)

Further, pursuant to *Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196, 1205-1206 [57 Cal.Comp.Cases 149], a party may seek relief from the consequences of a procedural failure by utilizing a procedure substantially similar to Code of Civil Procedure section 473(b), which provides in pertinent part:

The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.

The court in *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 [243 Cal.Rptr. 902, 749 P.2d 339], has reaffirmed some basic principles relating to relief from default. It is the policy of the law to favor, whenever possible, a hearing on the merits. Appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than when the default judgment is allowed to stand. [Citation].

As the WCJ eloquently stated in her Report:

“At trial, the court found the applicant to be a very credible witness and found good cause that the claim should be reinstated as it was in the middle of the Covid Pandemic. In the alternative, the court's dismissal without prejudice contained self-destruct clauses and is therefore void. . . .

The Petition to Dismiss an Inactive Claim came squarely in the middle of the pandemic when doctors were not seeing patients in person, emergency regulations were being instituted by the WCAB and the Governor, and things were somewhat chaotic. She was ill and ignored by her prior attorney and most, if not all, courts and law firms were working remotely. Doctors' offices were cancelling appointments right and left and when an appointment was available they were only allowing for rare remote appointments. It was an unprecedented time. These events culminated in a “perfect storm” of ruin for this applicant and her case was unfortunately dismissed.

The State of Emergency En Banc decision MISC.NO 260, dated 3/18/2020, temporarily suspended WCAB rules of Practice and Procedure contained in Title 8 of the California Code of Regulations. Specifically CCR

Sections 10562, 10563, 10563.1, 10755, 10756, 10888 which suspended Dismissal of an Application or Lien Claim for Failure to Appear. As the Petition for Dismissal was reliant on applicant's failures to appear as a few medical appointments, it seems as if the dismissal by the WCJ without prejudice was not valid." (Report and Recommendation on Petition For Reconsideration, 10/10/2022, pp. 2-4.)

Here, it is clear from applicant's testimony that Law At Your Side failed to manage her case. Specifically, applicant's prior attorneys failed to respond to the NIT and in doing so failed to represent applicant's interests, which caused her case to be dismissed. Applicant's prior attorneys' failure should not penalize applicant in her pursuit of her industrial injury claim and her case should be decided on the merits.

Accordingly, we affirm the F&O.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact, Order, Award, and Opinion issued on September 6, 2022 is **AFFIRMED**.

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

September 11, 2023

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

**LORENA ZAVALA
OCCUPATIONAL INJURY LAW CENTER
DIETZ, GILMOR & CHAZEN**

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Petitioner/Defendants RED ROBIN BURGER & SPIRITS EMPORIUMS, SAFETY NATIONAL CASUALTY, by and through their attorneys of record, has filed a timely Petition for Reconsideration challenging the court's Findings of Fact, Award, Order and Opinion on Decision dated 9/6/2022. The Petition for Reconsideration is dated 10/3/2022.

This report and recommendation on reconsideration is consistent with CCR §10860 and the Policy and Procedure Manual § 1.65.

II

FACTS

Petitioner/Defendant RED ROBIN BURGER & SPIRITS EMPORIUMS, has filed a timely Petition for Reconsideration. The Respondent/Applicant sustained an admitted injury to her low back while employed as a cook for Red Robin Burger & Spirits Emporium on 5/29/2019. The matter was accepted and the applicant voluntarily received medical treatment through the carrier. Applicants' case was dismissed upon Petition citing three failures to appear at medical appointments and no response from the applicant's attorney. The matter was dismissed without prejudice on 11/23/2020. The Notice of Intent to Dismiss and the Order Dismissing the claim included self-destruct clauses.

At trial the applicant testified that she had Covid twice and a nonindustrial scheduled surgical procedure that was repeatedly changed. Despite all efforts, she received no response and no help from her prior attorney and found out later that her case was dismissed without prejudice. She dismissed her attorney and spoke to Information and Assistance. She then proceeded, in proper, and filed a Petition to Reopen on 5-19-2021.

At trial, the court found the applicant to be a very credible witness and found good cause that the claim should be reinstated as it was in the middle of the Covid Pandemic. In the alternative, the court's dismissal without prejudice contained self-destruct clauses and is therefore void.

The applicant testified that she had Covid, twice and that her attorney was non responsive to her repeated calls and questions about the case progression.

As well, the EN BANC MISC. NO. 260, suspended dismissals of applications for failures to appear.

III

PETITIONER'S CONTENTIONS AND DISCUSSION

Defendant/Petitioner asserts that they are aggrieved by the court's order and finding on the issue of Dismissal on the following grounds:

1. By the order, decision or award made and filed by the Worker's Compensation Judge, the appeals board acted without or in excess of her powers:
2. The evidence does not justify the findings of fact: and
3. The findings of fact do not support the order, decision or award.

IV

DISCUSSION

If a dismissed claim cannot be reopened on the grounds of new and further disability under LC 5814, an applicant may be able to reopen a claim for good cause under LC 5803 and LC 5804.

The applicant was found to be very credible at trial. She testified that she was ignored by her prior attorney's office, never spoke to an attorney, and was taken off guard when she was told that her case was dismissed. She cancelled one of her PQME evaluations due to covid and for the other missed appointment she was ill. She repeatedly contacted her attorney's office and thought that they were handling her workers compensation case.

The applicant had an accepted industrial injury and she received medical treatment for her injuries. During the pandemic, her employer was moving to a take-out order only status and she did not understand her work schedule. She was confused and thought she was being laid off initially. During this time period the applicant had Covid twice and a significant medical condition developing. She was also scheduled for a non-industrial surgical procedure but due to the pandemic the procedure was continuously delayed and cancelled.

