WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DIANE MINISH, *Applicant*

vs.

HANUMAN FELLOWSHIP;
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ1703796
San Jose District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the Findings and Order (F&O) issued on January 22, 2021, by a workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant did not rebut the presumption of receipt of the notice of intention (NIT) or the Order Dismissing and did not show good cause to vacate the September 6, 2016, Order Dismissing.

Applicant contends in pertinent part that she was not served with the Order Dismissing and that due process requires that she receive actual notice prior to her claim being dismissed; that she rebutted the presumption of mailing with her credible testimony that she did not receive the NIT and the Order; and that due process requires that cases be litigated on the merits.

We received an Answer from defendant. We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ, recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons

[1] Commissioner Lowe, who was on the panel that issued the Opinion and Order Granting Reconsideration, no longer serves on the Appeals Board. Another panelist was appointed in her place.

discussed below, as our Decision After Reconsideration, we will rescind the F&O and substitute a new F&O, which finds that applicant rebutted the presumption of receipt and that applicant demonstrated good cause to vacate the Order Dismissing her case and orders that the Petition to Vacate is granted and that the Order Dismissing is rescinded.

FACTS

We will briefly review the relevant facts.

Applicant claimed injury to various body parts while employed on September 16, 2006, as a software engineer and volunteer at Watsonville/Mount Madonna Center by defendant Hanuman.

Applicant filed an Application for Adjudication of Claims. Subsequently, she filed a serious and willful petition on September 14, 2007, and a civil action against her employer in Santa Cruz County Superior Court on October 11, 2007. Defendant State Compensation Insurance Company (SCIF) provided medical treatment and temporary disability benefits through January 2011. From 2010 through 2016, while applicant pursued her civil action, very little activity took place with the WCAB.

On May 23, 2016, SCIF filed a petition for dismissal of claim for lack of prosecution, which was denied.

On July 11, 2016, SCIF filed a second petition for dismissal, and according to the proof of service, applicant was served at a post office box in Durham, North Carolina (NC PO Box).

On August 10, 2016, the PWCJ issued the NIT, and according to the proof of service, applicant was served at the NC PO Box.

On September 6, 2016, the PWCJ issued the Order Dismissing, and according to the proof of service, applicant was served at the NC PO Box.

On December 11, 2018, applicant filed her "Petition to Vacate Order Dismissing Case and Then Stay Case Pending Determination of Employment by Superior Court" (Petition to Vacate), requesting that her case be reopened and alleging that her first notice of the Order Dismissing was on June 12, 2018. She alleged that the civil matter was set for trial on July 14, 2019, and contended that the civil case involved a common issue of employment so that the statute of limitations was tolled. She also filed a declaration of readiness (DOR).

On December 31, 2018, the matter was set for a status conference. Applicant specially appeared through counsel, and counsel for defendant employer and counsel for defendant SCIF appeared. The matter was taken off calendar at applicant's request. According to the hand-written notation on the minutes: "IW wants to learn outcome of civil case in case exclusive remedy bars comp case. IW's pet to set aside dismissal is deferred at this time."

Sometime thereafter, applicant settled her civil case for an undisclosed amount. As part of that settlement, applicant agreed to dismiss her claim for serious and willful, and a WCJ issued an order dismissing the serious and willful claim issued on October 28, 2019. Around this time, applicant also filed another DOR on her Petition to Vacate.

On July 13, 2020, the matter proceeded to trial on the issue of applicant's Petition to Vacate. Applicant testified that she did not receive SCIF's pre-dismissal letter or the Petition for Dismissal. She also testified that she did not receive the August 10, 2016 NIT or the September 6, 2016 Order Dismissing. She testified that during this time frame, she lived in British Columbia, Canada. She did not update her address with the WCAB between June 2016 and September 2016 because she intended to return to North Carolina. She testified that mail from North Carolina was being forwarded to her in Canada during this time, except for the mail mentioned above.

Subsequently, the case was submitted for decision on December 15, 2020, and the WCJ issued the F&O on January 22, 2021.

In her Opinion on Decision, the WCJ stated that:

> Based on evidence presented, this WCJ finds that applicant did provide sufficient evidence showing non-receipt of NOI to Dismiss or Order Dismissing her case. This WCJ finds no good cause to vacate the 2016 Order Dismissing.

(Opinion on Decision, January 22, 2021, p. 3.)

DISCUSSION

Former WCAB Rule 10582 stated in pertinent part that:

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> Cases set for hearing may be removed from the active calendar by an order taking off calendar.
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> Cases in off calendar status may be restored to the active calendar upon the filing and serving of a properly executed Declaration of Readiness to Proceed.

> 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. A case may be dismissed after issuance of a ten (10) day notice of intention to dismiss and an opportunity to be heard . . .
>
> A petition by defendant to dismiss the case must be accompanied by a copy of a letter mailed to the applicant and, if represented, to the applicant's attorney or representative, more than thirty (30) days before the filing of the petition to dismiss. This letter must state that it is the intention of the persons signing the letter to file a petition for dismissal thirty (30) days after the date of that letter unless the applicant or his attorney or representative shows in writing some good reason for not dismissing the case. . . . A copy of the petition must be served on all parties and all lien claimants.

(Cal. Code Regs., tit. 8, § 10582, emphasis added [repealed and replaced by Cal. Code Regs., tit. 8, § 10550].)

