

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

**JOSE FERREIRA MURILLO, *Applicant***

**vs.**

**SMITH & ROAN, INC.; STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ3499491 (LAO 0838377)  
Oxnard District Office**

**OPINION AND DECISION  
AFTER REMOVAL**

On June 23, 2023, we removed this matter on our own motion pursuant to Labor Code<sup>1</sup> section 5310, and issued a Notice of Intention (NIT) to rescind the April 23, 2019 Order Awarding Attorney Fee, and vacate the March 14, 2019 Notice of Intention to Award Attorney Fees.

We have received and considered the response from defendant State Compensation Insurance Fund (defendant), which contends that the misspellings in the WCJ's Order and Notice of Intention may be retroactively corrected by order *nunc pro tunc*, and that the rescission of the Order Awarding Attorney Fee is excessive and unnecessary.

We have received a response from Dennise Mejia for California Physician Network, LLC, filed with the Workers' Compensation Appeals Board (WCAB) on August 2, 2023. Our June 23, 2023 NIT provided the parties with ten days plus five days for mailing in which to file their response, and accordingly, lien claimant's response is not timely. (Cal. Code Regs., tit. 8, §§ 10600, 10605.) We admonish Dennise Mejia and lien claimant California Physician Network, LLC for their failure to comply with our filing instructions, and expect future compliance with our Rules and any applicable time limits for filings. However, and notwithstanding the dilatory response, we accept lien claimant's correspondence pursuant to WCAB Rule 10964, and we have considered it herein.<sup>2</sup> (Cal. Code Regs., tit. 8, § 10964.)

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise stated.

<sup>2</sup> Lien claimant's Response raises issues related to conduct of parties beyond the scope of the issues addressed in our NIT, and further raises issues falling outside the jurisdiction of the Appeals Board. We remind the parties that issues

Based on our review of the record, and for the reasons stated both below and in our June 23, 2023 Notice of Intention, which we adopt and incorporate, as our Decision After Removal we will rescind the April 23, 2019 Order Awarding Attorney Fee, vacate the March 14, 2019 Notice of Intention to Award Attorney Fees, and return this matter to the WCJ for further proceedings.

## **BACKGROUND**

Our June 23, 2023 Notice of Intention (NIT) sets forth the relevant factual background:

On September 29, 2016, the WCJ issued Findings and Orders (F&O) that lien claimant California Physician's [sic] Network and its employee Denisse Mejia engaged in bad faith tactics within the meaning of Labor Code section 5813, by generating the lien and proof of service dated December 14, 2004 for an improper use. (F&O, Finding of Fact No. 1.) The WCJ issued monetary sanctions against lien claimant and Ms. Mejia, jointly and severally. (F&O, Finding of Fact No. 2.) The WCJ further awarded costs and attorney's fees pursuant to section 5813 to defendant, payable jointly and severally by California Physician Network and Denisse Mejia, in an amount to be adjusted by the parties. (F&O, Finding of Fact No. 3.)

On October 25, 2016, lien claimant filed a Petition for Reconsideration of the F&O, and on November 7, 2016, defendant filed its Answer.

On December 27, 2016, we dismissed lien claimant's Petition for Reconsideration as untimely, skeletal, and filed without proof of service. (Opinion and Order Dismissing Petition for Reconsideration, December 27, 2016, at 3:11.)

On March 14, 2019, the WCJ issued a Notice of Intention to Award Attorney Fees (NIT) in favor of defendant in the amount of \$14,350.00, payable by "California Physicians [sic] Network and Denisse Mejia," jointly and severally. (Notice of Intention to Award Attorney Fees, March 14, 2019.) The NIT was served on California Physician Network, and defendant at its Inland Empire and Oxnard service addresses, but not on Ms. Mejia as an individual. (*Ibid.*)

On March 19, 2019, California Physician Network LLC filed its "Objection to Intent to Award Attorney Fees," and on April 9, 2019, defendant filed its Response.

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pertaining to alleged conduct that violates applicable statutes or regulations may be raised by petition for sanctions, or in a collateral forum vested with jurisdiction over the allegations raised. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421.) We decline to address those issues raised in lien claimant's response that fall outside of our jurisdiction.

