

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

EDWARD ZAFFINA, *Applicant*

vs.

**NBC UNIVERSAL, INC.; HELSMAN MANAGEMENT SERVICES;
TWENTIETH CENTURY FOX FILM CORPORATION;
TRAVELERS INSURANCE; PARAMOUNT PICTURES CORPORATION;
ACE AMERICAN INSURANCE; CAST & CREW PRODUCTION PAYROLL, LLC;
ENTERTAINMENT PARTNERS ENTERPRISES, LLC;
ABC SIGNATURE, LLC, *Defendants***

**Adjudication Numbers: ADJ15911190; ADJ15911191; ADJ15911697;
ADJ15911698; ADJ15915542; ADJ15915543; ADJ17731638
Van Nuys District Office**

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

Applicant, in pro per, seeks reconsideration of the Amended Joint Order of Dismissal of his cases (Order of Dismissal) of July 31, 2024, issued by a workers' compensation administrative law judge (WCJ).

Applicant contends that dismissal of his cases was improper, and that once the WCJ issued an order for applicant to attend a medical evaluation with qualified medical evaluator Ronald Gabriel, M.D.,¹ (QME) there was no reason for a trial, as the sole issue and purpose of the trial was to obtain a determination as to which physician was to act as the PQME.

We did not receive an Answer from defendant.

The Presiding WCJ in the Anaheim District Office prepared a Report and Recommendation on Petition for Reconsideration pursuant to WCAB Rule 10962 (Cal. Code Regs., tit.8, § 10962) recommending that the Petition be denied.

¹ We presume petitioner is referring to the WCJ's Order Compelling Medical Examination dated January 29, 2024, which is discussed further herein.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the Joint Order of Dismissal, and return this matter to the WCJ for further proceedings.

BACKGROUND

On March 12, 2022, applicant, through legal counsel, filed six (6) separate cumulative trauma (CT) cases against numerous defendants (ADJ15915543 - Entertainment Partners (EP), ADJ15915542 - Cast & Crew, ADJ15911698 - Paramount, ADJ15911190 NBC Universal Inc., ADJ15911697 – Twentieth Century Fox, ADJ15911191 – WB Studio Enterprises, Inc.). The cases all appear to involve similar parts of body.

A petition for consolidation was filed on May 18, 2022 by defendant EP along with a declaration of readiness to proceed (DOR), and the cases were ordered consolidated by the Presiding Workers Compensation Judge (PWCJ) at the Van Nuys district office (VNO) at the Mandatory Settlement Conference (MSC) on February 16, 2023.

On February 17, 2023, applicant’s attorney filed a DOR for a priority conference requesting an order to enforce the Labor Code, section 5402(b) presumption as to defendant Paramount.

Also on February 17, 2023, defendant EP filed a DOR on all cases requesting an expedited hearing on the issue of the proper QME panel, enforcing Panel number 7518716 with Rodney Gabriel as the remaining panelist after two panel strikes by defendant. Thereafter, the cases were set for a priority conference with WCJ Graff for March 27, 2023, which was continued to June 26, 2023.

In the interim, applicant filed an additional CT claim on 5/23/23 against defendant Motion Picture Health for the period April 8, 2001 through March 28, 2015, which was assigned case number ADJ17731638.

On June 26th, WCJ Graff continued the six consolidated cases for another priority conference to September 18, 2023. Comments in the Minutes state:

“Parties will be utilizing an AME in these consolidated matters – the identity is being finalized. AA to gather records from treating doctors for AME.”

(MOH, 6/25/23.)

The WCJ continued the September 18, 2023 priority conference to Jan. 8, 2024, indicating the following in the Minutes:

“Add’l panels have been pulled and parties have not yet had an opportunity to strike.”

(MOH, 9/18/23.)

On October 11, 2023, all defendants on the consolidated six cases filed a joint petition for an order staying a medical examination with Eleby Washington, M.D., and compelling a medical examination with Hrair Darakjian, M.D. In response to the petition, the WCJ issued an order to produce documentation as to any prior agreements to utilize the services of AME Dr. Brouman, as well as communications and scheduling or cancelling of such appointment. The WCJ set a Conference before himself scheduled for November 28, 2023.

Applicant filed a written objection to the defendants’ petition on November 9, 2023. Also on November 9, 2023, defendant ABS Signature, LLC filed a petition at the Santa Ana district office (ANA), requesting that their case (ADJ17731638) be transferred to the Van Nuys district office (VNO). Defendant also filed a petition for consolidation on November 16, 2023.

The case was ordered transferred to VNO on November 9, 2023 by the Santa Ana PWJC.

At the November 28, 2023 priority conference, WCJ Graff continued all of applicant’s cases to a trial, set for February 14, 2024 with WCJ Sommer.

