

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

RICARDO MORENO, *Applicant*

vs.

**ADVANCED PATTERN AND MOLD, INC.;
OHIO SECURITY INSURANCE COMPANY,
C/O LIBERTY MUTUAL, *Defendants***

**Adjudication Number: ADJ11207885
Pomona District Office**

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

Applicant filed a Petition for Removal regarding the July 12, 2021 Order Dismissing Serious & Willful Claim and Order Quashing Depositions (Order) issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ dismissed applicant's petition for increased benefits for serious and willful (S&W) misconduct by the employer pursuant to Labor Code section 4553 without prejudice, based in part on applicant's request for dismissal filed on November 12, 2019. Concurrently with the Petition for Removal, applicant also filed an Objection to Order Dismissing Serious & Willful Claim, as well as a petition entitled Applicant's Labor Code §5803 Petition to Set Aside and Rescind Dismissal without Prejudice and Request for Dismissal of S&W Petition.¹

In the Petition for Removal, applicant contends that the WCJ violated his right to due process by dismissing the S&W petition sua sponte based on a dormant petition for dismissal without affording applicant notice and the opportunity to be heard.

¹ Pursuant to our authority, we accept applicant's supplemental filings. (Cal. Code Regs., tit. 8, former § 10848, now § 10964 (eff. Jan. 1, 2020).)

We did not receive an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Removal recommending that the petition be denied.

Based on our review of the record and for the reasons discussed below, we will treat applicant's petition as one seeking reconsideration, grant reconsideration, rescind the July 12, 2021, and return this matter to the trial level.

A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) Here, the WCJ's order dismissing applicant's S&W petition, while characterized as "without prejudice," is a final order because it definitively extinguishes applicant's right to seek benefits pursuant to section 4553. "A dismissal 'without prejudice' necessarily means without prejudice to the filing of a new action on the same allegations, so long as it is done within the period of the appropriate statute of limitations." (*Eaton Hydraulics Inc. v. Continental Casualty Co.* (2005) 132 Cal.App.4th 966, 974-975, fn. 6 [34 Cal Rptr.3d 91].) The limitations period for the filing of an S&W petition is twelve months from the date of injury.² (Lab. Code, § 5407.) Because the July 12, 2021 Order dismissing the S&W petition is beyond the limitations period, applicant can no longer refile an S&W petition, i.e., his substantive right to seek benefits was extinguished. This makes the order dismissing a final order subject to reconsideration rather than removal.

We now turn to the substantive issues. The WCJ recommends we deny applicant's petition based on WCAB Rule 10850(a) and "because Applicant himself long ago requested the action that the court eventually took." However, we do not find WCAB Rule 10850(a) controlling. While WCAB rules may indeed be informative in situations even when not directly on point, WCAB Rule 10850(a) states that "Orders of dismissal of Applications for Adjudication of Claim shall issue *forthwith* upon request by the employee...." (Cal. Code Regs., tit. 8, § 10850(a), emphasis added.) "Forthwith" means immediately and without delay. In this case, applicant filed the Request for Dismissal of the S&W petition on November 12, 2019. The dismissal order was not

² The injury in this case occurred on August 29, 2017.

issued forthwith but rather it was issued approximately one year and eight months later. For orders of dismissal that are not issued “forthwith,” WCAB Rule 10850 subsection (b) states that “All other orders of dismissal of Applications for Adjudication of Claim shall issue only after service of a notice of intention allowing at least 10 days for any adverse party to show good cause to the contrary....” The purpose of a notice of intention is to give notice and the opportunity to be heard to any adverse party the intended action of the court. 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.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) Due process requires that a party be provided with reasonable notice of the proceedings and an opportunity to be heard. (*Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 711–712 [57 Cal.Comp.Cases 230].) A notice of intention should have issued in this case.

We further note that applicant’s November 11, 2019 Request for Dismissal asks for dismissal “without prejudice” and “that the court reserve jurisdiction to litigate the S&W Petition at a later date....” This language clearly evinces a desire not to abandon the claim forever but to litigate it at a later date. However, at the time the Request for Dismissal was filed, the limitations period of section 5407 had already expired. Therefore, reservation of jurisdiction was not possible upon the dismissal of the petition. Given the conflict between applicant’s request for dismissal and the request for reservation of jurisdiction, the WCJ should have set this matter for conference to clarify applicant’s requests.

Accordingly, due to the procedural defects, we will grant reconsideration, rescind the WCJ’s decision, and return this matter to the trial level. Upon this matter’s return, the WCJ should set a status conference to allow the parties to agree to a plan for discovery.

For the foregoing reasons,

IT IS ORDERED that applicant’s Petition for Reconsideration of the July 12, 2021 Order Dismissing Serious & Willful Claim and Order Quashing Depositions is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 12, 2021 Order Dismissing Serious & Willful Claim and Order Quashing Depositions is **RESCINDED**, and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 13, 2021

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

**RICARDO MORENO
REYES AND ASSOCIATES
LAW OFFICES OF MUHAR, GARBER, AV & DUNCAN**

PAG/abs

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