WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JULIUS HUDSON, ***Applicant***

vs.

VECTOR MARKETING CORPORATION;
THE TRAVELERS INDEMNITY COMPANY, ***Defendants***

Adjudication Number: ADJ16477989
Long Beach District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 1, 2024, wherein the WCJ found that applicant did not demonstrate good cause to oppose the Notice of Intention to Submit (NIT) and that applicant was not employed by defendant on the date of injury; and ordered that the matter stands submitted as of November 1, 2024 and that applicant take nothing.

Applicant contends in the Petition that he demonstrated good cause to oppose the NIT, when he asserted that neither he nor his attorney was served with notice of the September 30, 2024 trial. Applicant contends, too, that he was an employee of Vector Marketing at the time of injury and thus entitled to workers' compensation benefits.

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 of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report with respect thereto. Based on our review of the record, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the WCJ for further

proceedings and decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

BACKGROUND

On July 27, 2022, applicant filed an Application for Adjudication (Application), in which he alleged that while employed by defendant on June 10, 2022, he suffered a finger laceration injury.

Defendant filed a Declaration of Readiness on December 7, 2022, indicating that it had denied applicant's claim based on its contention that there was no employment relationship and requesting a trial on that issue.

On January 2, 2024, the matter was heard and set for trial on the issue of employment. (1/2/24 Minutes.) On February 14, 2024, defendant's motion to dismiss was denied without prejudice, the matter was continued to April 3, and applicant was ordered to be present on that date to testify. (2/14/24 Minutes.) On April 3, 2024, the trial date was reset for April 23, due to applicant having dismissed his attorney. (4/3/24 Minutes.) Applicant's new counsel appeared at the April 23 proceeding and the matter was continued to May 29 and again to August 28, 2024. (4/23/24 Minutes; 8/28/24 Minutes.) At a virtual appearance on August 28, 2024, the matter was set for an in-person trial, to "streamline case/exhibits/proceedings." (8/28/24 Minutes.) The trial date was subsequently set for September 30, 2024, and defendant was directed to serve the August 28, 2024 minutes on all parties. (*Ibid*.)

Defendant filed a proof of service, indicating that it had served applicant and his attorney by mail, with the August 28, 2024 minutes. (9/6/24 POS.) This proof of service stated that the document served was, "Minutes of Hearing – Trial On 8/28/24." (*Ibid*.)

At the trial on September 30, 2024, applicant and his attorney were not present. (9/30/24 MOH.) The issues for trial were employment and "independent contractor/sales representative status." Admitted exhibits included defendant's denial notice, the August 28, 2024 minutes and defendant's September 6, 2024 proof of service. (Defendant's Exh. A; Court's Exhs. 1 and 2.) The WCJ noted that the three exhibits were admitted without objection, and that applicant was not present to be called as a witness or cross-examined by defendant. The Minutes of Hearing included a Notice of Intent to Submit, which stated,

> **NOTICE IS HEREBY GIVEN** to Applicant that the above-entitled case will be submitted on November 1, 2024**,** unless Good Cause to the contrary is shown in writing under penalty of perjury within said time.

(9/30/24 MOH, at p. 3.)

Applicant's attorney timely filed an Objection to Notice of Intention to Submit. (10/7/24 Objection.) In it, applicant's attorney explained that at the August 28, 2024 virtual trial setting, he appeared and requested that the trial be set for an in-person appearance, to address "complicated issues regarding discovery and evidence" that were better heard in person. He stated that he did not receive notice of the September 30, 2024 trial date and thus did not appear on that date. He requested that the trial date be reset, to give applicant an opportunity to present his case.

On October 10, 2024, defendant filed a Petition to Lodge Notice of Trial, alleging that notice was served on September 6, 2024. (10/10/24 Petition to Lodge.) The WCJ did not act on this petition.

No hearing was held on applicant's Objection to the NIT, prior to the issuance of the F&O on November 1, 2024.

DISCUSSION

I.

Former Labor Code section 5909[1] provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024 section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under

[1] All section references are to the Labor Code, unless otherwise indicated.

Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on November 19, 2024 and 60 days from the date of transmission is Saturday, January 18, 2025. The next business day that is 60 days from the date of transmission is Tuesday, January 21, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Tuesday, January 21, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on November 19, 2024, and the case was transmitted to the Appeals Board on November 19, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 19, 2024.

II.

Notices of Hearing are governed by section 5504 and WCAB Rule 10750. Section 5504 requires that,

> A notice of the time and place of hearing shall be served upon the applicant and all adverse parties and may be served either in the manner of service of a summons in a civil action or in the same manner as any notice that is authorized or required to be served under the provisions of this division.

(Lab. Code, § 5504.)

WCAB Rule 10750 requires, in relevant part,

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

(a) Notice shall be served on all parties and their attorneys or non-attorney representative of record of the time and location, including whether the hearing will be conducted electronically, of each hearing scheduled, whether or not the hearing affects all parties, as provided in rule 10625.

(b) The Workers' Compensation Appeals Board may, in its discretion, designate a party or their attorney or agent of record to serve a notice of hearing as provided in rule 10629. Notice shall include the time and location, including whether the hearing will be conducted electronically and how to access any electronic hearing.

(Cal. Code Regs., tit. 8, § 10750.)

When a required party, after notice, fails to appear at a trial 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, § 10756.)

The WCJ may issue an NIT for any proper purpose, including "[s]ubmitting the matter on the record." (Cal. Code Regs., tit. 8, § 10832(a)(4).) If an objection to the NIT 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.

(Cal. Code Regs., tit. 8, § 10832(c).)

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, 394-395 [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.) 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 157-158.) Due process requires "a 'hearing appropriate to the nature of the case.'" (*In re James Q*. (2000) 81 Cal.App.4th 255, 265, citing *Mullane v. Cent. Hanover Bank & Trust Co*. (1950) 339 U.S. 306, 313.)

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.)*

Pursuant to sections 5313 and 5815 and the California Constitution, a WCJ must make determinations on all issues in controversy, provide a statement of the reasons or grounds upon which those determinations were made, and to do so in a manner that is "expeditiously, inexpensively, and without encumbrance of any character." (Lab. Code, §§ 5313, 5815; Cal. Const., art. XIV, § 4.) 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 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; Cal. Code Regs., tit. 8, § 10787(c); see also *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Bd. en banc).)

While the mere allegation of non-receipt of a document is insufficient to establish that it was not received, an applicant is entitled to a hearing where he is given an opportunity to produce "believable contrary evidence" that notice was not received. (*Castro v. WCAB* (1996) 61 Cal.Comp.Cases 1460, 1462 [an attorney's bare allegation of non-receipt was insufficient to overcome the WCAB's proof of service of the F&O]; *Craig v. Brown & Root* (2000) 84 Cal.App.4th 416, 421-422, citing *Slater v. Kehoe* (1974) 38 Cal.App.3d 819, 832, fn. 12 [If a party proves that a letter was mailed, the trier of fact is required to find that the letter was received in the absence of any believable contrary evidence. If the adverse party denies receipt, the presumption is gone and the trier of fact must weigh the evidence and determine whether the letter was received.] In *Suon v. California Dairies*, we explained, that, although a "letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail," that presumption is rebuttable. (*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1817 (Appeals Bd. en banc), citations omitted.) "If the sending party thus produces evidence that a document was mailed, the burden shifts to the recipient to produce 'believable contrary evidence' that it was not received. [Citations.] Once the recipient produces sufficient evidence showing non-receipt of the mailed item, "the presumption disappears" and the "trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received. [citation.]" (*Ibid.*)

Here, there are three reasons that the WCJ's November 1, 2024 F&O, including the finding that applicant did not make a showing of good cause to oppose the NIT to submit, and the order that the matter stands submitted, must be rescinded. First, the WCJ's decision must be based on "admitted evidence in the record" (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 476), but the F&O entered here are not supported by an adequate evidentiary record. The available evidence appears to demonstrate that defendant did not provide adequate notice of hearing to applicant. Defendant was designated pursuant to WCAB Rule 10629 to serve the August 28, 2024 minutes, but its September 6, 2024 proof of service for those minutes stated, incorrectly, "Trial On 8/28/24," thus giving the false impression that a trial had already occurred on August 28, 2024. (9/6/24 POS; Cal. Code Regs., tit. 8, § 10629.) Defendant's proof of service contained no indication that the matter had been set for trial, nor any indication that the trial date was set for September 30, 2024. (*Ibid*.) In addition, defendant failed to timely serve and file a Notice of Hearing for the September 30, 2024 trial date. (Cal. Code Regs., tit. 8, § 10750.) Instead, nearly two weeks *after* the trial date had

