

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

**ELENA DELGADO DOMINGUEZ, *Applicant***

**vs.**

**PARAGON PERSONNEL, permissibly self-insured, administered by PACIFIC CLAIMS  
MANAGEMENT, *Defendants***

**Adjudication Number: ADJ15923475  
Santa Ana District Office**

**OPINION AND ORDER  
DISMISSING PETITION FOR  
RECONSIDERATION**

Applicant, by and through her attorney, seeks reconsideration of the Order Dismissing Case without prejudice issued by a workers' compensation administrative law judge (WCJ) on June 14, 2023, on the basis that she has been out of the country for urgent purposes and wishes to prosecute her case.

We received a Report and Recommendation from the WCJ (Report) recommending that we deny applicant's Petition for Reconsideration.

We have considered the allegations of the Petition for Reconsideration (Petition) and the contents of the Report, and reviewed the record in this matter. For the reasons discussed below, we will dismiss applicant's petition as one for reconsideration, return the matter to the trial level for consideration of the Petition as one to set aside the Order Dismissing applicant's case in the first instance and/or a Petition to Reopen.

**BACKGROUND**

Applicant claims to have sustained a cumulative injury to various body parts from March 4, 2021 to March 4, 2022, while employed as a truck driver.

On March 17, 2022, applicant's attorney filed an application for adjudication.

On August 9, 2022, defendant's attorney filed a Notice of Representation and Answered applicant's claim by denying it.

On April 25, 2023, defendant's attorney filed a Petition To Dismiss An Inactive Case.

On May 3, 2023, the WCJ issued a Notice of Intention To Dismiss Case For Lack of Prosecution (NIT) which states:

**IT APPEARING THAT** defendant Paragon Personnel self-insured group, administered by Pacific Claims Management ("petitioner") have filed their Petition seeking an Order of this court dismissing the above-captioned case pursuant to California Code of Regulations section 10550; and,

**GOOD CAUSE APPEARING,**

**NOTICE IS HEREBY GIVEN** that an Order Dismissing the above-entitled case, without prejudice, shall issue twenty (20) days from the date of service hereof, unless good cause to the contrary is shown in writing within said time. **HOWEVER, IT SHALL BE THE RESPONSIBILITY OF PETITIONER,** NO SOONER THAN THE 30<sup>TH</sup> DAY FOLLOWING DATE OF SERVICE OF THIS NOTICE OF INTENTION, TO: 1) FILE AND SERVE A DECLARATION UNDER PENALTY OF PERJURY SETTING FORTH WHETHER THEY HAVE RECEIVED OR ARE AWARE OF ANY OPPOSITION TO THIS NOTICE OF INTENTION HAVING BEEN MADE, FILED OR SERVED; AND, 2) PROOF OF SERVICE OF THIS NOTICE OF INTENTION; AND, 3) A PROPOSED FINAL ORDER OF DISMISSAL OF CASE WITHOUT PREJUDICE.

(Notice of Intent To Dismiss Case, May 3, 2023, emphasis in original.)

On May 5, 2023, defendant, filed a Proof of Service which states that the NIT was served on claims management, applicant, and applicant's attorney.

No objection to the NIT was received.

On June 7, 2023, defendant filed a declaration confirming service and lack of an opposition thereto in support of their request for an Order for Dismissal.

On June 14, 2023, the WCJ issued an Order Dismissing case without prejudice.

On March 20, 2024, applicant's attorney filed a verified petition for reconsideration, dated March 19, 2024, stating, in substance:

"Client has been out of the country for urgent purposes and has now recently returned and wishes to pursue her claim.

Applicant pleads [*sic*] the board not to dismiss her case and allow her to prosecute her claim and attend her medicals [*sic*]"

## DISCUSSION

Subject to the limitations of Labor Code section 5804, “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.”<sup>1</sup> (Lab. Code, § 5803.)

While applicant has filed a Petition for Reconsideration, it appears that in substance, applicant seeks to set aside the WCJ’s Order dismissing her case because she was out of the country until recently, and thus it is unclear whether she received a copy of either the 30-day notice required under WCAB Rule 10550, as well as the NIT or Order of Dismissal.

