

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

EMMA MARTINEZ MARQUEZ, *Applicant*

vs.

**ORANGEWOOD LLC, dba HOTEL DOUBLETREE GUEST SUITES;
SECURITY NATIONAL INSURANCE COMPANY,
administered by AMTRUST NORTH AMERICA, *Defendants***

**Adjudication Numbers: ADJ10947203; ADJ11271775
Los Angeles District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.¹

Applicant seeks reconsideration of the Amended Order Dismissing Cases (Order) issued on January 25, 2022, wherein the workers' compensation administrative law judge (WCJ) dismissed Case Number ADJ11271775 on the basis that applicant failed to appear at the mandatory settlement conference (MSC) on November 4, 2021 and failed to object to the notice of intention to dismiss the case (NIT). The WCJ also ordered that her December 13, 2021 order dismissing Case Number ADJ10947203 was vacated.

Applicant contends that her case should not have been dismissed because WCAB Rule 10755(a) (Cal. Code Regs., tit. 8, § 10755(a)) only applies when neither applicant nor her attorney appears at an MSC.

We have received an Answer from defendant.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

¹ Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

We have considered the Petition, the Answer, and the WCJ's Report, and we have reviewed the record in this matter. As discussed below, we will rescind the Order and substitute a new Order which vacates the Order dated December 13, 2021, and issued on January 4, 2022, in its entirety.

FACTS

In Case Number ADJ10947203, applicant claimed that while employed by defendant as a housekeeper for defendant from June 6, 2012 through April 27, 2017, she sustained industrial injury to multiple body parts. This case was resolved by way of a Compromise and Release (C&R) and an order approving issued on August 21, 2019.

Applicant filed a second Application for Adjudication in Case Number ADJ11271775 on April 11, 2018, claiming injury to her knee while employed by defendant on March 1, 2014.²

On August 12, 2021, a status conference took place, and applicant appeared by way of her attorney. The Minutes indicate that a tentative settlement C&R agreement was pending, but that applicant's attorney's office "has not be able to locate applicant and she is not responding to her last known address(es)." The Minutes then state:

If App doesn't appear at next SC, set for MSC.

ORDER: Applicant is ordered to appear at the next hearing.

Defendant served the Minutes by mail to all parties on August 19, 2021.

On September 23, 2021, at the subsequent status conference, applicant again appeared by way of her attorney. The Minutes state:

Continued from last hearing where applicnat [*sic*] failed to show up at last hearing and aa says they still cannot locate the applicant. Parties had tentative cr agreement w/ docs sent to their office but they still can't get the cr signed. App was ordered to appear for today based on the moh from last time. Aa confirms they cannot find applicant.

Order:

This matter will be continued to msc, and applicant is ordered to appear; otherwise, a notice of intent to dismiss the case may issue due to failure to appear at 3 hearings.

(All capital letters in original.)

Defendant served the Minutes on all parties on October 4, 2021.

² All subsequent discussions as to the proceedings are in Case Number ADJ11271775.

On November 4, 2021, applicant again appeared by way of her attorney at the MSC. The Minutes state:

App is in Mexico but interp has been calling her since Thursday.

At hrg today, c&r has been recommended and is being sent to applicant for signature. Unknown if applicant is going to accept and/or sign. There were 2 parts to the case – one part settled and this is remaining portion of the case. The sum of both is what applicant wanted. Da says at prior 2 hrgs, there was no contact w/ applicant. Aa says now he does have contact w/ applicant, from a ‘veronica’. Da wants trial or noi to dismiss case but if aa gets hold of app in the next few weeks and/or signs c&r, then they should object to the noi. She was already ordered to appear for today and the time before that.

Notice of intent to dismiss case per 10755:

Notice is hereby given that this case will be dismissed for applicant’s failure to appear today and at the last 2 hearings, without good cause shown, 30 days after service of this document by da upon the parties.

(All capital letters in original.)

The Minutes were served by defendant on November 8, 2021. Applicant was served at her address in California, despite her attorney’s statement that she was in Mexico.

On December 10, 2021, defendant filed a request for dismissal.

On December 13, 2021, without holding a hearing or taking any evidence, the WCJ signed an “Order Dismissing Cases (Per CCR §10755),” with both case numbers listed. The order indicated that the cases were dismissed, pursuant to WCAB Rule 10755, because applicant failed to appear at the MSC, an NIT was issued and served, and no objection was filed by applicant. This dismissal order issued on January 4, 2022, and it was served on all parties by the WCAB.

On January 13, 2022, defendant filed a letter requesting that the WCJ issue an amended dismissal order, dismissing only case ADJ11271775.

