

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

YAUHENI MAKSIMENKA, *Applicant*

vs.

**W8 SHIPPING, LLC.; ZURICH AMERICAN INSURANCE COMPANY, administered by
GALLAGHER BASSETT, *Defendants***

**Adjudication Numbers: ADJ14513995, ADJ14514019, ADJ15305279
Los Angeles District Office**

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

Lien claimant Eric Gofnung Chiropractic Corporation (Gofnung) has petitioned for reconsideration of the Joint Order Dismissing Lien without prejudice (Order Dismissing) dated September 4, 2024, wherein the workers' compensation administrative law judge (WCJ) ordered the lien dismissed after lien claimant failed to appear at the lien conference of June 19, 2024, and failed to object to the Notice of Intention (NIT) to dismiss.

Petitioner alleges that both the Joint NIT and Order Dismissing were not properly served upon lien claimant's assigned representatives, Collective Resources, and are therefore defective. Petitioner further asserts that the assigned hearing representative could not attend the lien conference because he became ill and could not attend. Finally, petitioner contends his lien should be adjudicated on the merits, and that Code of Civil Procedure section 473 allows the court to relieve lien claimant from a dismissal due to mistake, inadvertence, surprise or excusable neglect.

We have not received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending the Petition be dismissed or denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant the Petition, rescind the WCJ's Joint Order of Dismissal, and return this matter to the district office for the WCJ to create a record, and for further proceedings as needed.

BACKGROUND

Applicant, while employed as a forklift driver, filed three cases claiming industrial injuries arising out of and in the course of his employment with defendant; a specific injury to his low back occurring on January 6, 2020 (ADJ15305279), a specific injury to his back and lower extremities occurring on April 9, 2021 (ADJ14513995), and a cumulative trauma injury to his spine, shoulders, upper and lower extremities during the period January 1, 2028 through April 14, 2021 (ADJ14514019).

The parties settled all three cases by Joint Compromise and Release (C&R), which the WCJ approved on February 22, 2022. (Order Approving Compromise and Release, February 22, 2022.) The C&R, under Comments, states in relevant part, that the

“Settlement is based on a split between the report of Gofnung MD [sic] and PQME Janiak.”

(C&R, January 3, 2024, p. 7, para. 9.)

On April 1, 2024, Gofnung filed a Declaration of Readiness to Proceed (DOR) for ADJ14514019, although the EAMS cover page lists all three cases. The DOR requests a lien conference and states:

“A SETTLEMENT OFFER HAS BEEN CONVEYED TO SETTLE LIEN. THERE HAS BEEN NO RESPONSE. THE BOARDS [sic] ASSISTANCE IS REQUESTED TO HELP FACILITATE SETTLEMENT OR SET THE MATTER FOR TRIAL.”

(DOR, 4/1/24.)

On April 2, 2024, the WCAB served a Notice of Hearing on the parties, including Gofnung.

On May 23, 2024, Gofnung filed and served a Notice of Representation listing case ADJ14513995 for the June 19, 2024 hearing at 8:30 a.m. with WCJ Dobrin. The notice lists the names and phone numbers of several hearing representatives with the authority to appear on Gofnung’s behalf at lien hearings, followed by an address for “42 Orchard Drive Corp. dba Collective Resources, Long Beach”.

On May 28, 2024, Collective Resources was added to the official address record in case ADJ14514019.

At the lien conference of June 19, 2024, the WCJ ordered the matter off calendar, noting under Board Reason:

“OTHER/COMMENTS PER DA EDD RESOLVED. DA STATES SHE DID HAVE COMMUNICATIONS WITH A REP FROM MED LEGAL PHOTCOPY BUT THAT REP NOT AVAILABLE AT ROLL CALL OR AT 1040 AM. AS TO ANY OTHER LC DA MAY FILE BRIEF MOTION TO DISMISS FOR FAILURE TO APPEAR”

On June 25, 2024, defendant filed a Joint Motion for Request of Notice of Intent to Dismiss Eric Gofnung Chiro Los Angeles, listing all three cases. While Gofnung was served with the Motion, Collective Resources was not. A Joint Notice of Intention to Dismiss (NIT) the lien of Gofnung as to these cases issued on August 6, 2024. Service was made upon defendant’s counsel and Gofnung, but not Collective Resources. Defendant also served the NIT on August 6, 2024, but only upon Gofnung.