On April 23, 2019, the WCJ issued an Order Awarding Attorney Fees (Order) that acknowledged receipt of lien claimant's objection and defendant's response and awarded attorney's fees to defendant in the amount of \$14,350, payable by "Cal [sic] Physician Network and Denisse Mejia jointly and severally." (Order Awarding Attorney Fees, April 23, 2019.) The Order was served on the California Physician Network, and defendant at its Inland Empire and Oxnard service addresses. (*Ibid.*)

On October 19, 2019, lien claimant filed its "Petition to [sic] Reconsideration and Objection to Order Awarding Attorney Fees," asserting incomplete service of the award of attorney fees.

On October 25, 2019, defendant filed its Answer.

On November 25, 2019, we dismissed lien claimant's Petition for Reconsideration as untimely. (Opinion and Order Dismissing Petition for Reconsideration, November 25, 2019.)

On February 1, 2022, defendant filed its Petition, seeking to "remove, deny, and/or suspend the privilege of Dennise Mejia to appear in any proceeding before the WCAB pursuant to Labor Code section 4907." (Petition, at 1:18.) Defendant avers the attorney fee award remains unpaid, and that Ms. Mejia continues to conduct business on behalf of lien claimant "CA Physicians Network," before the Workers' Compensation Appeals Board (WCAB). (Petition, at 4:4.) Defendant requests that we suspend the privilege of Ms. Mejia to appear before the WCAB pursuant to section 4907 until such time as the award of attorney's fees along with accrued statutory interest has been paid.

On February 7, 2022, defendant filed an Amended Petition, clarifying that it seeks the suspension of, "Dennise Mejia and/or lien claimant California Physician Network to appear in any proceeding before the WCAB or any of its judges." (Amended Petition, at 1:22.)

On April 7, 2023, defendant filed a letter with the Appeals Board entitled "Complaint re Violation of Labor Code §4907, Non-attorney hearing representative: Dennise Mejia." (Third Petition, at p. 1).

(Opinion and Order Granting Removal on Motion of the Appeals Board; Notice of Intent to Rescind Order, June 23, 2023, Pp. 2-3.)

Our June 23, 2023 Opinion observed that the March 14, 2019 NIT incorrectly identified the name of the entity against whom attorney fees were contemplated, and that the service of the NIT was incomplete. Accordingly, the March 14, 2019 NIT was procedurally inadequate and could not have provided the notice required to effectuate due process. Because the procedurally defective NIT was the basis for the April 23, 2019 Order Awarding Attorney Fees, the resulting Order was

procedurally defective. In addition, the service of the April 23, 2019 Order was not fully effectuated on all parties, and to the extent that the Order lists an incorrect entity, it was both procedurally and substantively defective, and is without force or effect.

Defendant's Objection to the WCAB's Opinion and Notice of Intent to Rescind Order Awarding Attorney Fees (Objection) avers the "misspelling in the WCJ's Order and NIT are neither substantive nor procedural defects," and that "a nunc pro tunc order is an appropriate means for correcting those errors." (Objection to the WCAB's Opinion and Notice of Intent (Objection), July 5, 2023, at p. 3:7.)

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].) The essence of due process is notice and the opportunity to be heard. (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986].) In *Carstens v. Pillsbury* (1916) 172 Cal.572, the California Supreme Court observed "the commission ... must find facts and declare and enforce rights and liabilities - in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law." (*Id.* at p. 577.) 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. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

Here, the WCJ's order awarding attorney fees "in an amount to be adjusted" issued on September 27, 2016. Thereafter, the WCJ properly applied principles of due process of law by issuing a notice of intention with respect to fixing the amount of the fees to be awarded.<sup>3</sup> However, both the NIT and the ensuing Order contained errors in identification of the parties to be assessed with the fees, and service of both the NIT and the Order was incomplete. (NIT, at p. 6.)