The Petition to Dismiss an Inactive Claim came squarely in the middle of the pandemic when doctors were not seeing patients in person, emergency regulations were being instituted by the WCAB and the Governor, and things were somewhat chaotic. She was ill and ignored by her prior attorney and most, if not all, courts and law firms were working remotely. Doctors' offices were cancelling appointments right and left and when an appointment was available they were

only allowing for rare remote appointments. It was an unprecedented time. These events culminated in a “perfect storm” of ruin for this applicant and her case was unfortunately dismissed.

The State Of Emergency En Banc decision MISC.NO 260, dated 3/18/2020, temporarily suspended WCAB rules of Practice and Procedure contained in Title 8 of the California Code of Regulations. Specifically CCR Sections 10562, 10563, 10563.1, 10755, 10756, 10888 which suspended Dismissal of an Application or Lien Claim for Failure to Appear. As the Petition for Dismissal was reliant on applicant’s failures to appear at a few medical appointments, it seems as if the dismissal by the WCJ without prejudice was not valid.

The court may reopen a matter absent new and further disability if good cause is found. In *Sarabi v. WCAB* (2007) 72 CCC 778, 782, An award may be reopened if an applicant has timely filed a petition to reopen and did not suffer new and further disability, but there are reasons other than that to justify reopening a case after an award. Absent a new and further disability within the meaning of LC 5410, an appeals board action to reopen is governed by the provisions of LC 5803 and LC 5804. In this matter the court found ample good cause for this applicant to proceed with her accepted industrial injury.

The court found the applicant credible, and that she fell victim to the Covid Pandemic in her cases dismissal. Her Petition was within the five year statutory rule for reopening and therefore should be allowed to proceed with her accepted claim. This matter should be allowed to proceed on its own merits and the applicant should be allowed to seek a PQME and receive the benefits she was entitled to prior to the pandemic.

V

RECOMMENDATION AS TO PETITION FOR RECONSIDERATION

The court requests that this Petition for Reconsideration be denied.

Respectfully submitted,

Date:10/10/2022

MARIBETH ARENDT
Workers’ Compensation Judge

OPINION ON DECISION

Good Cause

This WCJ finds that good cause exists to allow the applicant reinstatement of her claim and allow her to continue with her industrial injury claim. If a dismissed claim cannot be reopened on the grounds of new and further disability under LC 5814, an applicant may be able to reopen a claim for good cause under LC 5803 and LC 5804.

At trial, the applicant very credibly testified that she was ignored by her prior attorney's office, never spoke to an attorney, and was completely shocked when she was told that her case was dismissed.

The applicant had an admitted injury at work. She was confused by her possible lay off status. During this time period the applicant had Covid twice and a very significant medical condition going on. She was supposed to have a surgical procedure but due to the pandemic it was continuously delayed and cancelled.

Not only was she ill and ignored by her prior attorney but her case sat squarely within the beginnings of the Covid pandemic. Covid was at its peak and the courts were in the process of working remotely. Doctors offices were cancelling appointments right and left and when an appointment was available they were only allowing for rare remote appointments.

It was an unprecedented and confusing time. These events culminated in a "perfect storm" of ruin for this applicant and her case was unfortunately dismissed. The regulations promulgated during the Covid pandemic were tailor made and directly related to this applicant's difficulties and situation.

Good cause is found by the WCJ to reinstate the claim.

Valid

Was the original dismissal valid? A case may be dismissed after issuance of a 10-day notice of intention to dismiss and an opportunity to be heard, but not by an order with a clause rendering the order null and void if an objection showing good cause is filed (a "self-destruct order") (CCR 10550(f)). Judge Durr's Notice of Intent to Dismiss and his actual Order to Dismiss both contained self-destruct clauses. The court finds that these orders were not valid.

In deciding whether to dismiss a claim under CCR 10550, the appeals board may balance the equities of the parties. If the equities favor the applicant, dismissal will be denied. As described above, the equities highly favor the applicant continuing with her claim and allowing the matter to go forward. Her case is reinstated and the dismissal is vacated.

Procedural dismissals are disfavored by the appeals board, and there is a strong public policy that litigation should be resolved on the merits whenever possible. *Moore v. Waste Management*, 2014 Cal. Wrk. Comp. P.D. *Haro v. Pacific Steel Casting*, 2016 Cal. Wrk. Comp. P.D. The applicant

has not received her PQME evaluations as of this time and should be allowed to continue with her claim.

Petition to Reopen

Even if the court were to find the dismissal valid, then the action is still within the 5 year window to reopen for new and further disability. The applicant has received additional medical treatment on a nonindustrial basis. While a dismissal without prejudice has the effect of a final judgment in favor of the employer insofar as it terminates the proceedings and concludes the rights of the parties in a particular action. It does not bar a subsequent action on the same cause filed within the applicable statutory period. *Nolan v. WCAB* (1977) 42 CCC 401, 405.

Even if the dismissal had been executed with prejudice, if the WCJ finds good cause the order could still be vacated under LC 5803. *Colton Joint Unified School District v. WCAB (Webster)* (2007) 72 CCC 1393 (writ denied). A dismissal without prejudice leaves the matter as if no application had been filed, in many cases, the appeals board will allow an applicant to reopen a dismissed claim as long as the petition to reopen was filed within five years of the date of injury. This was an accepted claim and treatment was rendered through the carrier voluntarily. When benefits have been furnished voluntarily, the five-year rule of LC 5410 is triggered. If the employer furnishes workers' compensation benefits either voluntarily or pursuant to an award, LC 5410 extends the period within which an original proceeding may be instituted from one year to five years after the date of injury on the grounds of new and further disability.

Conclusion

Based on the above, and under either circumstance, this claim is reopened for good cause and will be reinstated.

Date: 9/6/2022

Maribeth Arendt
Workers' Compensation Administrative Law Judge