

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

RUSSELL NELSON, *Applicant*

vs.

**RENAISSANCE HOLLYWOOD HOTEL; MARRIOTT INTERNATIONAL, INC.,
Permissibly Self-Insured and Self-Administered, *Defendants***

**Adjudication Number: ADJ3970584
Los Angeles District Office**

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

Applicant in pro seeks reconsideration of the Order Dismissing Particular Injury Claims from Case issued by a workers' compensation administrative law judge (WCJ) on June 6, 2023, wherein the WCJ ordered that applicant's claims of injury to various body parts were dismissed.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Objection or Petition For Reconsideration and/or Removal (Report) recommending that the petition be denied on its merits or dismissed due to lack of the verification.

We have considered the allegations in the Petition for Reconsideration, Answer, and the contents of the Report of the WCJ with respect thereto. For the reasons discussed below, we will grant applicant's Petition for Reconsideration, rescind the Order and return the matter to the trial level for further proceedings consistent with this decision.

BACKGROUND

Applicant claimed injury to various body parts while employed as an Engineer II for defendant on August 27, 2003.

On September 14, 2022, a status conference was held. The minutes state:

"There are a multitude of issues and several issues raised in app's proposed MSC such as 'Identity Theft' that WCJ believes are best handled by the civil courts, not the WCAB. Over any objection, no good cause for continuance is found and the status conf is going off

calendar over defendant's specific objection to grant defendant's request for a continuance and took the status conference off calendar over defendant's objection. If parties want the case set for trial they will need to follow board rules and file a DOR for MSC clearly stating the issues they cannot resolve after a good faith effort and complying with the meet and confer requirement of rule 10759(B)."

On October 27, 2022, defendant submitted via letter the fully executed Stipulation for Dismissal of Particular Injury Claims from Case with a date stamp of October 10, 2022, and an unsigned Order Dismissing Particular Injury Claims from the Case (Order.)

On January 12, 2023, defendant filed a Declaration of Readiness to Proceed (DOR.) The DOR states: "Defense and applicant in pro per executed and filed an Order/Stipulation regarding dismissal of specific claims on the case on October 27, 2022. To date, the parties have not received an order and EAMS does not reflect that an order has issued. WCAB assistance is requested in order to resolve the discovery issue." (DOR, January 12, 2023, p. 7.)

On May 31, 2023, a mandatory settlement conference (MSC) was held, and the WCJ granted the parties' request for a continuance. The matter was set for a MSC on October 4, 2023. According to the minutes of hearing,

"As parties are currently still in agreement, WCJ expects to issue stip order as written forthwith. Per agreement the above case is reset for MSC on all normal case in chief issues. Parties are ordered to file a complete joint signed pretrial conference statement at least 7 calendar days before the MSC."

On June 6, 2023, the parties filed a Stipulation for Dismissal of Particular Injury Claims From the Case (Stipulation) date stamped October 10, 2022. The Stipulation states:

"The applicant, representing himself in pro per, sustained injury on August 27, 2003 when he fell from a ladder injuring his back, right hip, left shoulder, and left elbow. [The initials "R.N." are handwritten written next to the aforementioned paragraph.]

An Amended Application for Adjudication of Claim was filed November 17, 2015 to include the teeth, arm, wrist, hand, fingers, abdomen, back, hips, shoulders, knees, lower extremities, digestive system, excretory system, and other body parts and systems. [The initials "R.N." are handwritten written next to the aforementioned paragraph.]

A Second Amended Application for Adjudication of Claim dated February 6, 2020 alleged body parts to include left arm, left shoulder, left wrist, left hand and fingers, back, right hip, right leg, right foot, right ankle, right knee, internal, teeth, abdoen [sic], digestive system, and left hip. [The initials "R.N." are handwritten written next to the aforementioned paragraph.]

The parties appeared at a Status Conference on September 14, 2022 and the matter was taken off calendar. [The initials "R.N." are handwritten written next to the aforementioned paragraph.]

The applicant has since indicated that he desired to move forward for Trial on only the orthopedic injuries related to the back, right hip, left shoulder, left elbow. [The initials "R.N." are handwritten written next to the aforementioned paragraph.]

The applicant further has agreed and hereby stipulates to the dismissal of the claimed injuries as it relates to the teeth, abdomen, digestive system, excretory system and any other internal body parts and systems with prejudice in the above captioned case. [The initials "R.N." are handwritten written next to the aforementioned paragraph.]

Applicant and defendant's signed the aforementioned document. (Stipulation For Dismissal of Particular Injury Claims, date stamped October 10, 2022, at pp. 1 -2.)

On June 6, 2023, the WCJ issued an Order Dismissing Particular Injury Claims From Case.

The Order Dismissing Particular Injury Claims From Case states:

"HAVING READ the Stipulation to Dismiss particular injury claims from the case dated September 21, 2022, and GOOD CAUSE APPEARING UPON FURTHER DISCUSSION AT HEARING of 5/31/23,

IT IS HEREBY ORDERED for the Dismissal of only the claimed injuries in as it relates to the teeth, abdomen, digestive system, excretory system and any other internal body parts and systems with prejudice in the above captioned case."