On January 25, 2022, the WCJ issued the Order.

DISCUSSION

I.

Although the Report and Answer assert that applicant’s Petition was not timely filed, in fact, the Petition was filed on time. There are 25 days allowed within which to file a petition for reconsideration from a “final” decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs.,

tit. 8, § 10600.) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(b).) Here, the first dismissal order was issued on January 4, 2022, so any Petition for Reconsideration was due 25 days later, on January 29, 2022. The Amended Order was issued on January 25, 2022, so any Petition for Reconsideration was due on February 21, 2022. Applicant timely filed her Petition on January 27, 2022.

II.

WCAB Rule 10305(c) defines “appearance” to mean “a party or their representative’s presence, pursuant to Labor Code section 5700, at any hearing.” (Cal. Code Regs., tit. 8, § 10305 (c), emphasis added.)

WCAB Rule 10752(a) requires that:

Each applicant and defendant shall appear or have an attorney or non-attorney representative appear at all hearings pertaining to the case in chief.

(Cal. Code Regs., tit. 8, § 10752 (a), emphasis added.)

WCAB Rule 10755 provides in relevant part that:

Where a required party, after notice, fails to appear at a mandatory settlement conference in the case in chief:

- (a) If good cause is shown for failure to appear, the workers’ compensation judge may take the case off calendar or may continue the case to a date certain.
- (b) If no good cause is shown for failure to appear, the workers’ compensation judge may issue a notice of intention pursuant to rule 10832, take the case off calendar or continue the case to a date certain.

(Cal. Code Regs., tit. 8, § 10755.)

Due process requires the issuance of an NIT to dismiss a petition as a condition precedent to dismissal, thereby affording the interested party or parties an opportunity to be heard. (*Fortich v. Workers’ Comp. Appeals Bd. (Fortich)* (1991) 233 Cal.App.3d 1449, 1452-1453 [56 Cal.Comp.Cases 537]; Cal. Code Regs., tit. 8, § 10850.) The WCAB Rule regarding NITs, Rule 10832, provides in relevant part:

- (a) The Workers’ Compensation Appeals Board may issue a notice of intention for any proper purpose, including but not limited to:

...

(5) dismissing an application....

...

(c) If an objection is filed within the time provided, the Workers' Compensation Appeals Board, in its discretion may:

- (1) Sustain the objection;
- (2) Issue an order consistent with the notice of intention together with an opinion on decision; or
- (3) Set the matter for hearing.

(c) Any order issued after a notice of intention shall be served by the Workers' Compensation Appeals Board pursuant to rule 10628.

...

(Cal. Code Regs., tit. 8, § 10832.)

WCAB Rule 10850(b) requires that any order of dismissal of an Application for Adjudication of Claim, other than those requested by the employee:

...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, and not by an order with a clause rendering the order null and void if an objection showing good cause is filed.

(Cal. Code Regs., tit. 8, § 10850(b).)

Article XIV, section 4 of the California Constitution mandates that the workers' compensation law shall be carried out "...to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character..." Based on the constitutional mandate to accomplish substantial justice, the Board has a duty to develop an adequate record. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal. Comp. Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1120 [63 Cal.Comp.Cases 261].) Moreover, "[t]he Board 'is bound by the due process clause of the Fourteenth Amendment to the United States Constitution to give the parties before it a fair and open hearing...All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.'" (*Rucker v. Workers' Comp Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805], citing *Kaiser Co. v. Industrial Acc. Com.* (1952) 109 Cal.App.2d 54, 58.)

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*)). 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.” (*Id.*, at p. 475.) The purpose of this requirement is to enable “the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]” (*Id.*, at p. 476, citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].) “For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record.” (*Ibid.*)

Applying these legal principles, we conclude that the dismissal Order issued on January 25, 2022 is invalid.

The Order was based on the WCJ’s determination that applicant “failed to appear at the Mandatory Settlement Conference on November 4, 2021...” but the record does not support this finding. Applicant’s attorney was present, representing applicant, at the November 4, 2021 MSC, and at the August 12 and September 23, 2021 status conferences cited in the NIT. Applicant’s attorney’s appearance at each proceeding met the requirement that an applicant, “...shall appear or have an attorney or non-attorney representative appear at all hearings pertaining to the case in chief.” (Cal. Code Regs., tit. 8, § 10752 (a), emphasis added.) Moreover, applicant “appeared” at each proceeding, pursuant to the definition of “appearance” as “a party or their representative’s presence, pursuant to Labor Code section 5700, at any hearing.” (Cal. Code Regs., tit. 8, § 10305 (c), emphasis added.) Thus, the determination that applicant “failed to appear,” which the WCJ relied upon in issuing the Order is incorrect. The WCJ’s reference to WCAB Rule 10755 is similarly incorrect. That Rule, which addresses only the situation where “a required party, after notice, fails to appear” at an MSC, is inapplicable here, when applicant was represented by counsel at the MSC and thus did not fail to appear. (Cal. Code Regs., tit. 8, § 10755.)

