

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

JOHNNY HAMLETT, *Applicant*

vs.

DAVID WALDSCHMIDT dba WOLF PERFORMANCE GOLF CARTS, *illegally uninsured*; UNINSURED EMPLOYERS BENEFITS TRUST FUND, *Defendants*

**Adjudication Numbers: ADJ7721850
San Bernadino 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. We now issue our Opinion and Decision After Reconsideration.¹

Applicant and Brian Collins, defendant David Waldschmidt's dba Wolf Performance Gold Carts (Waldschmidt's) former attorney, seek reconsideration of the Opinion and Decision After Reconsideration issued on March 21, 2022, wherein we rescinded the workers' compensation administrative law judge's (WCJ) Findings, Award and Order issued on February 12, 2021 and returned the matter for development of the record as to the issue of whether Mr. Collins was Waldschmidt's attorney of record as of the date of trial herein.

Applicant contends that the record demonstrates that Waldschmidt dismissed Mr. Collins as his attorney of record, that Mr. Collins consented to the dismissal, and that development of the record as to whether Mr. Collins was Waldschmidt's attorney of record as of the trial date herein is unnecessary, unduly time-consuming and prejudicial.

Mr. Collins similarly contends that the record demonstrates that Waldschmidt dismissed him as attorney of record, that he consented to the dismissal, and that he cannot be deemed Waldschmidt's attorney of record as of the trial date herein.

We did not receive an Answer.

¹ Commissioner Lowe, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

We have considered the allegations of the Petitions. Based on our review of the record, and for the reasons stated below and in our Mar 21, 2022 Opinion and Decision After Reconsideration, of which we adopt and incorporate the last paragraph of page 8, the first three paragraphs of page 9, the last paragraph of page 10, and page 11 with the exception of the last paragraph, as our Decision After Reconsideration, we will rescind our Mar 21, 2022 Opinion and Decision After Reconsideration and affirm the WCJ's February 12, 2021 Findings, Award and Order.

FACTUAL BACKGROUND

On July 17, 2013, the matter proceeded to trial of the issue of whether applicant was an employee of Waldschmidt. (Minutes of Hearing and Summary of Evidence and Disposition, July 17, 2013, pp. 1-2.) Brian Collins of the Law Office of Brian Collins appeared on behalf of Waldschmidt. (*Id.*, p. 1.)

At trial, Waldschmidt sought to introduce a September 13, 2012 award of arbitrator from applicant's civil case against him. (*Id.*, p. 3:16.) Waldschmidt also testified that applicant's civil suit against him was "settled." (Minutes of Hearing and Summary of Evidence (Further), March 5, 2014, p. 6:13-16.)

On May 30, 2014, the WCJ found that applicant was "an employee of and not an independent contractor of [Waldschmidt], illegally uninsured, as a golf cart mechanic, on October 21, 2010, when he sustained injury." (Findings of Fact, May 30, 2014.) The WCJ served notice of the finding on all parties shown on the OAR. (*Id.*)

A review of the record in EAMS reveals that no party sought reconsideration of the May 30, 2014 findings of fact.

On September 2, 2014, Waldschmidt filed a dismissal of attorney, asserting that he was dismissing the Law Office of Brian Collins as his attorney of record, that he lacked legal representation, and that he wished to have future documents served at his address of "74874 Joni Dr. #B5, Palm Desert, CA 92260" and not on his former attorney. (Dismissal of Attorney, September 2, 2014, p. 1.) The dismissal of attorney was prepared on a form identified as "DWC/WCAB FORM 37" which does not contain an affirmative representation of consent or a signature line for the attorney to indicate his or her consent to dismissal. (*Id.*)

The dismissal of attorney was served upon the WCAB and the parties of record by the Law Offices of Brian Collins. (*Id.*, pp. 2-3.)

A review of the record in EAMS reveals that Waldschmidt's dismissal of attorney was filed by the Law Office of Brian Collin, and that Mr. Collins's designation as a case participant ended on September 2, 2014 with the removal of his name from the OAR.

On October 21, 2020, the matter proceeded to trial, and the WCJ stated that Waldschmidt did not appear "even though he was served notice by" UEBTF. (Minutes of Hearing and Summary of Evidence and Disposition, October 21, 2020, p. 2:2-3.) The WCJ ordered that trial would be continued to December 2, 2020 and that UEBTF would serve notice thereof on Waldschmidt. (*Id.* p. 1:21-22.)