On June 13, 2023, as designated by the WCJ, defendant served the Order.

On July 6, 2023, applicant filed the Petition for Reconsideration. The Petition is date-stamped "RECEIVED" by the Los Angeles District Office.

On September 27, 2023, defendant filed a Pre-Trial Conference statement signed only by defendant.

On October 3, 2023, applicant's Petition for Reconsideration was discovered and uploaded into the Electronic Adjudication Management System (EAMS).

On October 4, 2023, a MSC was held. The WCJ issued an Order Taking the Matter Off Calendar (OTOC). The minutes of hearing state that:

"WCJ saw for the first time today that there is a removal petition submitted by applicant with a WCAB window stamp of 7/6/23 that may well be timely in light of service of disputed order on 6/13/23. Evidently the petition was not properly processed from the WCAB LAO window. No good cause found to continue while removal is pending as any trial will depend on whether removal is granted therefore off calendar over any objection, WCJ expects to prepare a report and forward the matter to the WCAB Control Unit. Defendant is aware of this petition and in fact filed it on applicant's behalf so it would be in EAM today."

DISCUSSION

I.

We note that a petition is generally considered denied by operation of law if the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, “it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice....” (*Shipley v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant’s petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of Labor Code section 5909. The Appeals Board did not act on applicant’s petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board’s decision holding that the time to act on applicant’s petition was tolled during the period that the file was misplaced. (*Id.*, at p. 1108.)

Like the Court in *Shipley*, “. . . we are not convinced that the burden of the system’s inadequacies should fall on [a party]. . . .” (*Shipley, supra*, at p. 1108.) Here, the Order was served on June 13, 2023, and applicant’s Petition was timely filed on July 6, 2023. However, the Appeals Board failed to act on applicant’s Petition within 60 days of its filing, and this failure to act was through no fault of applicant. Therefore, considering that the Appeals Board’s failure to act on the objection/petition was in error, we conclude that our time to act on the objection/petition was tolled.

II.

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with Labor Code section 5313. A WCJ is required to “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. The endorsement 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, §§ 5502, 5313; Cal. Code Regs., tit. 8, § 10761; see also *Blackledge v. Bank of America, ACE American Insurance Company (Blackledge)* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Board en banc).)

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*)). As required by section 5313 and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (Lab. Code, § 5313; *Hamilton, supra*, at 475.) In *Hamilton*, we held that the record of proceeding must contain, at a minimum, “the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence.” (*Ibid.*)

The WCJ’s opinion on decision “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton, supra*, at 476, citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].)

Moreover, 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 is “. . . one of ‘the rudiments of fair play’ assured to every litigant. . .” (*Id.*, at p. 158.) The “essence of due process is simply notice and the opportunity to be heard.” (*San Bernardino Community Hospital v. Workers. Comp. Appeals Bd. (McKernan)* 74 Cal.App.4th 928, 936 (64 Cal. Comp. Cases 986) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties’ rights to due process. (*Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584], citing *Rucker, supra*, at pp. 157-158.) 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, supra*, at p. 1295; *Rucker, supra*, at pp. 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].)

“The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of [Division 4] . . . At any time, upon notice and after the opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.” (Lab. Code, § 5803.)

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence “. . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.” (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) “Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess.” (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

WCAB Rule 10517 specifies that pleadings are deemed amended to conform to the stipulations agreed to by the parties on the record or may be amended by the Appeals Board to conform to proof. (Cal. Code Regs., tit. 8, §10517.)

Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].) As defined in *Weatherall*, “A stipulation is ‘An agreement between opposing counsel . . . ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,’ (Ballentine, Law Dict. (1930) p. 1235, col. 2) and serves ‘to obviate need for proof or to narrow range of litigable issues’ (Black's Law Dict. (6th ed. 1990) p. 1415, col. 1) in a legal proceeding.” (*Weatherall*, supra, 77 Cal.App.4th at p. 1119.)

Here, the WCJ did not create a record before issuing the June 6, 2023, Stipulation and Order. Instead he referred to discussions that occurred off the record on May 31, 2023. More significantly, there is no medical evidence in the record, including any medical evidence that supports injury / no injury to any body parts, and supports the Stipulation and Order. While we appreciate that the parties and the WCJ determined that some claims of injury to certain body parts may not be supported by medical evidence, this determination is best made after consideration of all admitted medical evidence. Once a record is created, and evidence is submitted, the WCJ can

then determine whether applicant sustained an industrial injury, and which body parts sustained injury. If the intention of the parties was to obviate the need for obtaining further evidence regarding those disputed body parts, that intention may also be memorialized on the record, and the WCJ can re-approve or amend the Stipulation at that time.

Accordingly, we rescind the Order, and return the matter to the WCJ for further proceedings consistent with this decision. Once the WCJ issues a decision, any aggrieved person may timely seek reconsideration of that decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Order Dismissing Particular Injury Claims from Case issued by the WCJ on June 6, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Order Dismissing Particular Injury Claims from Case issued by the WCJ on June 6, 2023 is **RESCINDED** and the matter is **RETURNED** to the WCJ for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 4, 2023

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

**RUSSELL NELSON
FLOYD SKEREN**

DLM/oo

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