On September 4, 2024, a Joint Order Dismissing Lien issued and was served by the WCJ. The parties served were Chong Legal Group and Eric Gofnung Chiro.

On September 19, 2024, Collective Resources on behalf of Gofnung Chiro filed their Joint Petition for Reconsideration. They were added to the official address record in case ADJ14513995 on September 30, 2024.

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 October 1, 2024 and 60 days from the date of transmission is Saturday, November 30, 2024. The next business day that is 60 days from the date of transmission is Monday, December 2, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).) This decision is issued by or on Monday, December 2, 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 October 1, 2024, and the cases were transmitted to the Appeals Board on October 1, 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 October 1, 2024.

II.

The WCJ may issue a Notice of Intention (NIT) for any proper purpose, including allowing, disallowing or dismissing a lien. (Cal. Code Regs., tit. 8, § 10832(a)(1).) Here, it appears that the WCJ issued the NIT in this instance after lien claimant failed to appear at the lien conference of

June 19, 2024, and defendant thereafter filed a Motion for a NIT to Dismiss Gofnung's lien for failure to appear.

The Minutes of June 19, 2024 indicate that other than defendant, a representative from EDD attended, but the WCJ does not document the names of what other lien claimants may have needed to appear, and further, who was served with notice of the lien conference, given the conference involved potential liens for all three of applicant's claims. The WCJ's comments in the Minutes that "[a]s to any other LC DA may file brief motion to dismiss for failure to appear" does not afford sufficient memorialization of who such party or parties would be, nor adequate notice to such parties.

Furthermore, it appears that lien claimant's hearing representative Collective Resources was added to the official address record in EAMS on May 28, 2024 on ADJ14513995, and such representation was also served on defendant prior to the WCJ's issuance and service of the Joint NIT and Order to Dismiss the lien of Gofnung, thereby calling the validity of the Joint NIT and Order into question.

Petitioner also seeks relief under Code of Civil Procedure section 473, for failing to appear at the lien conference, due to inadvertence, excusable neglect, as well as illness of lien claimant's representative.

Labor Code Section 5506 authorizes the Appeals Board to relieve a defendant from default or dismissal due to mistake, inadvertence, surprise or excusable neglect in accordance with Code of Civil Procedure section 473. That relief has been extended to all parties, including lien claimants. (*Fox v. Workers' Comp. Appeals Bd.* (1992) 4 Cal. App. 4th 1196 [57 Cal.Comp.Cases 149].)

Code of Civil Procedure section 473 permits the trial court to relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. A motion seeking relief under section 473 is addressed to the sound discretion of the trial court; its decision will not be overturned on appeal absent a clear showing of abuse of discretion. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 [243 Cal. Rptr. 902]; *Elston v. City of Turlock* (1985) 38 Cal. 3d 227, 233 [211 Cal. Rptr. 416].) "That discretion, however, "is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and

not to impede or defeat the ends of substantial justice.” (*Rivercourt Co. Ltd. v. Dyna-Tel, Inc.* (1996) 41 Cal.App.4th 1477, 1480 [49 Cal.Rptr.2d 279].)

Here, as in *Fox, supra*, lien claimant’s failure to appear at the lien conference where his presence was required resulted in the dismissal of his underlying lien claim. Here, as in *Fox*, lien claimant seeks relief under section 473 of the Code of Civil Procedure for failing to appear based upon surprise and neglect. Petitioner further asserts his hearing representative was ill on the date of the hearing. (Petition for Reconsideration, dated 9/18/2024, pp. 1-2.)