While the mere allegation of non-receipt of a document is insufficient to establish that it was not received, an applicant is entitled to a hearing where they are given an opportunity to produce "believable contrary evidence" that notice was not received. (*Castro v. WCAB* (1996) 61 Cal.Comp.Cases 1460, 1462 [an attorney's bare allegation of non-receipt was insufficient to overcome the WCAB's proof of service of the F&O]; *Craig v. Brown & Root* (2000) 84 Cal.App.4th 416, 421-422, citing *Slater v. Kehoe* (1974) 38 Cal.App.3d 819, 832, fn. 12 [If a party proves that a letter was mailed, the trier of fact is required to find that the letter was received in the absence of any believable contrary evidence. If the adverse party denies receipt, the presumption is gone and the trier of fact must weigh the evidence and determine whether the letter was received.] In *Suon v. California Dairies*, we explained that, although a "letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail," that presumption is rebuttable. (*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1817 (Appeals Bd. en banc), citations omitted.) "If the sending party thus produces evidence that a document was mailed, the burden shifts to the recipient to produce 'believable contrary evidence' that it was not received. [Citations.] Once the recipient produces sufficient evidence showing non-receipt of the mailed item, "the presumption disappears" and the "trier of fact must then weigh the

denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received. [citation.]" (*Ibid.*)

It is well established that the decisions of the Workers' Compensation Appeals Board must be supported by substantial evidence. (Lab. Code, § 5903; *LeVesque v. Worker's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635-637 [35 Cal.Comp.Cases 16].) When the WCJ's findings are supported by solid, credible evidence, they are to be accorded great weight by the Appeals Board and rejected only on the basis of substantial evidence in light of the entire record. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310].)

In *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500], the Supreme Court noted the general dearth of evidence offered in that case to rebut applicant's claim of injury, and reiterated that: "As a general rule, the board "must accept as true the intended meaning of [evidence] both uncontradicted and unimpeached." (*Id.* at p. 318.) Accordingly, the *Garza* court concluded that the Appeals Board failed to accord the appropriate weight to the referee's findings, that the evidence used to reject the WCJ's finding of industrial causation was conjectural and speculative, and that "the denial of compensation benefits cannot rest upon the board's mere suspicion or surmise, in view of the policy of the law to resolve all reasonable doubts in the employee's favor." (*Id.* at p. 319.)

Here, the WCJ concluded that applicant demonstrated that she did not receive the NIT and the Order Dismissing. We give great weight to the WCJ's credibility determinations (*Garza, supra*, 3 Cal.3d at p. 317), and based on our review of the record, we conclude that applicant successfully rebutted the presumption of receipt.

Yet, the WCJ determined that there was no good cause to set aside the Order. Labor Code section 5803 provides that the Appeals Board has continuing jurisdiction over all of its orders, and that: "At any time, upon notice and an opportunity to be heard is given to the parties in interest, the appeals board may rescind. . . any order . . . good cause appearing therefor."

Article XIV, section 4 of the California Constitution mandates that the workers' compensation law shall be carried out "…to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character…" Based on the constitutional mandate to accomplish substantial justice, the Board has a duty to develop an adequate record. (*Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 394-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd*.

(1998) 62 Cal.App.4th 1117, 1120 [63 Cal.Comp.Cases 261].) Moreover, "[t]he Board 'is bound by the due process clause of the Fourteenth Amendment to the United States Constitution to give the parties before it a fair and open hearing…All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.' " (*Rucker v. Workers' Comp Appeals Bd*. (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805], citing *Kaiser Co. v. Industrial Acc. Com.* (1952) 109 Cal.App.2d 54, 58.) 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 pp. 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, citing *Mullane v. Cent. Hanover Bank & Trust Co*. (1950) 339 U.S. 306, 313.)

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) (*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.) The purpose of this requirement is to enable "the parties, and the Board if reconsideration is sought, [to] ascertain the basis for the decision[.]" (*Id*., at p. 476, citing *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].) "For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Ibid.*)

Here, applicant credibly testified that she did not receive the NIT. Thus, she was not provided with adequate notice and an opportunity to be heard, and as a practical matter, if she did not receive the NIT, she could not object to it. Since the Order Dismissing is premised upon the notice and opportunity to be heard provided by the NIT, the Order is void. Moreover, if applicant did not receive the Order Dismissing, she was not provided with notice and an opportunity to challenge the Order. We also observe that the failure to provide applicant with the requisite due process is in itself good cause to set aside the Order Dismissing.

Accordingly, we rescind the F&O and substitute a new F&O, that finds that applicant rebutted the presumption of receipt of the NIT and the Order Dismissing and that applicant

demonstrated good cause to set aside the Order Dismissing, and orders that the Petition to Vacate is granted and that the Order Dismissing is rescinded.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on January 22, 2021 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant, Diane Minish, while allegedly employed on September 16, 2006 as a software engineer and volunteer at Watsonville/Mount Madonna Center, California, by Hanuman Fellowship, claims to have sustained injuries arising out of and in the course of employment to spine, ribs, shoulders, left lower extremity, lungs, et cetera.

2. At the time of the alleged injury, the employer's workers compensation carrier was State Compensation Insurance Fund.

3. Applicant rebutted the presumption of receipt of the Notice of Intention and the Order Dismissing.

4. Applicant demonstrated good cause to vacate the Order Dismissing her case.

ORDERS

a. Applicant's Petition to Vacate Order Dismissing Case is hereby granted.

b. The Order Dismissing issued on September 6, 2016 is rescinded.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 5, 2025

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

DIANE MINISH
BUTTS & JOHNSON
STATE COMPENSATION INSURANCE FUND, LEGAL
LITTLER MENDELSON, PC

AS/mc

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