WCAB Rule 10550 provides for administrative dismissal of inactive cases not activated for hearing within one year after the filing of the Application for Adjudication of Claim or the entry of an order taking off calendar, after notice and opportunity to be heard. Although WCAB Rule 10550 authorizes dismissal of an inactive case upon demonstration of the conditions that allow dismissal under the rule, and after affording the applicant notice and an opportunity to be heard, dismissal is discretionary, not mandatory. (*Roth v. Workers’ Comp. Appeals Bd.* (1971) 20 Cal.App.3d 452 [36 Cal.Comp.Cases 604].) There is a strong public policy favoring disposition of cases on their merits rather than on procedural grounds. (*Bland v. Workers’ Comp. Appeals Bd.* (1970) 3 Cal.3d 324 [35 Cal.Comp.Cases 513]; *Marino v. Workers’ Comp. Appeals Bd.* (2002) 103 Cal.App.4th 485 [67 Cal.Comp.Cases 1273]; *Moore v. Waste Management* (2014) 2014 Cal.Wrk.Comp.P.D. LEXIS 621 (panel decision).) Moreover, in determining whether to dismiss a case for lack of prosecution, the WCJ may balance the equities of the respective parties. (*Gutierrez v. Ramirez AG Service* (210) Cal. Wrk. Comp. P.D. LEXIS 410.)

WCAB Rule 10832 states: (a) The Workers’ Compensation Appeals Board may issue a notice of intention (NIT) for any proper purpose, including but not limited to: (1) Allowing, disallowing or dismissing a lien; (2) Granting, denying or dismissing a petition; (3) Sanctioning a party; (4) Submitting the matter on the record; or (5) Dismissing an application. (b) A Notice of Intention may be served by designated service in accordance with rule 10629. (c) If an objection is filed within the time provided, the Workers’ Compensation Appeals Board, in its discretion may:

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise stated.

(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. (d) Any order issued after a notice of intention shall be served by the Workers' Compensation Appeals Board pursuant to rule 10628. (e) An order with a clause rendering the order null and void if an objection is received is not a Notice of Intention and must be served by the Workers' Compensation Appeals Board.

Despite the Proof of Service filed by defendant's attorney in the Electronic Adjudication Management System (EAMS) which indicates that defendant served the NIT on applicant on May 5, 2023, at her home address listed on the Official Address Record, it is unclear if the applicant ever received the NIT because her attorney states that applicant was out of the country but does not state when she was gone. Thus, if applicant did not receive the NIT she would not know that she would have to object to the NIT in order for her case to remain active and not be dismissed by the Court.

All parties in workers' compensation proceedings retain their 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].) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572: [The] commission, ... must find facts and declare and enforce rights and liabilities,—in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law. (*Id.* at 577.) Due process guarantees all parties the right to notice of hearing and a fair hearing. (*Rucker*, supra, at 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 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.4 703, 710 [57 Cal.Comp.Cases 230].)

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) 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.” (*Id.* at p. 475.) Moreover, a WCJ's

decision 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, supra*, 3 Cal.3d at p. 318; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].)

Here, there is currently no evidence admitted into the record regarding applicant's allegation that she was out of the country and has recently returned, and in order to ensure that applicant is provided with due process, we will return this matter to the trial level for further proceedings to develop the record. Upon return of this matter to the trial level, we recommend the WCJ treat applicant's Petition as a petition to set aside, including the setting of a hearing so that applicant can provide evidence in support of her arguments and create a record upon which a decision can be made by the WCJ.

As such, we will dismiss the petition and return the matter to the trial level for the WCJ to treat as a petition to set aside and/or a petition to reopen. Once the WCJ issues a decision any aggrieved person may timely seek reconsideration. Accordingly, we dismiss applicant's Petition for Reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DISMISSED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**May 17, 2024**

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

**ELENA DELGADO DOMINGUEZ  
LAW OFFICE OF JAMES HARMON  
CALIFORNIA SELF INSURANCE LAW**

**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*