In cases where a lien claimant argues that they are entitled to 473 relief, the lien claimant is entitled to a hearing on whether the dismissal should be set aside due to mistake, inadvertence, surprise or excusable neglect. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157–158, [65 Cal.Comp.Cases 805].) This is consistent with the principle expressed in *Fox* that “it is the policy of the law to favor, whenever possible, a hearing on the merits.” (*Fox, supra*, 4 Cal.App.4th at 1205, citing *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.)

In determining whether a person’s mistake or inadvertence is excusable, “the court inquires whether ‘a reasonably prudent person under the same or similar circumstances might have made the same error.’” (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal. 4th 249, 258 citing *Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276.) It is also imperative that the party seeking relief pursuant to Code of Civil Procedure section 473(b) act with diligence in seeking relief as soon as the mistake is discovered. (*Benjamin v. Dalmo Mfg. Co.* (1948) 31 Cal. 2d 523.)

Finally, as previously stated, there remains an issue as to the validity of the existing NIT and Order of dismissal due to questions surrounding adequate notice to petitioner, and absent a record we cannot determine same. Such a finding may make the issue as to excusable neglect and inadvertence under section 473(b) moot.

A workers’ compensation administrative law judge’s (WCJ) decision must be based on admitted evidence and must be supported by substantial evidence. (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An

adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10566.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record.

At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id.* at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350] [a full and complete record allows for a meaningful right of reconsideration]; *Lewis v. Arlie Rogers & Sons* (2003) 69 Cal.Comp.Cases 490, 494, emphasis in original ["decision [must] be based on an ascertainable and adequate record," including "an *orderly identification* in the record of the evidence submitted by a party; and *what evidence is admitted or denied admission*."].) "An organized evidentiary record assists an arbitrator in rendering a decision, informs the parties what evidence will be utilized by the arbitrator in making a determination, preserves the rights of parties to object to proffered evidence, and affords meaningful review by the Board, or reviewing tribunal." (*Id.*)

The Appeals Board may not ignore due process for the sake of expediency. (*Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 469 [83 Cal.Comp.Cases 1643] [claimants in workers' compensation proceedings are not denied due process when proceedings are delayed in order to ensure compliance with the mandate to accomplish substantial justice]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805] [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].) "Even though workers' compensation matters are to be handled expeditiously by the Board and its trial judges, administrative efficiency at the expense of due process is not permissible." (*Fremont Indem. Co. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971 [49 Cal.Comp.Cases 288]; see *Ogden Entertainment Services v. Workers' Comp. Appeals Bd. (Von Ritzhoff)* (2014) 233 Cal.App.4th 970, 985 [80 Cal.Comp.Cases 1].)

The Appeals Board’s constitutional requirement to accomplish substantial justice means that the Appeals Board must protect the due process rights of every person seeking reconsideration. (See *San Bernardino Cmty. Hosp. v. Workers’ Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986] [“essence of due process is . . . notice and the opportunity to be heard”]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) In fact, “a denial of due process renders the appeals board’s decision unreasonable...” and therefore vulnerable to a writ of review. (*Von Ritzhoff, supra*, 233 Cal.App.4th at p. 985 citing Lab. Code, § 5952(a), (c).) Thus, due process requires a meaningful consideration of the merits of every case de novo with a well-reasoned decision based on the evidentiary record and the relevant law.

Accordingly, we grant lien claimant’s Petition for Reconsideration, rescind the September 4, 2024 Joint Order of Dismissal of the lien of Gofnung Chiropractic, and return this matter to the district office for further proceedings consistent with this decision, and for the WCJ to prepare a proper record of the proceedings in accordance with section 5313 and *Hamilton*.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Joint Order of Dismissal dated September 4, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration that the Joint Order of Dismissal issued by the WCA on September 4, 2024 is **RESCINDED** and the matter is **RETURNED** to the district office for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 2, 2024

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

**COLLECTIVE RESOURCES
GOFNUNG CHIRO
CHONG LEGAL GROUP**

LAS/abs

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