

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

TAMARA WOODS, *Applicant*

vs.

COUNTY OF SACRAMENTO, *permissibly self-insured, Defendants*

**Adjudication Number: ADJ14965765
Stockton District Office**

**OPINION AND ORDER
DISMISSING PETITION FOR
RECONSIDERATION
AND DENYING PETITION
FOR REMOVAL**

On April 16, 2024, defendant filed a timely Petition For Reconsideration (Petition) in response to the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (Decision) issued by the Worker's Compensation Appeals Board (WCAB) on March 25, 2024. By the Opinion and Order, the WCAB found that the matter should be returned to the trial level for further proceedings consistent with its opinion.

Defendant contends that no timely Petition for Reconsideration was filed by applicant to the Order of Dismissal and defendant had no opportunity to Answer. Applicant failed to show good cause to set aside the Order of Dismissal and there was no issue raised with regard to notice by Applicant. Last, any defect with regard to the Order of Dismissal could be remedied with revised service of the notice of the intent to dismiss on applicant's hearing representative.

We did not receive an Answer from applicant.

We have considered the allegations of the Petition for Reconsideration. Based on our review of the record, and for the reasons stated in our March 25, 2024, Decision, which we adopt and incorporate, we will dismiss the Petition for Reconsideration and treat it as one for removal and deny the Petition For Removal because there is no irreparable harm.

BACKGROUND

On January 25, 2024, applicant's non attorney representative filed a letter dated January 3, 2024, opposing the dismissal of applicant's case. The letter is titled Petition For Reconsideration in the Electronic Adjudication Management System (EAMS).

On March 25, 2024, the Workers' Compensation Appeals Board (WCAB) issued an Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration.

On April 16, 2024, defendant filed a Petition for Reconsideration of the WCAB's March 25, 2024, Opinion and Order Granting [applicant's] Petition for Reconsideration and Decision After Reconsideration asserting that the Petition was untimely, there was no good cause to set aside the Order of Dismissal, no issue was raised with regard to notice by applicant, and any defect regarding the Order of Dismissal could have been remedied by revised service of the Notice of Intent to Dismiss on applicant's hearing representative.

DISCUSSION

Labor Code section 5909¹ provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within sixty days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice. . . ." (*Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [9 Cal. Rptr. 2d 345, 57 Cal.Comp.Cases 493]; see *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635 fn. 22 [25 Cal. Rptr. 3d 828, 70 Cal.Comp.Cases 312].) ["irregularity which deprives reconsideration under the statutory scheme denies due process"].

The Court of Appeal reversed the Appeals Board, holding that the time to act on the petition was tolled during the period the file was misplaced. (*Shiple, supra*, 7 Cal.App.4th at p. 1107.) The Court emphasized that "Shiple's file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control." (*Shiple, supra*, 7 Cal.App.4th at p. 1107.) "Shiple's right to reconsideration by the board is likewise statutorily provided and cannot be denied him without due process. Any other result offends not only elementary due process principles but common sensibilities." (*Id.*, at p. 1108.) In *Shiple*, applicant sought a writ of review of a decision of the Appeals Board denying his petition for reconsideration by operation of law (Lab. Code, § 5909). The Court there granted a writ of review, stating that while the "language

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

[section 5909] appears mandatory and jurisdictional, the time periods must be based on a presumption that a claimant's file will be available to the board; *any other result deprives a claimant of due process and the right to a review by the board.*" (*Shipley, supra*, 7 Cal.App.4th at pp. 1107-1108, italics added.)

In *Shipley*, the Court of Appeal reversed the Appeals Board, holding that the time to act on the petition was tolled during the period the file was misplaced and unavailable to the Appeals Board. (*Shipley, supra*, 7 Cal.App.4th at p. 1007.) The Court emphasized that "Shipley's file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control." (*Shipley, supra*, 7 Cal.App.4th at p. 1007.) "Shipley's right to reconsideration by the board is likewise statutorily provided and *cannot be denied him without due process*. Any other result offends not only elementary due process principles but common sensibilities. Shipley is entitled to the board's review of his petition and its decision on its merits." (*Id.*, at p. 1108, italics added.) The Court stated that its finding was also compelled by the fundamental principle that the Appeals Board "accomplish substantial justice in all cases..." (Cal. Const., art. XIV, § 4), and the policies enunciated by section 3202 "to construe the act liberally 'with the purpose of extending their benefits for the protection of person injured in the course of their employment.'" (*Id.*, at p. 1107.) The Court in *Shipley* properly recognized that in workers' compensation, deprivation of reconsideration without due process – without this full de novo review of the record in the case – "offends" the fundamental right of due process, as well as the Appeals Board's mandate to "accomplish substantial justice in all cases..." (*Shipley, supra*, 7 Cal.App.4th at p. 1107-1108.)