passed, defendant filed its Petition to Lodge Notice of Trial, in which it requested that a notice of hearing and proof of service, both dated September 6, 2024, be lodged, and that the WCJ take judicial notice of those documents. (10/10/24 Petition to Lodge.) Defendant's petition was not acted on by the WCJ; thus, the notice of hearing and proof of service attached to that request are not in evidence. (Cal. Code Regs., tit. 8, §§ 10610, 10615, 10803(a)(2) ["Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings."].) Since the determination of whether service was proper is a pending evidentiary question, that determination must be made by the WCJ, after defendant has an opportunity to put on evidence showing proper service and applicant has an opportunity to rebut that evidence. (*Suon v. California Dairies, supra,* 83 Cal.Comp.Cases at p. 1817.)

The F&O must be rescinded, too, because no hearing was held prior to the issuance of the November 1, 2024 F&O, despite applicant's contention that neither he nor his attorney received the Notice of Hearing for the September 30, 2024 trial, resulting in their failure to appear at trial. (Petition, at pp. 4-5; 10/7/24 Objection to NIT, at pp. 1-2.) Applicant's counsel contends in his timely filed Objection to the NIT, that he did not receive notice of the trial date. (10/7/24 Objection to NIT.) In the Petition, applicant further contends that there is evidence which would demonstrate that defendant has a pattern and practice of failing to provide notice to applicant. (Petition, at pp. 4-5.) Determining an issue without giving the parties notice and an opportunity to be heard violates the parties' rights to due process. (See *Gangwish v. Workers' Comp. Appeals Bd., supra,* 89 Cal.App.4th at pp. 1295.) The WCJ should have set the matter for hearing, pursuant to WCAB Rule 10832, subdivision (c)(3), created a record, and then issued a decision. (Lab. Code, § 5313; Cal. Code Regs., tit. 8, §§ 10750, 10758, 10832(c)(3).) A hearing would have ensured applicant's due process rights and accorded him an opportunity to produce "believable contrary evidence" to rebut defendant's assertion that the notice of hearing was properly served, as required. (*Craig v. Brown & Root, supra,* 84 Cal.App.4th at pp. 421-422; *Suon v. California Dairies, supra,* 83 Cal.Comp.Cases at p. 1817.) Applicant had no such opportunity, since the WCJ did not treat defendant's assertion of service as a rebuttable presumption and did not hold a hearing. (*Ibid*.)

Lastly, the F&O cannot be upheld, because, without an evidentiary hearing, the WCJ could not comply with the requirement that minutes of hearing and summary of evidence "shall be served upon all the parties to the proceedings," including "a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313;

Cal. Code Regs., tit. 8, § 10787(c).) Here, no evidence was admitted into the record addressing whether notice of hearing had been provided, and no minutes of hearing or summary of evidence were filed, prior to the issuance of the November 1, 2024 F&O. Thus, the record is silent as to what evidence was considered, if any, or the grounds upon which the F&O are based.

Accordingly, we grant applicant's Petition, rescind the WCJ's November 1, 2024 Findings and Orders, 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.

III.

In the Petition, applicant also contends that the WCJ erred in finding that he was not employed by defendant. (Petition, at pp. 6-7.) We decline to consider the substance of applicant's employment argument here, as we have already determined that we will grant applicant's Petition and rescind the F&O on other grounds, as described above.

At trial, unless the issue of employment has been settled or otherwise resolved, the parties must be given an opportunity to call witnesses, put on evidence, and argue the matter, before a determination is made regarding employment.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of November 1, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of November 1, 2024 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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 17, 2025

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

JULIUS HUDSON
BARSOUM LAW
DIMACULANGAN & ASSOCIATES

MB/*cs*

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