Listed in the Minutes of Hearing under Comments, the WCJ states:

“Cases shall be linked with ADJ17731638, consolidation to be addressed by trial judge if not before by PJ. AME agreement if any re: Dr. Brouman is withdrawn. WCJ’s Order re: production dated 10/27 is rescinded. Matter set for trial on issue of appropriate QME evaluator. Applicant alleges all proper procedures followed, defendants allege that Dr. Darakjian was available and allege non-compliance with 4062.3. Trial limited to matters involving appropriate QME evaluator. Parties to file jointly executed PTCS on all ADJs by no later than 12/12/23 at 5:00 p.m. Parties to file exhibits and exhibit list with ADJ numbers no later than 20 days prior to trial. As trial concerns appropriate evaluator, parties are encouraged to postpone any pending appointments. Party shall comply with Reg 10401 and 10773 et seq.”

(MOH, 11/28/24.)

On December 30, 2023, applicant dismissed his attorney of record.

On January 2, 2024, defendant WB Studio Enterprises filed an objection to the DOR filed by applicant in case ADJ15911191 stating that the applicant’s DOR, which requested a priority

conference on the issue of “discovery” and a “replacement QME” was already on calendar for a trial set for February 14, 2024 on the issue of the correct panel/qme in the case.

On January 25, 2024, defendant EP filed a December 16, 2022 petition to compel medical examination. Attached to the petition is correspondence dated December 15, 2022, referencing a medical examination with Rodney Gabriel, scheduled for January 19, 2023, at 4:00 p.m.

On January 29, 2024, WCJ Sommer issued an Order Compelling Attendance to Medical Examination. The Order states:

“Pursuant to defendant’s Petition for Order Compelling Attendance to Medical Examination, and good cause having been presented, it is hereby ordered the EDWARD ZAFFINA shall appear for the PQME scheduled for January 19, 2023 pursuant to the Notice provided and shall not delay obstruct, or defer the medical examination.”

(Order, January 29, 2024.)

At the trial setting of February 14, 2024, WCJ Sommer issued an Order consolidating case ADJ17731638 with applicant’s six other cases, continued the matter to another Trial scheduled for May 29, 2024. The Comments on the MOH state:

“Applicant failed to appear at Trial. Seventh claim consolidated. NOI to dismiss for failure to appear to issue. PARTIES TO APPEAR LIVE.”

(MOH, 2/14/24.)

On February 16, 2024, applicant filed an objection to the upcoming trial date as well as to disqualify several WCJ’s, and failed to appear at the trial set for May 29, 2024. The MOH of May 29, state:

“Mr. Zaffina refused to appear (see attached I&A correspondence) NOI to dismiss for failure to appear issued”.

(MOH, 5/29/24.)

The WCJ then continued the trial to July 30, 2024.

On May 29, 2024, the WCJ prepared a Notice of Intention to Dismiss for Lack of Prosecution (NIT) and it issued on May 30, 2024.

The NIT to Dismiss to which the applicant objected, and that issued on May 30, 2024, indicates that the notice of intention to dismiss is for lack of prosecution, not failure to appear, and cites to the prior WCAB Rule 10582, giving the applicant 10 days from the date of service to object for good cause.

Applicant filed a petition for removal on June 4, 2024, reiterating his February 16, 2024 objection to the trial setting and requesting disqualification of several of the WCJs at the Van Nuys district office.

Applicant also filed an objection on June 13, 2024 to the May 29, 2024 NIT to dismiss his cases.

On July 22, 2024, we issued an Opinion and Order Denying Removal and Disqualification, noting that the order setting the matter for trial was not a final order, and thus no irreparable harm had been demonstrated. We noted in our Opinion and Order Denying Removal that an objection to the NIT to dismiss applicant's cases was filed by applicant and that no hearing as to the objection nor order of dismissal had yet occurred.

On July 25, 2024, the WCJ served a Joint Order of Dismissal of applicant's cases, and further cancelled the trial scheduled for July 30, 2024. Applicant objected to the order of dismissal by correspondence on July 29, 2024. An amended Order of Dismissal was served by the Court on July 31, 2024.

On August 16, 2024, applicant filed his Petition for Reconsideration.

DISCUSSION

I.

Former Labor Code section 5909 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, Labor Code 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 Labor Code 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 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 cases were transmitted to the Appeals Board on September 18, 2024 and 60 days from the date of transmission is Sunday, November 17, 2024. The next business day that is 60 days from the date of transmission is Monday, November 18, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).) This decision is issued by or on Monday, November 18, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the cases 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. Labor Code 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 September 18, 2024, and the cases were transmitted to the Appeals Board on September 18, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 18, 2024.

II.

We note at the outset that applicant’s petition was timely filed.

There are 20 days allowed within which to file a petition for reconsideration from a “final” decision. (Lab. Code, §§ 5900(a), 5903.) This time is extended by 10 calendar days if service is made to an address outside of California but within the United States. (Cal. Code Regs., tit. 8,

§ 10605(a)(1).) Further, 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(b).)

While applicant received service of the decision within California, defendant was served at an address outside of California. Accordingly, and to observe due process for all parties, we interpret WCAB Rule 10605 as extending the time to file for all parties being served.

