

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

YU ZHANG, *Applicant*

vs.

BOB MCCANN & ASSOCIATES, administered by FARMERS, *Defendants*

**Adjudication Number: ADJ1871535 (VNO 0546000)
Riverside District Office**

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

Applicant seeks reconsideration of the Order for Dismissal issued by a workers' compensation administrative law judge (WCJ) on February 23, 2009, wherein the WCJ dismissed applicant's case for failure to prosecute. Applicant contends that he did not receive a notice of intention to dismiss (NOI) his case and requests that his claim be reinstated.

We did not receive an Answer. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the petition be dismissed as untimely pursuant to Labor Code section 5903.

We have reviewed the allegations of the Petition for Reconsideration and the contents of the WCJ's Report. Based upon our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the Order for Dismissal, and return the matter to the WCJ for further proceedings and decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

BACKGROUND

Applicant claimed industrial injury to various body parts while employed as a laborer on April 15, 2007. On November 21, 2008, applicant and his attorney were served with a notice of intention to dismiss (NOI) applicant's claim under WCAB Rule 10582 for lack of prosecution.

The NOI stated, in relevant part: “Notice is hereby given that IT IS THE INTENT OF THIS COURT to DISMISS the above-referenced case(s) within 20 days UNLESS good cause is stated, in writing, within said 20 days why the claim should not be dismissed.” (NOI, November 19, 2008.) Attached to the NOI were a blank Order for Dismissal and a Minutes of Hearing (MOH) indicating that neither applicant nor his representative appeared; however, the MOH was neither signed nor dated by the WCJ, and the date of the hearing during which an appearance was not made on applicant’s behalf was not otherwise made clear on the MOH.¹

On February 23, 2009, the WCJ issued the Order dismissing applicant’s case for lack of prosecution, which was served on the parties on February 25, 2009. (Order Dismissing with POS, February 23, 2009.)

On February 22, 2023, applicant’s attorney filed an amended application for adjudication. A status conference was held on April 26, 2023. The MOH issued during the April 26, 2023 hearing stated that representatives for applicant and defendant were present. The April 26, 2023 MOH further stated: “Case was dismissed in February of 2009. AA wants change of venue [to] VNO to obtain documents. AA will need to file a petition to change venue.” (MOH, April 26, 2023.) The hearing was continued to October 25, 2023; however, neither applicant nor his attorney appeared during that hearing. In the MOH issued on October 25, 2023, the court noted, “Matter was continued to today from 4/26/23. No appearances by AA. Court reserves sanctions and [defendant’s] costs. Case was dismissed in February of 2009.” (MOH, October 25, 2023.)

On October 31, 2023, applicant filed a Petition for Reconsideration of the February 23, 2009 Order for Dismissal, arguing that he did not receive an NOI or a final order of dismissal. Applicant contended that, as a result, his workers’ compensation claim should be reinstated.

DISCUSSION

The record shows that applicant was served with the NOI on November 21, 2008. Thus, the central issue in this case is whether the NOI was adequate to provide applicant with adequate notice, i.e., due process, as to the basis for the February 23, 2009 Order for Dismissal, dismissing his case for failure to prosecute.

Due process requires that a party be provided with reasonable notice and an opportunity to be heard. (*Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 711-712 [57

¹ The only date listed on the MOH stated “*Before*,” as opposed to “*At*,” “Date of Hearing: 11-19-08.”

Cal.Comp.Cases 230].) As a matter of due process, an NOI must *clearly* state the reason(s) for dismissal so as to provide adequate notice and a meaningful opportunity to respond. If an NOI is issued in violation of due process, the corresponding order issued thereafter is invalid.

As noted above, the only reason set forth in the NOI in this case was a violation of Rule 10582, which governed dismissal for failure to prosecute at the time in question. Although the NOI was served along with an MOH indicating that no appearance was made on applicant's behalf, the MOH did not clearly indicate the date of the hearing where the nonappearance occurred, and, perhaps more significantly, the MOH was neither dated nor signed by the WCJ. Furthermore, the WCJ did not list the nonappearance noted in the MOH as the basis for his decision to issue the NOI.

Upon review, we conclude that the basis for dismissal stated in the NOI was so brief and so vague that it failed to provide applicant with proper notice and due process. (See *Connally v. General Constr. Co.* (1926) 269 U.S. 385, 391 [a law is constitutionally void on its face when, as matter of due process, it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application"]; see also *Smith v. Goguen* (1974) 415 U.S. 566, 582 [the void for vagueness doctrine is designed to prevent arbitrary and discriminatory enforcement].) Because the NOI was invalid, so was the Order for Dismissal issued on February 23, 2009.

We also note that the WCJ issued the Order for Dismissal on February 23, 2009, but designated defendant to perform service on all other parties listed on the Official Address Record pursuant to WCAB Rule 10500. However, former WCAB Rule 10500 stated, in relevant part, that "The Workers' Compensation Appeals Board shall not designate a party or lien claimant, or their attorney or agent of record, to serve any final order, decision, or award relating to a submitted disputed issue." (Cal. Code Regs., tit. 8, former § 10500, now § 10628 (eff. January 1, 2020).) Because service of the February 23, 2009 Order for Dismissal did not comply with former WCAB Rule 10500, we consider it defective for this reason, as well.

Accordingly, we grant applicant's Petition for Reconsideration, rescind the February 23, 2009 Order for Dismissal, and return the matter to the WCJ for further proceedings and decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the February 23, 2009 Order for Dismissal is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 23, 2009 Order for Dismissal is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 29, 2023

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

**YU ZHANG
EQUITABLE LAW FIRM
LAW OFFICES OF SCOTT STRATMAN**

AH/cs

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