Also on October 21, 2020, the WCJ entered into the minutes the order that trial be continued until December 2, 2020 and that UEBTF serve applicant's employer with notice of the continued trial. (Minutes of Hearing, October 21, 2020.) The WCJ designated UEBTF to serve a copy of the October 21, 2020 upon the parties of record. (*Id.*)

On October 22, 2020, UEBTF sent notice of the December 2, 2020 trial by mail to Waldschmidt at the address of "74874 Joni Drive Palm Desert CA 92260." (Proof of Service-Notice of Trial, October 27, 2020, pp. 1-4.)

On October 27, 2020, the court served a copy of the October 21, 2020 Minutes of Hearing and Summary of Evidence and Disposition on all parties of record. (Minutes of Hearing and Summary of Evidence and Disposition, October 21, 2020, p. 25.)

On February 12, 2021, the WCJ issue found that (1) while employed on October 21, 2010 as a golf cart mechanic by Waldschmidt, who was illegally uninsured, applicant sustained injury arising out of and in the course of employment (AOE/COE) to his left arm, left hand, left wrist, left elbow, left shoulder, right hand, face, head and skin; (2) applicant's injury caused temporary total disability from October 21, 2010 through October 20, 2012, at the rate of \$400.00 per week, plus a ten percent penalty increase per Labor Code² 4554, payable by the employer, less attorney's fees of fifteen percent; (3) applicant's injury caused permanent disability of seventy-six percent, entitling applicant to indemnity payable at \$270.00 per week for 529.25 weeks and a life pension thereafter at \$123.69 per week, plus a ten percent penalty increase on each species of benefit pursuant to section 4554, payable by the employer, less attorney's fees of fifteen percent; and (4) applicant will require further medical treatment to cure or relieve from the effects of his injury.

The WCJ issued an award in favor of applicant and against Waldschmidt of temporary

² Unless otherwise stated, all further statutory references are to the Labor Code.

disability indemnity, permanent disability indemnity, and further medical in accordance with these findings.

The WCJ ordered the parties to negotiate all liens, costs, self-procured medical treatment and medical mileage, and ordered UEBTF to notify applicant and applicant's counsel of any action brought against Waldschmidt. (Findings, Award, and Orders, February 12, 2021, pp. 1-2.)

In the Opinion on Decision, the WCJ states:

A prior proceeding and Finding of 5/30/2014 determined that Mr. Hamlett was an employee of . . . Waldschmidt . . . and not an independent contractor. Earning[s] are disputed and there is no stipulation as to indemnity rates for temporary or permanent disability. The employer has paid no compensation. The employer has furnished no medical treatment. Applicant's treating physician was Dr. Ralph Steiger. No attorney fees have been paid and no attorney fee arrangements were made. The parties stipulated that David Wood, M.D. is the orthopedic Agreed Medical Examiner. The Uninsured Employers Benefits Trust Fund has been properly joined. Liens were deferred by agreement.

Raised in issue were the following:

1. Injury arising out of and in the course of employment.
2. Parts of body injured, with the left arm, left hand, left wrist, left elbow, left shoulder, right hand, face, head, skin, neck and body system disputed.
3. Earning[s], with applicant asserting \$600 per week based on the employer's trial testimony per the 3/5/2014 Minutes of Hearing, at Page 8, Lines 3 – 10.
4. Temporary disability, with the applicant asserting entitlement to 104 weeks from 10/21/2010 through 10/20/2012.
5. Permanent and stationary date, with the applicant asserting 10/20/2012, based on Dr. Steiger and with there being no assertion by defendant.
6. Permanent disability.
7. Need for further medical treatment.
8. Liability for self-procured medical treatment.

9. Attorney fees, with Mr. Rubel requesting 15% of benefits awarded, including retro temporary disability, permanent disability, and life pension, all payable per LC 4555 or 4554.

10. Applicant requests a general finding as to additional costs and medical transportation and there is currently a lien in EAMS for applicant's attorney's request for an Order of Costs in the amount of \$2,677.96, and it has been agreed by the parties that the issue of applicant's attorney's costs will be deferred, as will be the liens of Med-Legal Photocopy and Ralph Steiger, M.D.

11. Applicant's Petition for amendment of the exhibit list.

Applicant's attorney requested judicial notice be taken of all the prior exhibits admitted at the prior trial, as well as the Minutes of Hearing and Summary of Evidence from 7/17/2013 through 3/5/2014 for multiple days of trial, Findings and Orders and Opinion on Decision.

