

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

SERVANDO MURILLO, *Applicant*

vs.

HADLEY GROW; STATE COMPENSATION INSURANCE FUND, *Defendants*

**Adjudication Number: ADJ10524351
Sacramento District Office**

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

Applicant seeks reconsideration or alternatively removal of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on March 26, 2024, wherein the WCJ found in pertinent part that based on the April 19, 2021 order of dismissal, the WCAB no longer has jurisdiction to address applicant's September 30, 2021 "Petition to Re-Open and Re-Activate Applicant's Worker's Compensation Claim."

Applicant contends that the WCAB retains jurisdiction over original worker's compensation claims beyond five years, as well as jurisdiction to review its own orders and awards. Applicant further contends that Labor Code sections¹ 5405 and 5804 do not apply to his claim as an original proceeding and that denying him the opportunity to reactivate his case substantially prejudices applicant.

We received an Answer from defendant.

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

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 grant applicant's Petition, rescind the Findings and Order issued on March 26, 2024, and return the matter to the WCJ for further proceedings consistent with this decision.

¹ All statutory references are to the Labor Code unless stated or otherwise required by context.

BACKGROUND

We will briefly review the relevant facts.

Applicant claimed injury to his right ear in the form of hearing loss while employed by defendant as a painter on February 19, 2015. This is an accepted claim.

On February 19, 2021, defendant filed a petition to dismiss the case on the basis that the case had been inactive for a period in excess of one year.

On March 22, 2021, WCJ Michael Geller issued a Notice of Intent to Dismiss the case, stating in pertinent part:

NOTICE IS HEREBY GIVEN that an Order Dismissing the above entitled case, without prejudice, shall issue ten (10) days from the date of service hereof, unless good cause to the contrary is shown in writing within said time.
(March 22, 2021 Notice of Intent to Dismiss, p. 1.)

On April 19, 2021, an Order of Dismissal issued.

On September 30, 2021, Applicant filed a petition to re-open and re-activate applicant's worker's compensation claim.

On May 19, 2023, applicant filed a Declaration of Readiness on the following issue:

Defense has not responded to applicant's March 1, 2023 settlement demand.
WCAB assistance is necessary.
(May 19, 2023 Declaration of Readiness, p. 7.)

On June 7, 2023 the matter proceeded to a hearing. The Minutes of Hearing (Minutes) state: Parties met and conferred; actively negotiating settlement. (June 7, 2023 Minutes, filed June 9, 2023, p. 1.)

On January 11, 2024, defendant filed an Answer to applicant's petition to reopen.

On January 16, 2024, defendant filed a Declaration of Readiness on the following issue:

Applicant's petition for new and further is not timely, Board intervention requested.
(January 16, 2024 Declaration of Readiness, p. 7.)

On January 31, 2024, applicant filed an objection to the DOR, stating in part:

Activity in this case from September 27th, 2021 through March 1st, 2023 was as follows: State Fund served adjustor status letter May 3rd, 2022; State Fund served a settlement offer letter on December 14th, 2022; Applicant served a settlement counter-offer letter on Defendants on March 1st, 2023.

...

Regarding medical status, PQME Kern's 2018 report found Applicant to be not MMI, and in need of surgery to repair perforation of the inner ear. Re-evaluation with Dr. Kern's is currently scheduled for March 20th, 2024.

(Applicant's January 31, 2024 objection to DOR, p. 2.)

On March 11, 2024, the matter proceeded to trial on the following issue:

After WCJ Geller's April 19, 2021 order dismissing the case without prejudice, is the applicant's September 30, 2021 Petition to Reopen a timely reactivation of the case.

(Minutes of Hearing and Summary of Evidence (MOH/SOE), March 11, 2024 trial, p. 3.)

On March 26, 2024, the WCJ issued twenty-three Findings of Fact. Finding number 23 is as follows:

23. Based on the April 19, 2021 order of dismissal, the WCAB no longer has jurisdiction to address the Applicant's September 30, 2021 "Petition to Re-Open and Re-Activate Applicant's Worker's Compensation Claim."

(March 26, 2024 Finding of Fact, p. 2.)

DISCUSSION

As a preliminary matter, if a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Bd. en banc).) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Threshold issues include, but are not limited to, the following: injury AOE/COE, jurisdiction, the existence of an employment relationship, and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Here, the underlying order of dismissal determines a "threshold" issue, e.g., that applicant's claim for benefits is foreclosed. Thus we will treat applicant's petition as one for reconsideration.

Subject to the limitations of Labor Code section 5804, "[t]he 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 the policy of the law to favor, whenever possible, a hearing on the merits. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478, “when a party in default moves promptly to seek relief, very slight evidence is required to justify a trial court’s order setting aside a default.”) This is particularly true in workers’ compensation cases, where there is a constitutional mandate “to accomplish substantial justice in all cases.” (Cal. Const., art. XIV, § 4.)