Here, the WCJ issued his initial Order of Dismissal on July 25, 2024, and the Amended Order on July 31, 2024. Thirty days from July 25, 2024 is Saturday, August 24, 2024. The next business day is August 26, 2024, and per the Events in EAMS, applicant filed his petition on that day.

Thus, the Petition was timely filed within 20 days of the decision as to both the initial and amended order.

Turning to the facts, the record indicates that the applicant timely filed an objection to the NIT to Dismiss his cases, as well as listing numerous other objections, including having to appear at a trial on the scheduled date.

WCAB Rule 10832, which governs notice of intention and orders after notice of intention states, in pertinent part:

...(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.

The courts have also long indicated that claims should be adjudicated based on substance rather than form. (*Bland, supra*, at pp. 328–334; *Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 1102, 1116 [53 Cal.Comp.Cases 502]; *Rivera v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 1456 [52 Cal.Comp.Cases 141]; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592, 598 [24 Cal.Comp.Cases 274].)

Additionally, it is the policy of the law to favor, whenever possible, a hearing on the merits. (*Fox v. Workers' Comp. Appeals Bd.*, (1992) 4 Cal.App.4th 1196, 1205 [57 Cal.Comp.Cases 149]; see also *Shamblin v. Brattain* (1988) 44 Cal. 3d 474, 478 [243 Cal. Rptr. 902], “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.)

The NIT to dismiss applicant’s cases was served on the parties, and applicant timely objected to same. Per the Minutes of February 14, 2024, applicant did not attend the scheduled trial date, which occurred after the January 25, 2024 Order of the WCJ to compel attendance to a medical examination.

We note that the Minutes of Hearing dated May 29, 2024 refer to a documented conversation with applicant and the Information and Assistance (I&A) office on that date, however, no hearing was held, no testimony taken, nor was evidence submitted and presented by the parties in order to create a record of the proceedings.

Further, once the applicant filed an objection to the NIT to dismiss on June 13, 2024, the WCJ should have taken one of the actions set forth in WCAB Rule 10832, but he did not. Therefore, we do not have a sufficient record to evaluate the Joint Order of Dismissal.

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with Labor Code section 5313. “The Labor Code and the Board’s rules set forth what must be included in a proper trial record. It is the responsibility of the parties and the WCJ to ensure that the record of the proceedings contains at a minimum, the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Bd. en banc) (*Hamilton*).

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.” (*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.” (*Hamilton, supra*, 66 Cal.Comp.CASes at p. 476.)

The Appeals Board’s record of proceedings is maintained in the adjudication file and consists of: the pleadings, minutes of hearing and summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits marked but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards, and the arbitrator’s file, if any.

Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings. (Cal. Code Regs., tit. 8, § 10803.) The WCJ's decision "must be based on admitted evidence in the record." (*Hamilton, supra*, at p. 476.) 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." (*Id.* at p. 477.)

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].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].) 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]; *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].)

Since the WCJ did not hold a hearing or admit any evidence into the record on the issue of dismissal of applicant's cases, we do not have a sufficient record to consider the issue in the first instance. Moreover, as a matter of due process, applicant is entitled to a hearing.

Additionally, it appears that the issues originally set for trial were related to a determination as to the selection of the proper medical examiner, however, the Order compelling attendance at a medical examination issued on January 29, 2024, prior to trial. Applicant asserts in his petition that the issuance of the order compelling medical examination rendered the need for the trial moot.

Unfortunately, however, the existing Order of January 29, 2024 states:

"Pursuant to defendant's Petition for Order Compelling Attendance to Medical Examination, and good cause having been presented, it is hereby ordered that EDWARD ZAFFINA shall appear for the PQME scheduled for January 19, 2023 pursuant to the Notice provided and shall not delay, obstruct, or defer the medical examination."

(Order Compelling Attendance to Medical Examination, 1/29/24.)

Thus, the Order relates to applicant attending an appointment on a date certain that has already passed, and does not identify the physician, the location and time for same, nor an opinion explaining the basis for the Order. As such, this issue needs to be revisited by the parties and the WCJ along with the objection by applicant to the NIT to dismiss applicant's cases, in order to see if the parties can agree upon applicant's attendance and the date, time, and location for same.

If the parties still disagree as to which medical evaluator should examine applicant, the matter can be determined by the WCJ along with any other issues at a trial relevant to the issue or issues raised by the parties.

Accordingly, we grant the Petition, rescind the Joint Order of Dismissal, and return the matter to the trial level for further proceedings consistent with this decision. When the WCJ issues a new decision, any aggrieved person can timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Joint Order of Dismissal issued on July 31, 2024, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Order of July 31, 2024 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 18, 2024

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

**EDWARD ZAFFINA
SAMUELSEN, GONZALEZ, VALENZUELA & BROWN
PEARLMAN, BROWN & WAX
MICHAEL SULLIVAN & ASSOCIATES
LAW OFFICE OF CARRIE O'CONNOR
GURVITZ & MARLOWE
MISA, STEFEN, KOLLER AND WARD
PARKER AND IRWIN**

LAS/abs

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