(Opinion on Decision, pp. 4-5.)

On September 28, 2021, Waldschmidt sought reconsideration of the WCJ's findings, award and orders, contending that Mr. Collins had failed to enter his complete address into the OAR, causing him to lack notice of the proceedings in violation of the right of due process and entitling him to the equitable remedy of rescission. (Petition for Reconsideration, September 28, 2021.) Waldschmidt also argued that adjudication of applicant's claim is barred by the doctrine of res judicata. (*Id.*)

The WCJ issued a report and recommendation on Waldschmidt's petition, stating:

Title 8 CCR 10205.5(c) states that every party shall advise the district office and all parties of any change of mailing address and telephone numbers by furnishing the current information within five business days of any change. It is each person's or party's responsibility to ensure that the WCAB has the correct mailing address for each participant, and the Official Address Record is available online to each party to ensure that the WCAB has the correct address in their system for that person or party. If incomplete information or an incomplete address was given to the WCAB for the Official Address Record, then that is the information in our system until a person or party advises the WCAB of the correct information. EAMS is not intuitive and requires persons and parties to make a specific request to make a change in the Official Address Record.

Insofar as Mr. Waldschmidt participated in and testified at the initial trial in this matter to determine if applicant was an independent contractor or an employee, he certainly had access to the Official Address Record. He was represented by counsel, who also had access to the Official Address Record. If the address for Mr. Waldschmidt was never checked or corrected on the Official Address Record, that responsibility ultimately falls on Mr. Waldschmidt, who, once he dismissed his prior counsel (Dismissal of Attorney was filed 9/2/2014 – EAMS Doc. ID 12936522) became responsible for representing himself and making sure the WCAB had his correct address. Further, parties to a case have access to an online site to obtain Official Address Information and status of case
...

No petition to change or correct Mr. Waldschmidt's address was made prior to the instant filing of the Petition for Reconsideration, which was accompanied by a separate Notice of Change of Address, and Notice of Representation filed by current counsel, English Lloyd & Armenta. Asserting an incorrect address nearly 11 years after the Application for Adjudication of Claim was filed and 7 years after dismissal of his prior attorney after 3 days of trial and a final determination as to an employee/employer relationship certainly does not show adherence to the Rules or due diligence.
...

[T]here is a Dismissal of Attorney, which infers that the attorney was dismissed or "fired" by the client and did not seek leave from the court to be allowed to withdraw.
...

Once Mr. Waldschmidt (1) submitted himself to the jurisdiction of the WCAB; (2) failed to object to WCAB jurisdiction; (3) participated in and testified at the threshold trial in this matter in 2013 and 2014; and (4) failed to appeal the adverse determination made on 5/30/2014 in the WCAB case as to the employer/employee relationship that was determined to exist, he has by his own actions waived his right to assert that res judicata should apply to vacate the WCAB determinations.

Only now, at this VERY late date, has Mr. Waldschmidt submitted evidence of a dismissal of the civil action filed by Mr. Hamlett in the Superior Court (dismissal issued with prejudice for failure to respond to an order to show cause re dismissal) and asserts this should bar Mr. Hamlett's finally adjudicated workers' compensation claim. By the time that Superior Court dismissal was entered (dated 4/22/2014), Mr. Hallett and Mr. Waldschmidt had already had 3 days in trial before the WCAB and the issue of employment was

already submitted for decision. Thus, it appears clear by the actions of the parties that they preferred to adjudicate this matter before the WCAB and had, in fact, already submitted and acquiesced to the WCAB's jurisdiction in this matter by allowing the issue to proceed to trial and be submitted for decision.

...

It is disingenuous for Mr. Waldschmidt, through his new counsel, to now raise that Superior Court dismissal of the civil suit in April of 2014 should serve as *res judicata* to bar any workers' compensation determination, insofar as the WCAB had already invoked jurisdiction to adjudicate the threshold issue of employment, and the parties – both applicant and Mr. Waldschmidt - had submitted and acquiesced to WCAB jurisdiction.

(Report, pp. 3-6)

On March 21, 2022, we determined that “the record before us suggests that the court improperly removed Mr. Collins’s name [as Waldschmidt’s attorney of record] from the OAR and that it did not serve him as a consequence of its own error” and, therefore, that we would treat Waldschmidt’s petition as timely. (Opinion and Decision After Reconsideration, March 21, 2022, p. 8.) Having treated the petition as timely, we ordered that the matter be returned “to the trial level to develop the record as to the issue of whether Waldschmidt was represented by Brian Collins of the Law Office of Brian Collins.” (*Id.*, p. 11.)

