

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

VICTOR AGUILAR, *Applicant*

vs.

**MOWBRAY'S TREE SERVICES;
BENCHMARK INSURANCE COMPANY, *Defendants***

**Adjudication Numbers: ADJ14935109; ADJ14934592
Santa Ana District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant sought reconsideration of the dismissal order issued by the workers' compensation administrative law judge (WCJ) on October 26, 2022. Applicant apparently contends that he is now able to pursue his case and that the dismissal order should be rescinded.

We received a Report and Recommendation (Report) from the WCJ, wherein he recommended that the Petition for Reconsideration be denied. We did not receive an Answer from defendant.

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

FACTUAL BACKGROUND

Applicant filed two Applications for Adjudication (Applications) on July 22, 2021. The first claim was for injuries to multiple body parts from lifting, cutting trees, driving, and sitting, while employed by defendant, Mowbray's Tree Services, during the period December 5, 2018, to November 1, 2020. (Case number ADJ14935109.) Applicant's second claim was for a specific injury while working for the same employer, to his back, wrist and knee that occurred on April 16,

2020. (Case number ADJ14934592.)

On June 22, 2022, applicant's attorney filed and served a change of address form, indicating that the location of his office had changed.

On September 1, 2022, defendant filed a Petition to Dismiss for Lack of Prosecution, with a proposed dismissal order. The Petition alleged that one year had passed since applicant filed his claim; that applicant did not appear for the three scheduled depositions, thus preventing defendant from conducting discovery; and that "on June 22, 2022, Defendant sent a letter to Applicant notifying them of their intent to move for dismissal of the case within 30 days. (Exhibit A)." The Petition stated that, as of September 1, 2022, defendant had not received a response from applicant to the June 22 letter. Defendant's Proofs of Service indicate that defendant's June 22, 2022 letter and defendant's September 1, 2022 Petition to Dismiss for Lack of Prosecution were served on applicant's attorney at the attorney's previous address. There is no indication in the record that defendant re-sent the letter or the petition to the correct address, when defendant learned that applicant's attorney's address had changed.

On September 9, 2022, the WCJ issued a Notice of Intention to Dismiss Case (NIT), which states:

"Notice is hereby given that an Order Dismissing the above-entitled cases, 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 30th 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 cases without prejudice."

Defendant served copies of the NIT on all parties, on September 20, 2022, although applicant's attorney was once again served at his prior address. On October 12, 2022, defendant re-served the NIT on applicant's attorney, using applicant's attorney's new address.

No objection to the NIT was received.

On October 26, 2022, the WCJ issued an Order Dismissing applicant's case without prejudice. (Order Dismissing, October 26, 2022.) The order stated:

HAVING READ the forgoing petition and supporting documents, and good cause having been shown, IT IS ORDERED THAT Defendant's Petition to Dismiss ADJ14935109 and ADJ14934592 for Applicant's Lack of Prosecution is granted, and Applicant's is dismissed without prejudice.

On November 15, 2022, applicant filed a Petition that stated, in full, “The client was forced to go back to Mexico abruptly due to a family emergency and has now returned and wants to start his treatments.”¹ (Petition, November 15, 2022, p. 1.)

In his Report, the WCJ recommended that we deny the Petition, and noted that if we determine that the record is insufficient to support dismissal, then “the Petition For Reconsideration is premature and should be dismissed, because the record of proceedings does not allow for a determination of whether the Order To Dismiss Case should be set aside.”

DISCUSSION

Although the WCJ correctly noted in the Report that applicant’s petition lacks specificity regarding both the legal basis for the petition and the order that it seeks to reverse, we base our decision not on the adequacy of applicant’s petition, but on the lack of adequate notice provided to applicant and his attorney prior to the issuance of the Order Dismissing applicant’s case.

WCAB Rule 10550, regarding petitions to dismiss inactive cases, requires:

(a) Unless a case is 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, the case may be dismissed after notice and opportunity to be heard. Such dismissals may be entered at the request of an interested party or upon the Workers' Compensation Appeals Board's own motion for lack of prosecution.

(b) At least 30 days before filing a petition to dismiss, the defendant seeking to dismiss the case shall send a letter to the applicant and, if represented, to the applicant's attorney or non-attorney representative, stating the defendant's intention to file a “Petition to Dismiss Inactive Case” 30 days after the date of that letter, unless the applicant or applicant's attorney or non-attorney representative objects in writing, demonstrating good cause for not dismissing the case.

(c) A petition to dismiss shall be filed with the district office having venue or in EAMS and the petition shall be served on all parties and all lien claimants pursuant to Rule 10625.

(d) A petition to dismiss shall be captioned “Petition to Dismiss Inactive Case [assigned ADJ number].”