We note that all timely petitions for reconsideration filed *and received* by the Appeals Board are "acted upon within 60 days from the date of filing" pursuant to section 5909, by either denying or granting the petition. The exception to this rule are those petitions *not received* by the Appeals Board within 60 days due to irregularities outside the petitioner's control. (See *Rea, supra*, 127 Cal.App.4th at p. 635, fn. 22, italics added.) Pursuant to the holding in *Shipley* allowing tolling of the 60-day time period in section 5909, the Appeals Board acts to grant or deny such petitions for reconsideration within 60 days of receipt of any such petition, and thereafter to issue a decision on the merits. By doing so, the Appeals Board also preserves the parties' ability to seek meaningful appellate review. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra*, 68 Cal.2d at p. 753.) This approach is consistent with *Rea* and other California appellate courts, which have consistently

followed *Shiple*y’s lead when weighing the statutory mandate of 60 days against the parties’ constitutional due process right to a true and complete judicial review by the Appeals Board.

In this case, defendant’s petition was filed on April 16, 2024, and a response was due on June 17, 2024, but due to an administrative irregularity, the petition was not transmitted to the Appeals Board until June 18, 2024, and therefore unavailable to the Appeals Board until after 60 days from the time of filing. This administrative irregularity was not the fault of either party. Thus, pursuant to *Shiple*y, the time within which the Appeals Board was to act on the petition for reconsideration was tolled until the petition became available to the Appeals Board.

A petition for reconsideration may properly be taken only from a “final” order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) 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].) We will also deny the petition to the extent it seeks removal. Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Id.* at p. 1075 [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Here, our Decision solely resolves an intermediate procedural or evidentiary issue or issues. The decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a “final” decision and the petition will be dismissed to the extent it seeks reconsideration.

Our March 25, 2024, Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration rescinded the WCJ’s Order dismissing applicant’s case and returned the matter to the trial level for further proceedings consistent with our opinion. Our decision thus did not adjudicate any substantive right or liability and is a non-final order. Accordingly, we dismiss the Petition as one for reconsideration and treat as one seeking removal since the Board’s decision solely resolves an intermediate procedural or evidentiary issue because it rescinded the Order dismissing applicant’s case and this decision does not determine any substantive right or liability and does not determine a threshold issue. Accordingly, it is not a “final” decision and the petition will be dismissed to the extent it seeks reconsideration.

Here, for the reasons stated in the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, we are not persuaded that substantial prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy if the matter ultimately proceeds to a final decision adverse to petitioner.

Also, it was inappropriate for defendant to attempt to proceed to trial while its petition was pending. As pointed out by defendant, a simple solution would be for defendant to accurately serve all parties, including applicant’s representative.

Further, WCAB Rule 10752 (a) states: “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), italics added.) WCAB Rule 10305(c) defines 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), italics added.) Thus, it is imperative that an attorney or a non-attorney hearing representative appear at all hearings absent an order from the WCJ.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 19, 2024

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

**TAMARA WOODS
HANNA BROPHY
COUNTY OF SACRAMENTO WORK COMP
SACRAMENTO COUNTY
EDD SDI STOCKTON**

THE FOLLOWING PARTY IS NOT LISTED ON THE OFFICIAL ADDRESS RECORD:

**S. YVONNE BAILEY
MELO-SON LEGAL SERVICES
P.O. BOX 1957
MANTECA, CA 95336**

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*

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

Applicant seeks reconsideration of the Order Dismissing Application for Adjudication of Claim (Order) without prejudice issued by the workers' compensation administrative law judge (WCJ) on December 21, 2023.

Applicant contends that her claim should not have been dismissed.

We did not receive an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Petition) recommending that we deny applicant's petition.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and as discussed below, we will grant the Petition for Reconsideration, rescind the order and return the matter to the trial level for further proceedings consistent with this opinion.