DISCUSSION

We note preliminarily that our March 21, 2022 Opinion and Decision After Reconsideration treated Waldschmidt’s petition as timely on the grounds that the court may have erroneously removed Mr. Collins’s name from the OAR and failed to serve his office with the February 12, 2021 Findings, Award and Order as a result. (Opinion and Decision After Reconsideration, March 21, 2022, p. 8.) In treating the petition as timely, we assumed jurisdiction over Waldschmidt’s petition notwithstanding its late filing and returned the matter to the trial level for determination of the issue of whether the Law Office of Brian Collins represented Waldschmidt during the proceedings leading up to the February 12, 2021 decision. (*Id.*, p 11; and see *Id.*, pp. 6-7 (discussing the legal authorities applicable to issues of our jurisdiction over petitions for reconsideration).)

Although our exercise of jurisdiction over Waldschmidt’s petition relied upon the suggestion in the record that service of the February 12, 2021 decision was defective, the Petitions

now before us contrarily assert that the record suggests the Law Office of Brian Collins was not Waldschmidt's attorney and thus that there were no grounds in the first instance to deem service of the February 12, 2021 decision defective and Waldschmidt's petition as timely. However, our decision to treat Waldschmidt's petition as timely and return the matter to the trial level for a determination of the representation issue was based upon our evaluation of the allegations and evidence presented at the time of decision, and we are unable to discern grounds for the new allegations of the Petitions to retroactively deprive us of our jurisdiction to issue the March 21, 2022 decision. Instead, we are persuaded that we maintain jurisdiction over Waldschmidt's petition and the Petitions herein not despite but because of the jurisdictional issues they raise. (See *Yavitch v. Workers' Comp. Appeals Bd.* (1983) 142 Cal.App.3d 64, 70 (stating that the WCAB holds jurisdiction over jurisdictional questions, i.e., questions of whether a claim may fall within workers' compensation laws and is thus within its jurisdiction).) Accordingly, we conclude that we may exercise jurisdiction over the Petitions.

Turning the merits of the Petitions, we observe that in order for a dismissal of attorney to be entered into the record, it must be made upon the "consent of both client and attorney, filed with the clerk, or entered upon the minutes." (Cal. Code of Civil Proc. § 284; see also Cal. Code Regs., tit. 8, § 10402; *In re White & Bunch* (1981) 46 Cal.Comp.Cases 810 (Appeals Board en banc).) The purpose of this procedure "is to have the record of representation clear so that the parties may be certain with whom they are authorized to deal . . . and if there is some lawful reason why the new attorney ought not to be recognized as the attorney of record, the person having knowledge of such defect might appear and be heard." (*People ex rel. Department of Public Works v. Metrim Corp.* (1960) 187 Cal.App.2d 289, 294-295.)

Here, we are persuaded that the pleadings record shows not only that Waldschmidt dismissed the Law Office of Brian Collins by signing a dismissal of attorney on September 2, 2014, but also that the Law Office of Brian Collins consented to the dismissal and, therefore, that the dismissal was properly entered into the record.

Specifically, the dismissal of attorney was prepared on a form approved by the WCAB which did not contain an affirmative representation of consent or a signature line for Mr. Collins to indicate his consent. Nevertheless, Mr. Collins's consent is shown in the pleadings in that his office filed the dismissal form in EAMS and served copies of the dismissal upon all parties, including Waldschmidt. (Dismissal of Attorney, September 2, 2014, pp. 1-3.) Hence, we conclude

that the pleadings record is sufficient to establish Mr. Collins's consent to dismissal and, therefore, that he was not Waldschmidt's attorney of record at the time of trial herein. Accordingly, as our Decision After Reconsideration, we will rescind our Mar 21, 2022 Opinion and Decision After Reconsideration and affirm the WCJ's February 12, 2021 Findings, Award and Order.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that our Opinion and Decision After Reconsideration issued on March 21, 2022 is **RESCINDED** and the Findings, Award and Order issued on February 12, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 15, 2022

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

**JOHNNY HAMLETT
LERNER, MOORE, SILVA, CUNNINGHAM & RUBEL
ENGLISH LLOYD & ARMENTA
OFFICE OF THE DIRECTOR LEGAL
THE LAW OFFICE OF BRIAN COLLINS
DAVID WALDSCHMIDT DBA WOLF PERFORMANCE**

