

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ARTURO ACOSTA, *Applicant*

vs.

SWINERTON BUILDER; ZURICH NORTH AMERICA, *Defendants*

Adjudication Number: ADJ13289648
Riverside District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration¹ in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the June 2, 2021 Order Dismissing Case (Order), wherein the workers' compensation administrative law judge (WCJ) dismissed applicant's case without prejudice due to applicant and applicant attorney's "failure to appear" at the May 3, 2021 trial.

Applicant contends that he has not abandoned his case and that notice of the May 3, 2021 trial was not received by his attorney. (Petition for Reconsideration (Petition), p. 4.) He therefore argues that the Order should be rescinded so that he may proceed with adjudication of his claim. (*Ibid.*)

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, and as our Decision After Reconsideration, we will rescind the June 2, 2021 Order.

¹ Commissioner Sweeney, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Commissioner Dodd was unavailable to participate. Other panelists have been appointed in their place.

FACTS

Applicant claimed that, while employed by defendant as a drywall finisher on November 20, 2019, he sustained an injury arising out of and in the course of employment (AOE/COE) to his wrist, arms, hand, and back. The claim was denied by defendant.

On September 22, 2020, defendant filed a Declaration of Readiness to Proceed to a priority conference.

On October 22, 2020, the parties appeared for the priority conference, and the matter was continued. According to Communications in the Electronic Adjudication Management System (EAMS), notice of the continued hearing date of November 19, 2020, was served on October 26, 2020, to applicant via regular mail and to applicant's attorney, via email. Nowhere on EAMS, however, is the proper email address for service upon applicant's attorney listed.

On November 12, 2020, applicant filed a verified objection to the Declaration of Readiness to Proceed requesting that the hearing be vacated because medical discovery was not complete, and because applicant had an appointment scheduled with a panel qualified medical evaluator (PQME) for January 15, 2021, at 11:00 a.m.

The November 19, 2020 hearing proceeded as scheduled, and per the Minutes of Hearing, applicant and his attorney were not in attendance. The Minutes of Hearing indicated that a pretrial conference statement (PTCS) was to be filed by the parties at least twenty days prior to trial but did not specify the reason for the non-appearance of applicant or his attorney. WCJ also made no record as to whether applicant and his attorney were served with a notice of hearing. Defendant was designated for service of the Minutes of Hearing and ultimately served the parties on December 31, 2020, per a Proof of Service.

On February 11, 2021, the parties appeared for trial, and the matter was continued to a further trial date. The Comments noted, in relevant part, that:

...[p]arties filed late PTCS on [February 8, 2021], due [January 22, 2021,] per MOH [from November 19, 2020]. Applicant amended application on [December 8, 2020] with additional body parts. QME found [right] wrist compensable but didn't comment on other parts. Parties may want to get supplemental report.

Although service of the Minutes of Hearing was delegated to defendant, service of the notice of hearing was not. According to Communications in EAMS, the WCAB did not serve a notice of hearing.

At the May 3, 2021 trial, neither applicant nor applicant's attorney were in attendance. The WCJ made no record as to whether applicant and his attorney were served with a notice of hearing but noted as follows in the Minutes of Hearing:

Trial set today but applicant's attorney failed to appear. A representative called after the case was adjourned.

NOI:

Per CCR 10755, Court hereby issues a notice of intention to dismiss case. Court also issues a notice of intention to issue \$100 sanctions against applicant's attorney and defendant's costs.

A timely objection stating good cause filed within 15 days of service shall stay the NOI.

Defendant was designated for service and ultimately served the parties on May 10, 2021, per a Proof of Service. A separate NIT did not issue.

On June 2, 2021, the WCJ issued an Order Dismissing Case which indicated as follows:

IT APPEARING THAT a notice of intention to dismiss the case was issued on May 3, 2021, due to applicant's and his attorney's failure to appear, and this notice was duly served by defendant on May 10, 2021, with **GOOD CAUSE APPEARING** according to Title 8 of the California Code of Regulations section 10755 and no timely objection on file,

IT IS ORDERED THAT the case is hereby dismissed without prejudice and the Trial set for July 19, 2021 is hereby vacated and the matter is off calendar.

The court stays the \$100 sanctions against applicant's attorney and defendant's costs.

Defendant was designated with service and served the Order on June 2, 2021, per a Proof of Service. Thereafter, applicant filed this Petition.

In his Report, the WCJ stated as follows:

The MOH for the February 11, 2021 hearing was served by defendant on March 26, 2021 with a proof of service (EAMS ID 36084208) per Title 8 of the California Code of Regulations section ("CCR") 10629. On March 26, 2021, defense counsel also provided notice of the continued trial set May 3, 2021 to the parties (Exhibit "B" of Defendant's Answer dated 7/1/21).

The court highlights that Applicant's representative was cognized [*sic*] of the Priority Conference on November 19, 2020, based on the admission stated in the two briefs entitled Objection to the DOR filed a week prior to the hearing, wherein the representative requested to vacate the hearing. The WCAB via EAMS provided notice of the trial to the parties listed on the official address list including the applicant and applicant's attorney. On March 26, 2021, defendant also provided notice of the May 3, 2021 trial to the parties that included applicant's attorney and applicant, according to Exhibit "B" attached to the Answer dated July 1, 2021. These facts were bolstered when applicant's representative called into the AT&T telephonic trial line on May 3, 2021, but WCJ Yee advised him that the case had already adjourned. (Please see MOH dated [May 3, 2021], EAMS ID 74146502.)