WCAB Rule 10517 states that “pleadings may be amended by the Workers’ Compensation Appeals Board to conform to proof.” (Cal. Code Regs., tit. 8, § 10517.) This Rule represents the application of California’s public policy in favor of adjudication of claims on their merits, rather than on the technical sufficiency of the pleadings. Informality of pleading in proceedings before the Board has long been recognized, and courts have repeatedly rejected pleading technicalities as grounds for depriving the Board of jurisdiction. (*McGee Street Productions v. Workers’ Comp. Appeals Bd.* (2003) 108 Cal.App.4th 717, 724 [68 Cal.Comp.Cases 708]; *Rubio v. Workers’ Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 200-201 [50 Cal.Comp.Cases 160]; *Liberty Mutual Ins. Co. v. Workers’ Comp. Appeals Bd.* (1980) 109 Cal.App.3d 148, 152-153 [45 Cal.Comp.Cases 866].)

These principles of liberal pleading are further reflected in section 5506, which authorizes the Appeals Board to relieve a defendant from default or dismissal due to mistake, inadvertence, surprise, or excusable neglect in accordance with Code of Civil Procedure section 473. Section 473 of the Code of Civil Procedure permits the trial court to relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Code of Civil Procedure section 473(b) provides, in relevant part:

The court *may*, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.

Notwithstanding any other requirements of this section, the court *shall*, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney’s sworn

affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.

(Code Civ. Proc., § 473(b), italics added.)

The general underlying purpose of Code of Civil Procedure section 473(b) is to promote the determination of actions on their merits. (See *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 255–256.) The additional, more specific purposes of Code of Civil Procedure section 473(b)'s provision for relief based on attorney fault is to “relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits.” (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838-839; *Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481, 1487.)

The Court of Appeal has made it clear that the protections afforded under Code of Civil Procedure section 473(b) are applicable in workers' compensation proceedings. (*Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196 [57 Cal.Comp.Cases 149].) Therefore, in workers' compensation proceedings, it is settled law that:

- (1) pleadings may be informal; *Martino v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 485, 491 [67 Cal.Comp.Cases 1273]; *Rivera v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 1452, 1456 [52 Cal.Comp.Cases 141]; *Liberty Mutual Ins. Co. v. Workers' Comp. Appeals Bd. (Aprahamian)* (1980) 109 Cal.App.3d 148, 152-153 [45 Cal.Comp.Cases 866]; *Blanchard v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 590, 594-595 [40 Cal.Comp.Cases 784]; *Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (1973) 9 Cal.3d 848, 852 [38 Cal.Comp.Cases 500]; *Bland v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 324, 328-334 [35 Cal.Comp.Cases 513]; *Beaida v. Workmen's Comp. Appeals Bd.* (1968) 263 Cal.App.2d 204, 207-210 [33 Cal.Comp.Cases 345]);
- (2) claims should be adjudicated based on substance rather than form (*Martino, supra*, at 491; *Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1116 [53 Cal.Comp.Cases 502]; *Rivera, supra*, at 1456; *Bland,*

supra, at 328-334; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592, 598 [24 Cal.Comp.Cases 274]);

(3) pleadings should liberally construed so as not to defeat or undermine an injured employee's right to make a claim (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 925-926 [72 Cal.Comp.Cases 778]); *Martino, supra*, at 490; *Rubio, supra*, at 199-201; *Aprahamian, supra*, at 152-153; *Blanchard, supra*, at 594-595; *Beaida, supra*, at 208-209); and

(4) technically deficient pleadings, if they give notice and are timely, normally do not deprive the Board of jurisdiction (*Rivera, supra*, at 1456; *Aprahamian, supra*, at 152-153; *Blanchard, supra*, at 594-595; *Bland, supra*, at 331-332 & see fn. 13; *Beaida, supra*, at 208-210).

Here, although applicant's September 30, 2021 petition to re-open and re-activate his worker's compensation claim was poorly captioned, applicant essentially appears to have been seeking to set-aside the order of dismissal issued by the WCJ less than six months earlier, on April 19, 2021. Based on the record before us, when applicant filed the September 30, 2021 petition, the WCJ should have treated it as a petition to set-aside the order of dismissal and provided applicant the opportunity present evidence.

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].)

Accordingly, we grant applicant's Petition for reconsideration, rescind the Findings and Order issued by the WCJ on March 26, 2024, and return the matter to the WCJ for further proceedings consistent with this opinion. 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.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued by the WCJ on March 26, 2024 is **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 11, 2024

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

**SERVANDO MURILLO
RANCANO & RANCANO
STATE COMPENSATION INSURANCE FUND**

JB/pm

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

CS