SRO/pc

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

**OPINION AND DECISION
AFTER RECONSIDERATION (pp. 8, 9, 10-11)**

Turning to the contention that Waldschmidt lacked notice of the proceedings in violation of the right to due process and is therefore entitled to the equitable remedy of rescission, we observe that determination of an issue without providing a party notice and a fair opportunity to be heard is a denial of due process. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284 [66 Cal.Comp.Cases 584] (due process violated when case decided on new rationale not addressed at trial); *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151 [65 Cal.Comp.Cases 805] (same).) All parties are entitled to due process in a workers' compensation proceeding. (*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461]; *Abron v. Workmen's Comp. Appeals Bd.* (1973) 34 Cal.App.3d 232 [38 Cal.Comp.Cases 591]; *Cedeno v. American National Ins. Co.* (1997) 62 Cal.Comp.Cases 939.) "An elementary and fundamental requirement of due process in any proceeding which is 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." (*Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449 [56 Cal.Comp.Cases 537].)

Here, the record shows that Waldschmidt failed to appear at the October 21, 2020 trial of this matter "even though he was served notice by" UEBTF. (Minutes of Hearing and Summary of Evidence and Disposition, October 21, 2020, p. 2:2-3.) Nonetheless, the WCJ continued the trial until December 2, 2020 and issued an order on the record for UEBTF to serve notice of the continued trial on Waldschmidt. (*Id.*, p. 1:21-22.) The WCJ also entered the order that trial be continued until December 2, 2020 into the minutes and designated UEBTF to serve the minutes upon Waldschmidt. (Minutes of Hearing, October 21, 2020.) Thereafter, on October 22, 2020, UEBTF sent notice of the December 2, 2020 trial by mail to Waldschmidt at the address of "74874 Joni Drive Palm Desert CA 92260" and the court served a copy of the October 21, 2020 Minutes of Hearing and Summary of Evidence and Disposition on the parties of record, including Waldschmidt at the same address as that used by UEBTF. (Proof of Service-Notice of Trial, October 27, 2020, pp. 1-4; Minutes of Hearing and Summary of Evidence, October 21, 2020, p. 25.)

Based upon this record that service was effected upon Waldschmidt at his address of record, and because we agree with the WCJ's reasoning that Waldschmidt was required to ensure that his address in the OAR was complete, we are unable to discern merit to Waldschmidt's argument that his alleged lack of receipt of notice of trial herein constitutes a violation of the right to due process.

First, as the WCJ explained in the Report, the record reveals that the issue of whether applicant's claim was barred by res judicata was adjudicated at the April 2014 trial on the issue of whether applicant was employed by Waldschmidt on the date of his injury. (Report, pp. 5-6.) After trial, the WCJ found that applicant was employed by Waldschmidt—a finding that became final when the time period for the parties to seek reconsideration expired. (Findings of Fact, May 30, 2014; Report, p. 5; *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008] (finding that when the time to file a petition for reconsideration expires, the underlying order or decision becomes final and the Board lacks the power to change it); see also *Marsh v. Workers' Comp. Appeals Bd.* (1968), 257 Cal.App.2d 574 (finding that a decision of the WCAB becomes final on the expiration of the time for review and the WCAB is required to give res judicata effect to its final decisions).) Since the May 30, 2014 finding is final, the issue of whether applicant's claim is barred is not subject to re-litigation and Waldschmidt's argument that res judicata applies to bar these proceedings is without merit.

In addition, we observe that issue preclusion or collateral estoppel may only be applied when all of the following requirements are met: (1) "the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding;" (2) "this issue must have been actually litigated in the former proceeding;" (3) "it must have been necessarily decided in the former proceeding;" (4) "the decision in the former proceeding must be final and on the merits;" and (5) "the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Branson v. Sun-Diamond Growers of California*, 24 Cal.App.4th 327, (1994) (quoting *Lucido v. Superior Court*, 51 Cal.3d 335, 341, (1990), cert. denied, 500 U.S. 920 (1991)).)

In this regard, the record shows that Waldschmidt testified that the civil action brought by applicant was settled. (Minutes of Hearing and Summary of Evidence (Further), March 5, 2014, p. 6:13-16.) Because the claim was settled, there could not have been a final decision on the merits in the civil case on which Waldschmidt's res judicata argument relies. Accordingly, we conclude that Waldschmidt's argument lacks merit on the separate ground that the record fails to show that applicant's civil action resulted in a final decision on the merits.