Nor can we agree with the WCJ’s conclusion that dismissal was warranted due to applicant’s failure to personally appear after being ordered to do so. Neither the orders to appear, nor the NIT, met minimal due process requirements. The Minutes for the August 12 and September 23, 2021 status conferences include orders to appear, but in both cases these orders failed to identify applicant by name. Rather, the orders are addressed to “applicant,” and do not include her “full legal name,” as required. (Cal. Code Regs., tit. 8, § 10390 (a); see, generally, Cal. Code Civ.

Proc. §§ 1985 (a), 1987 (a); Lab. Code §3210; Cal. Code Regs., tit. 8, §§ 10640, 10642.) Thus, the August 12 and September 23, 2021 Minutes do not constitute personal notices to appear. Moreover, the Minutes for these proceedings were served to applicant with proofs of service indicating only that “minutes of hearing” were being served, thus failing to provide applicant with adequate notice that the Minutes potentially contained orders directed to her personally.

The November 4, 2021 NIT, similarly, failed to comport with due process. It did not provide adequate notice to applicant of a possible dismissal because it failed to include applicant’s “full legal name,” as required. (Cal. Code Regs., tit. 8, §10390 (a); see, generally, Cal. Code Civ. Proc. §§ 1985 (a), 1987 (a); Lab. Code § 3210; Cal. Code Regs., tit. 8, §§ 10640, 10642.) The NIT did not meet minimal due process requirements, too, because it was written on the Minutes rather than being issued as a stand-alone order, which would have clearly communicated to applicant the necessary steps to avoid dismissal. Finally, the NIT failed to comport with due process because it did not inform applicant about the correct legal basis for the proposed dismissal, when it incorrectly referenced WCAB Rule 10755 instead of WCAB Rule 10832(a)(5). (Cal. Code Regs., tit. 8, §§ 10755, 10832 (a)(5); 10752.)

The Order is invalid, too, because it appears likely that applicant never received the NIT. Applicant’s attorney stated at the MSC that applicant was in Mexico. Despite this information, the NIT was mailed to applicant only at her address of record in California. There is no evidence in the record regarding when applicant went to Mexico, the length of her absence from California, nor whether she had returned to California at any point during these proceedings. This likelihood that applicant did not receive the NIT raises significant procedural due process concerns. Without actual notice of the orders and the NIT, applicant could not have known that she would have to file a timely objection to the NIT to prevent her case from being dismissed by the Court. (Cal. Code Regs., tit. 8, § 10832(c).)

It is one of the basic tenets of jurisprudence that a party must be provided notice and an opportunity to be heard before their case is dismissed. (See, e.g., *San Bernardino Cmty. Hosp. v. Workers’ Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986].) Although it is a party’s duty, under WCAB Rule 10205.5 (Cal. Code Regs., tit. 8, § 10205.5) to maintain an accurate mailing address with the Board, “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. [Citations.]” (*Fortich, supra*, at pp. 1452-1453, citing *Armstrong v. Manzo* (1965) 380 U.S. 545, 550.) Here, the failure to serve the NIT to applicant at an address where she was likely to receive it was a violation of WCAB Rules and a fundamental violation of applicant’s due process rights.

Lastly, the Order is invalid because it was not based on “admitted evidence in the record,” as required. (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 476.) No hearing was held, no testimony was heard, and no documents were admitted into evidence before the WCJ issued the January 25, 2022 Order. Notably, there was no evidence admitted regarding applicant’s assertion that she was in Mexico, nor evidence about whether applicant had received any of the orders to appear. In the absence of an evidentiary record, we are unable to evaluate the basis for the WCJ’s Order.

Accordingly, we rescind the Order and substitute a new Order which vacates the Order dated December 13, 2021 in its entirety.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 25, 2022 Order is **RESCINDED** and the following is **SUBSTITUTED** therefor:

IT IS ORDERED that the Joint Order Dismissing cases dated December 13, 2021, and issued on January 4, 2022, is vacated in its entirety.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 27, 2024

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

**EMMA MARTINEZ MARQUEZ
LAW OFFICES OF TELLERIA, TELLERIA & LEVY
HALLETT, EMERICK, WELLS & SAREEN**

MB/es

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