Petitioner's facts and arguments in the Petition for Reconsideration were completely silent about whether or not they received the Minute[s] of Hearing dated May 3, 2021 that was duly served by defendant on May 10, 2021. This is a key omission because that MOH contained the notice of intention to dismiss the case, and applicant had failed to object. Petitioner also did not comment on why they actually appeared late on May 3, 2021, and after the case was adjourned.

Therefore, Petitioner's arguments that they failed to receive notice of the hearings or the Notice of Intention to dismiss the case without prejudice are simply not plausible.

(Report, pp. 3, 5-6.)

DISCUSSION

Turning now to the merits of the Petition, we highlight two statutes governing hearing notices: Labor Code² section 5504 and WCAB Rule 10750. Section 5504 specifies that:

A notice of the time and place of hearing shall be served upon the applicant and all adverse parties and may be served either in the manner of service of a summons in a civil action or in the same manner as any notice that is authorized or required to be served under the provisions of this division.

(Lab. Code, § 5504.)

WCAB Rule 10750 specifies, in relevant part, that:

- (a) Notice shall be served on all parties and their attorneys or non-attorney representatives of record of the time and location, including whether the hearing

² All further statutory references will be to the Labor Code unless otherwise indicated.

will be conducted electronically, of each hearing scheduled, whether or not the hearing affects all parties, as provided in rule 10625.

(b) The Workers' Compensation Appeals Board may, in its discretion, designate a party or their attorney or agent of record to serve a notice of hearing as provided in rule 10629. Notice shall include the time and location, including whether the hearing will be conducted electronically and how to access any electronic hearing.

(Cal. Code Regs., tit. 8, § 10750.)

Pursuant to WCAB Rule 10756, when a required party, after notice, fails to appear at a trial in the case-in-chief:

(a) If good cause is shown for failure to appear, the workers' compensation judge may take the case off calendar or may continue the case to a date certain.

(b) If no good cause is shown for failure to appear, the workers' compensation judge may issue a notice of intention pursuant to rule 10832, take the case off calendar or continue the case to a date certain.

(Cal. Code Regs., tit. 8, § 10756.)

The WCJ may issue a NIT for any proper purpose, including “[d]ismissing an application.” (Cal. Code Regs., tit. 8, § 10832(a)(5).) If an objection to the NIT is filed within the time provided, the Appeals Board, in its discretion, may sustain the objection, issue an order consistent with the NIT together with an opinion on decision, or set the matter for hearing. (Cal. Code Regs., tit. 8, § 10832(c).) There is, however, 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].)

It is also well established that although a NIT may be provided alongside Minutes of Hearing, *it is a separate and distinct document and should clearly indicate 1) that it is a NIT; 2) the parties involved; 3) the relevant dates and/or timelines; and 4) the basis for the NIT.*

Here, rather than issue a separate and proper NIT, the WCJ specified his intent to dismiss applicant's case and issue sanctions and costs within the May 3, 2021 Minutes of Hearing. As the NIT was not validly issued, the NIT, along with the resulting Order, are void ab initio.

We note, however, that even if the NIT had been properly issued, the Order is fatally defective as it references WCAB Rule 10755 as authority for the dismissal, which applies mandatory settlement conferences, not trials. The WCJ also designated defendant for service in

contravention to WCAB Rule 10628, which states, in relevant part, that “[t]he Workers’ Compensation Appeals Board shall not designate a party, or their attorney or agent of record, to serve any final order, decision or award.” (Cal. Code Regs., tit. 8, § 10628(a).) Given that the Order was a final order, designated service is improper.

Additionally, decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. 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.” (*Hamilton, supra*, at 475.) The purpose of this requirement is to enable “the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]” (*Hamilton, supra*, at 476, citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350].)

Here, the WCJ failed to create a record as to whether the WCAB served applicant and applicant’s attorney with copies of the notice of hearing and whether applicant and applicant’s attorney received notice. With respect to the issue of sanctions and costs, there was also a lack of specificity as to the party or parties, the sanctions and costs were to be levied against.

Given the above issues, upon receipt of applicant’s Petition, the WCJ should have set the matter for hearing to create a proper record in accordance with *Hamilton* and to provide due process. It is well established that due process requires 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].)

We note also that pursuant to section 5504 and WCAB Rule 10750, a notice of hearing must be served on the parties by the WCAB. The sole instance wherein service of a notice of hearing may be assigned is when a WCJ has issued an actual order delegating said service. This did not occur here. The notice requirement is fundamental to due process and failure to comply is inexcusable. Notwithstanding these issues, the WCJ clings to his tenuous position that a Minutes of Hearing may substitute for a notice of hearing. (Report, p. 6.)

To be clear, Minutes of Hearing are simply a record of appearance and, although they may, on occasion, include orders which require no record, they cannot and do not serve as an evidentiary record, a notice of hearing, or a NIT.

Lastly, the WCJ references a document attached to defendant's Answer regarding notice to applicant. (Report, p. 5.) We note that the attachment was made in violation of WCAB Rule 10945 (Cal. Code Regs., tit. 8 § 10945) and is not a part of the evidentiary record.

Accordingly, we rescind the June 2, 2021 Order.

For the foregoing reasons,

IT IS ORDERED that as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the June 2, 2021 Order Dismissing Case is **RESCINDED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 23, 2025

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

**ARTURO ACOSTA
DIEFER LAW GROUP, PC
FLOYD SKEREN MANUKIAN LANGEVIN, LLP**

RL/cs

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