

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

GERMAN RAMIREZ, *Applicant*

vs.

**OCTOPUS RESTAURANT GROUP dba SUMO SUSHI NEWBURY PARK;
TECHNOLOGY INSURANCE COMPANY, adjusted by AMTRUST, *Defendants***

**Adjudication Number: ADJ12184149
San Bernardino 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.

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on February 3, 2020, wherein the WCJ found in pertinent part that applicant's claim is barred by the Labor Code section 3600(a)(10) post-termination defense.

Applicant contends that the F&O violates his due process rights because the WCJ proceeded to trial without applicant present.

We received an answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto.

Based on our review of the record, and for the reasons discussed below, we will rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this decision.

BACKGROUND

On May 10, 2019, applicant filed an application for adjudication, alleging injury to various body parts, including his back, left hip, waist, left thigh, left knee, left calf, left foot, psyche, stress, sleep disturbance, internal, respiratory, and lung disease, on March 30, 2018, while employed by defendant as a dishwasher. The application for adjudication lists applicant's address as 633 Paseo Esmeralda, Newbury Park, CA.

On or about November 12, 2019,¹ defendant filed a declaration of readiness to proceed (DOR) to a status conference. The disputed issue was whether applicant's injuries arose out of and in the course of employment (AOE/COE).

On November 12, 2019, a Notice of Hearing issued for a December 2, 2019 conference date.

On November 19, 2019, the Notice of Hearing addressed to applicant at 633 Paseo Esmeralda, Newbury Park, CA was returned as undeliverable at applicant's address, marked "return to sender," "not deliverable as addressed," and "unable to forward."

On November 26, 2019, applicant's counsel objected to the DOR on the basis that applicant had not been evaluated for his claimed injuries and applicant had not reached maximum medical improvement (MMI).

The parties raised the following issues in the pre-trial conference statement: AOE/COE, parts of the body injured, and defendant raised a post-termination defense, alleging that applicant was terminated for cause on April 6, 2019.

On December 2, 2019, a pre-trial conference was held. Over objection by applicant's attorney, the WCJ set the matter for trial on December 31, 2019. The minutes state "AA opposes trial setting. App did not appear for depo, no meds." Applicant was not present at the pre-trial conference. The WCJ designated defendant to serve the minutes and pre-trial conference statement from the December 2, 2019 pre-trial conference, although we see no corresponding proof of service in the EAMS adjudication file. (Code Civ. Proc., § 1013a [proof of service by mail requires signed affidavit or certificate stating the exact title of the document served, the date and place of service,

¹ The proof of service for the pre-trial conference statement is dated November 8, 2019. This is likely a typographical error as this pre-dates the notice of representation, dated November 10, 2019. Because we are rescinding the F&O on other grounds, we do not further consider the issue of service. However, we remind counsel to comply with regulations and WCAB Rules regarding service. (Code Civ. Proc., § 1013a; Cal. Code Regs., tit. 8, § 10625(c).)

as well as individuals or entities effectuating service and being served]; Cal. Code Regs., tit. 8, § 10625(c).) Aside from the notice of trial in the pre-trial conference statement, for which no proof of service was filed, we do not find an adequate notice of trial in EAMS. (Lab. Code, §§ 5316, 5504; Cal. Code Regs., tit. 8, § 10750.)

On December 31, 2019, the matter proceeded to trial over applicant's attorney's objections. Applicant's counsel advised the court that applicant did not receive notice of the trial and the trial proceeded without applicant.

Suzanne Kim, director of operations for defendant, testified at trial. She testified in pertinent part that prior to being terminated, applicant was given the option to resign. (Minutes of Hearing/Summary of Evidence (MOH/SOE), December 31, 2019 trial, at 8:8-16.)

Based on a review of EAMS, the minutes dated December 31, 2019, were served on applicant at the same previously invalid address. Although the minutes indicate that the WCJ intended to issue a Notice of Intent to submit the matter, no Notice of Intent appears in the record. (MOH/SOE, December 31, 2019 trial, at 1:18-24.)

On January 14, 2020, applicant notified the Appeals Board and the parties of a change of address.

On February 3, 2020, the WCJ issued a F&O as follows.

1. German Ramirez, born [], while employed as a dishwasher, at Newbury Park, California, on 3/30/2019, by Octopus Restaurant Group dba Sumo Sushi Newbury Park, then insured as to workers' compensation liability by Technology Insurance Company, Inc., adjusted by AmTrust, did not sustain injury arising out of and occurring in the course of his employment to the full back, left hip, waist, left thigh, left knee, left calf, left foot, psyche, stress, sleep, internal, respiratory and lung disease insofar as no evidence was provided to sustain applicant's burden of proof.
2. Even if applicant had presented evidence of injury, defense testimony would support a post-termination defense insofar as applicant was terminated from his employment before the filing of his claim and defendant had no notice of a claim of injury prior to the termination.
3. All other issues have been rendered moot.

DISCUSSION

Labor Code section 5313² requires that a WCJ “make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.” (Lab. Code, §§ 5313, 5316; Cal. Code Regs., tit. 8, §§ 10759, 10761; see also *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-22 (Appeals Bd. en banc) (emphasis added).) The Notice of the December 2, 2019 pre-trial conference was returned to sender as undeliverable, thus it is not clear that applicant received notice of the hearing. (Lab. Code, § 5504; Cal. Code Regs., tit. 8, § 10625(d).) Furthermore, there is no proof of service in EAMS that the minutes or pre-trial conference statement were served or filed with the Board. (Code Civ. Proc., § 1013a; Cal. Code Regs., tit. 8, § 10625(b)-(c).) Moreover, it is unclear whether applicant received notice of the December 31, 2019 trial, as the only “notice of hearing” in the record appears in the aforementioned pre-trial conference statement, for which there is no proof of service filed in EAMS. (Lab. Code, §§ 5316, 5504; Cal. Code Regs., tit. 8, §§ 10625(c), 10750.)

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].) 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]; *Rucker, supra*, at 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].)

As the WCJ observed, applicant did not timely inform the appeals board, district office, and all parties of any change to his mailing address. (Cal. Code Regs., tit. 8, § 10205.5(c).) It is a party’s duty to inform the appeals board, district office, and all parties of any change of mailing address or contact information, in part to effectuate service of documents. (Cal. Code Regs., tit. 8,

² All further statutory references are to the Labor Code, unless otherwise noted.

§§ 10205.5, 10205.6, 10628.) While we are sympathetic to the WCJ's frustration about the court's time and resources, we note that while the Court of Appeal in *San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* found that the constitutional right to due process may not prohibit the enactment of reasonable rules of procedure, it also maintained that the essence of due process is notice and the opportunity to be heard. (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 936 [64 Cal. Comp. Cases 986].)

Here, applicant had neither notice or the opportunity to be heard, as he did not receive notice of the pre-trial conference or trial. Moreover, based on a review of EAMS, it is not clear whether a Notice of Intent issued.

Accordingly, we rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this decision. Upon return to the trial level, we recommend that the WCJ hold a hearing to allow the parties to frame the issues and any stipulations, submit exhibits as evidence, call witnesses, if necessary, lodge any objections, and make their legal arguments.

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 3, 2020 Findings and Order 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/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 8, 2022

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

**GEMAN RAMIREZ
BLOMBERG BENSON & GARRETT
TIMBOL & KAPLAN**

JB/abs

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