(e) The following documents shall be filed with a petition to dismiss:

¹ We remind applicant’s attorney that a Petition for Reconsideration should meet the requirements of WCAB Rule 10945 and Labor Code sections 5900 *et seq.*, particularly the requirements in section 5902 that a petition “shall set forth specifically and in full detail the grounds upon which the petition considers the final order, decision or award made and filed by the appeals board or a workers’ compensation judge to be unjust or unlawful, and every issue to be considered by the appeals board.” (Lab. Code § 5902; Cal. Code Regs, tit. 8, § 10945.) The Petition for Reconsideration filed herein borders on skeletal and could be subject to dismissal. (Cal. Code Regs., tit. 8, § 10972.)

(1) A copy of the letter required by subdivision (b) of this rule; and

(2) Any reply to the letter required by subdivision (b) of this rule.

(f) A case may be dismissed after issuance of a 10-day notice of intention to dismiss and an opportunity to be heard, but not by an order with a clause rendering the order null and void if an objection showing good cause is filed.

(Cal. Code Regs., tit. 8, § 10550.)

WCAB Rule 10625(d), requires that “where a party receives notification that the service to one or more parties failed, the server shall re-serve the document on all intended recipients and execute a new proof of service, or provide a courtesy copy to the recipient on whom service failed, within a reasonable amount of time.” (Cal. Code Regs., tit. 8, § 10625(d).)

WCAB Rule 10832 requires, in pertinent part, that (a) The Workers’ Compensation Appeals Board may issue a notice of intention for any proper purpose, including dismissing an application; and (b) that a Notice of Intention may be served by designated service in accordance with rule 10629. (Cal. Code Regs., tit. 8, § 10832.)

Due process requires that a party be provided with reasonable notice and an opportunity to be heard. (*Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 711-712 [57 Cal.Comp.Cases 230].)

Here, there were three significant due process violations and violations of the requirements of WCAB Rules 10550 and 10625(d).

First, defendant did not comply with WCAB Rule 10550(b), which requires that thirty days prior to filing a petition to dismiss, the defendant must send a letter to applicant and applicant’s attorney, informing them of defendant’s intention to file a “petition to dismiss inactive case.” (Cal. Code Regs., tit. 8, § 10550(b).) Defendant sent the required letter but failed to adequately serve applicant’s attorney. (Defendant’s Petition to Dismiss, Attachment A). Applicant’s attorney filed and served a change of address on June 22, 2022. Upon receiving notice that applicant’s attorney had a new address, defendant was required to re-serve the letter to applicant’s attorney, at the correct address. (Cal. Code Regs., tit. 8, § 10625(d).) Defendant did not do so. The record contains no information that the letter was re-sent to the correct address for applicant’s counsel, that a courtesy copy of the letter was provided to applicant’s counsel, nor that applicant’s counsel received the letter sent to the incorrect address. Thus, defendant’s 30-day notice letter was not served on applicant’s attorney, as required.

Second, defendant's September 1, 2022, Petition to Dismiss for Lack of Prosecution failed to comply with the service requirement in WCAB Rule 10550(c), which mandates that a petition to dismiss shall be served on all parties pursuant to WCAB Rule 10625. (Cal. Code Regs., tit. 8, § 10550(c).) Defendant failed to serve applicant's attorney, because defendant mailed the September 1, 2022 petition to the wrong address. This error, like the error regarding defendant's June 22 letter, was not corrected. As both defendant's June 22 letter, and defendant's September 1 petition were never adequately served, no valid Petition to Dismiss was filed in this matter.² If the Petition to Dismiss is invalid, then there is no sufficient basis for the NIT, and thus the NIT is void.

Lastly, applicant's due process rights to notice and an opportunity to be heard were violated because the dismissal order was issued without allowing sufficient time for applicant to respond. The NIT indicated that if good cause to the contrary was not shown, the dismissal order would issue twenty days from the date of service of the NIT. Defendant served the NIT on applicant's attorney, at his correct address, on October 12, 2022. The WCJ issued the dismissal order on October 26, 2022, only fourteen days after the NIT was served. The premature issuance of the dismissal order rendered that order void.

Accordingly, we rescind the October 26, 2022 Order Dismissing, and return the matter to the trial level for further proceedings consistent with this decision.

² We observe that these errors were part of a pattern by defendant's counsel of disregarding rules and the WCJ's written instructions. For example, counsel disregarded WCAB Rule 10550(d), which required the petition to be captioned "Petition to Dismiss Inactive Case" rather than "Petition to dismiss for lack of prosecution." In another example, the Court's NIT directed defendant to file and serve a declaration indicating whether any opposition to the NIT was filed. Defendant's counsel failed to file any such declaration. Counsel similarly failed to file a proposed final order within the timeframe indicated in the NIT, instead filing a proposed order prior to the NIT.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 26, 2022 Order Dismissing is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 26, 2024

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

**VICTOR AGUILAR
ROSSI LAW
LAW OFFICES OF JAMES HARMON**

MB/ara

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