BACKGROUND

Applicant claims to have sustained a cumulative injury to her psyche from May 1, 2020 to June 1, 2021.

On July 13, 2021, applicant filed an application for adjudication dated June 27, 2021. According to the Application, S. Yvonne Bailey is listed as a non-attorney representative. However, Ms. S. Yvonne Bailey is not listed on the Official Address Record (OAR).

On September 3, 2021, defendant's attorney filed a Notice of Representation. A Proof of Service dated September 3, 2021, was filed on September 9, 2021, and includes Ms. S.Y. Bailey of Melo-Son Legal, Financial and Tax Services, P.O. Box 1957, Manteca, CA 95336.

On July 24, 2023, the matter proceeded to trial. Defendant's counsel appeared and informed the WCJ that she received an email from applicant's hearing representative on the morning of trial that applicant was not feeling well. The minutes of hearing state:

“The Applicant **and the Non-Attorney hearing representative** are ordered to appear at the next scheduled trial, to be set on notice. Failure to attend the next scheduled trial could cause a Notice of Intent for Sanctions and a Notice of Intent to Dismiss the Application for Adjudication of Claim to issue as per Title 8, California Code of Regulations sections 10751 and 10832.” (emphasis added) (minutes of hearing, 7/24/2023, p.2.)

According to Communications in the Electronic Adjudication System (EAMS), the WCAB served a notice of hearing on July 26, 2023, on applicant, defendant and defendant's attorneys. Ms. Bailey was not served.

On August 7, 2023, defendant requested that the August 17, 2023, trial be continued due to the unavailability of a defense witness. According to the minutes, the WCJ granted defendant's continuance and the minutes state that trial will be set on Notice.

On August 11, 2023, defendant filed a Proof of Service dated August 8, 2023, for service of the minutes of hearing/request for continuance and Ms. Bailey, applicant's hearing representative was served. According to Communications in the Electronic Adjudication System (EAMS), the WCAB served a notice of hearing on August 11, 2023, on applicant, defendant and defendant's attorneys. Ms. Bailey was not served.

On October 9, 2023, neither applicant nor her hearing representative appeared at trial. Defendant's attorney's request for an Order Taking Off Calendar (OTOC) was granted, and the same day, all parties listed on the OAR were served with the minutes by the WCAB.

Additionally, on October 9, 2023, the WCJ issued a Notice of Intent To Dismiss Application For Adjudication of Claim For Non-Appearance Rules 10756 and 10832 (a)(5) (NIT). The Notice states:

This matter was set for trial on October 9, 2023. Applicant was served notice of the trial set for October 9, 2023. Applicant did not appear

GOOD CAUSE APPEARING,

NOTICE IS HEREBY GIVEN, pursuant to Title 8, California Code of Regulations, Sections 10756 and 10832(a)(5) that the Application for Adjudication of Claim will be dismissed absent a written objection filed and served within 30 (thirty) days of service of this notice plus the statutory time for mail, showing good cause as to why the Application for Adjudication of Claim should not be dismissed.

No Notice of Representation on behalf of the Applicant has been filed. As per the Official Address Record, the Applicant is not represented. The Applicant may contact the Information and Assistance Officer at the Stockton Workers' Compensation Appeals Board for any questions concerning this notice at 1-209-948-7980.

After the expiration of the time period referenced above, Defendant shall submit a proposed Order Dismissing Application for Adjudication of Claim. (Notice of Intent to Dismiss Application For Adjudication of Claim For Non-Appearance Rules 10756 and 10832 (a)(5), 10/9/2023.)

The Proof of Service lists applicant, but her hearing representative is not listed.

On November 14, 2023, the WCJ issued an Amended To Correct [*sic*] Case Number Notice of Intent To Dismiss Application For Adjudication of Claim For Non-Appearance Rules 10756 and 10832 (d). The Notice states:

This matter was set for trial on October 9, 2023. Applicant was served notice of trial set for October 9, 2023, Applicant did not appear.

GOOD CAUSE APPEARING,

NOTICE IS HEREBY GIVEN, pursuant to Title 8, California Code of Regulations, Sections 10756 and 10832(5) that the Application for Adjudication of Claim will be dismissed absent a written objection filed and served within 30 (thirty) days of service of this notice plus the statutory time for mail, showing good cause as to why the Application for Adjudication of Claim should not be dismissed.