An order nunc pro tunc cannot be used to retroactively satisfy the requirement that all parties be accorded due process of law. The California Court of Appeal has observed:

The general rule is that an amendment of the record of a judgment, and a nunc pro tunc entry of it, may not be made to correct a judicial error involving the merits, or to enlarge the judgment as originally rendered, *or to supply a judicial*

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<sup>3</sup> WCAB Rule 10421 requires that prior to the award of attorney's fee and costs, the "alleged offending party or attorney must be given notice and an opportunity to be heard." (Cal. Code Regs., tit. 8, § 10421.)

*omission or an affirmative action which should have been, but was not, taken by the court, or to show what the court might or should have decided, or intended to decide, as distinguished from what it actually did decide, even if such failure is apparently merely an oversight.*

*(Hamilton v. Laine (1997) 57 Cal.App.4th 885, 890-891 [67 Cal.Rptr.2d 407], italics original.)*

Thus, due process requires *effective* notice of the intended action along with the opportunity for the affected party to be heard on the issue. Effective notice, in turn, requires that parties to the action be identified correctly in advance of the contemplated action, and that the notice be served on *each and every party* affected thereby. This is true even when the failure of notice is inadvertent. (*Hamilton v. Laine, supra*, at p. 891.) While defendant may wish to turn back the clock to provide adequate notice to the parties, retroactive amendment to an NIT *after* the issuance of an order is inconsistent with principles of due process.

Moreover, as we noted in our NIT, the failure to separately serve the person or entity that will be held jointly and severally liable for an order or award renders the NIT procedurally inadequate. (*Hartford Accident & Indem. Co. v. Workers' Comp. Appeals Bd. (Phillips)* (1978) 86 Cal.App.3d 1, 3 [149 Cal.Rptr. 878, 43 Cal.Comp.Cases 1193] [failure to serve documents in a WCAB proceeding in the manner required by statute is not a "mere irregularity" but, rather, an omission of substance which denies a fundamental right].)

Accordingly, we are not persuaded that notice can be retroactively effectuated via order *nunc pro tunc*. (*Hamilton v. Laine, supra*, 57 Cal.App.4th 885, 890-891; Cal. Code Reg., tit. 8, § 10832(a)(3).) We conclude that principles of due process require the effective and timely service of an NIT on the parties being assessed with attorney fees as a condition precedent to the issuance of the order for fees, thereby affording all parties the opportunity to respond and be heard. (*Fortich v. Workers Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1453 [56 Cal.Comp.Cases 381, 285 Cal. Rptr. 222]; Cal. Code Regs., tit. 8, § 10832.)

We again observe that our decision to vacate the March 14, 2019 NIT and to rescind the April 23, 2019 Order fixing the amount of attorney fees to be paid to defendant *does not alter or diminish* the WCJ's underlying order awarding attorney fees in an amount to be determined, as issued on September 27, 2016. (See NIT, at p. 7, fn.5.)

Upon return of this matter to the trial level the WCJ may wish to hold a hearing to address the issue of the amount of attorney fees to be awarded. Thereafter, the WCJ should issue a notice

of intention pursuant to WCAB Rule 10832 that correctly identifies the parties found liable for the attorney fees, the amount of the fees to be assessed, and that serves each party individually, in keeping with the right to due process accorded to all parties in the California Worker's Compensation system. (Cal. Code Regs., tit. 8, § 10832; *Hartford Accident & Indem. Co. v. Workers' Comp. Appeals Bd. (Phillips)*, *supra*, 86 Cal.App.3d 1, 3.)

For the foregoing reasons,

**IT IS ORDERED** as the **DECISION AFTER REMOVAL** of the Workers' Compensation Appeals Board that the April 23, 2019 Order Awarding Attorney Fees is **RESCINDED**, and that March 14, 2019 Notice of Intention to Award Attorney Fees is **VACATED**.

**IT IS FURTHER ORDERED** that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**October 13, 2023**

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

**CALIFORNIA PHYSICIAN NETWORK LLC  
DENNISE MEJIA  
RONDEAU LAW, ATTN: CHARLES R. RONDEAU  
STATE COMPENSATION INSURANCE FUND**

**SAR/abs**

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