No Notice of Representation on behalf of the Applicant has been filed. As per the Official Address Record, the Applicant is not represented. The Applicant may contact the Information and Assistance Officer at the Stockton Workers' Compensation Appeals Board for any questions concerning this notice at 1-209- 948-7980.

After expiration of the time period referenced above, Defendant shall submit a proposed Order Dismissing Application for Adjudication of Claim. (Amended To Correct Case Number Notice of Intent to Dismiss Application For Adjudication of Claim For Non-Appearance Rules 10756 and 10832 (d), 11/14/2023.)

The subsequent NIT contains the same information as the first NIT except that the 30 days runs from November 14, 2023. The Proof of Service lists applicant, but her representative is again not listed on the Proof of Service.

On December 21, 2023, the WCJ issued an Order Dismissing Application for Adjudication of Claim Cal. Code of Regs. Sections 10756 and 10832 (a)(5). The Order states:

GOOD CAUSE APPEARING,

There has been no objection to submitted to the Notice of Intent to Dismiss Application for Adjudication of Claim for Non-Appearance dated October 9, 2023 and November 14, 2023.

The Application for Adjudication of Claim is hereby dismissed without prejudice. (Order Dismissing Application for Adjudication of Claim Cal. Code of Regs. Sections 10756 and 10832 (a)(5), 12/21/2023.)

According to the proof of service, applicant, defendant and defendant's attorneys were served. Applicant's representative was not.

DISCUSSION

Labor Code² section 5700 provides in relevant part that: "Either party may be present at any hearing, by attorney, or by any other agent " A non-attorney representative shall file and serve a notice of representation before filing a document or appearing on behalf of a party unless the information required to be included in the notice of representation is set forth on an opening document. (Cal. Code Regs., tit. 8 §10401(c).) Here, applicant's non-attorney hearing representative's name and mailing address are listed on the Application for Adjudication of Claim. (Application for Adjudication of Claim, dated 6/27/2021, filed 7/8/2021, p. 5.) Thus, applicant's hearing representative, Ms. Bailey, has complied with WCAB Rule 10401(c) and should have been placed on the Official Address Record (OAR) at the time that the Application was filed. (Cal. Code Regs., tit. 8 §10205.5.)

The WCJ may issue a notice of intention (NIT) for any proper purpose. (Cal. Code Regs., tit. 8, § 10832 (a).) A proper purpose includes, but is 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. (*Id.*) Pursuant to WCAB Rule 10832 (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 set the matter for hearing. (Cal. Code Regs., tit. 8, § 10832 (c).) When the WCJ issues any final order, decision or award on a disputed issue after submission, the WCJ is required to serve all parties of record, including their representatives. (Cal. Code Regs., tit. 8, §§10625(a), 10628(a).)

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].) The

² All further statutory references are to the Labor Code, unless otherwise noted.

“essence of due process is simply notice and the opportunity to be heard.” (*San Bernardino Cmty. Hosp. v. Workers’ Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986].) 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, quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313.)

Here, at trial on July 24, 2023, defendant informed the Court that it received an email on the morning of trial from the hearing representative stating that applicant was not feeling well and on the WCJ’s motion, she continued the trial to be set on notice and ordered applicant and her hearing representative to appear. Yet, applicant’s hearing representative is not listed on the Proof of Service issued by the WCAB for service of the minutes from the July 24, 2023, hearing; is not listed on the Proof of Service issued by the WCAB for service on July 26, 2023 of the notice of hearing; and is not listed on the Proof of Service issued by the WCAB for service on August 11, 2023 of the notice of hearing. In short, it is clear that the WCAB did not provide notice to Ms. Bailey of the trial on October 9, 2023.

Thus, because the basis for the NITs was invalid, the NITs were void, and therefore, the order is also void.

Accordingly, we rescind the Order dismissing and return the matter to the trial level.

For the foregoing reasons,

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

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Order Dismissing issued by the WCJ 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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 25, 2024

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

**TAMARA WOODS
HANNA BROPHY
COUNTY OF SACRAMENTO WORK COMP
SACRAMENTO COUNTY
EDD SDI STOCKTON**

THE FOLLOWING PARTY IS NOT LISTED ON THE OFFICIAL ADDRESS RECORD:

**S. YVONNE BAILEY
MELO-SON LEGAL SERVICES
P.O. BOX 1957
MANTECA, CA 95336**

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*