

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

**MICLE KAPLOWITZ, *Applicant***

**vs.**

**CAST & CREW ENTERTAINMENT SERVICES, INC.;  
ZURICH NORTH AMERICA, *Defendants***

**Adjudication Number: ADJ7306346  
Van Nuys 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.<sup>1</sup> We now issue our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order (F&O) dated January 3, 2022, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant, while employed by defendant on February 27, 2009 as a laborer, sustained injury arising out of and in the course of employment (AOE/COE) to his lumbar spine, neck, gastrointestinal system, and sleep disturbance, but no good cause to vacate the Order of Dismissal dated March 23, 2016. The WCJ also found that in the absence of estoppel, the court has no continuing jurisdiction over the matter. (F&O, pp. 1-2.)

Applicant contends that good cause exists to vacate the Order of Dismissal, including evidence of prior homelessness and psychiatric illness, and that he is now ready to proceed with his case.

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

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<sup>1</sup> Commissioner Marguerite Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been substituted in her place.

We have considered the Petition 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 F&O dated January 3, 2022, and substitute it with a new F&O which finds that the Order of Dismissal dated March 23, 2016, is void and therefore ordered vacated.

## **FACTS**

Applicant filed an Application for Adjudication claiming that while employed by defendant as a laborer on February 27, 2009, he sustained injury AOE/COE to his cervical spine, lumbar spine, gastrointestinal system, and sleep disturbance.

The parties proceeded with discovery and retained Gary Brazina, M.D. as the orthopedic Agreed Medical Evaluator (AME) and Jeffrey Hirsch, M.D. as the internal AME. Both physicians evaluated applicant on at least one occasion and issued corresponding reports. (Exhibits Y-Y4; X1-X2.)

On February 3, 2016, defendant filed a Declaration of Readiness to Proceed to a mandatory settlement conference alleging that no response had been received from applicant to their settlement demand.

Thereafter, the matter was set for a mandatory settlement conference on February 25, 2016. At the hearing, applicant's attorney and the defense attorney were present, but the Minutes of Hearing did not indicate whether applicant was present or whether applicant received notice of said hearing. The WCJ continued the matter to a further mandatory settlement conference and issued a "Notice of Intent (NIT) to Dismiss Pursuant to Rule 10562." The NIT indicated that:

Based on failure to appear for a regularly scheduled hearing [on February 25, 2016] after being duly noticed by the WCAB, notice is hereby given that IT IS THE INTENT of this court to DISMISS the above-referenced case should applicant fail to appear at the next hearing[.]

A new hearing date of March 14, 2016 was listed on the NIT and defendant was designated for service. Proof of service, however, was not located in the evidentiary record.

On March 14, 2016, the matter proceeded to a further mandatory settlement conference with a different WCJ. The Minutes of Hearing indicated that applicant's attorney and the defense attorney were both present but did not indicate whether applicant was present.

On March 23, 2016, an Order of Dismissal was issued by the WCJ stating that:

Petition to Dismiss the above-captioned matter(s) having been filed by defendant(s) and no GOOD CAUSE response filed by applicant to the Notice of Intent to Dismiss, and good cause appearing based on the contents of said Petition for Dismissal,

IT IS ORDERED that the above-entitled Case be, and the same hereby is, dismissed without prejudice.

The above Order of Dismissal was based upon an ostensible Petition for Dismissal by defendant. The evidentiary record, however, does not reveal the filing of any such petition. Applicant was served with a copy of the above Order of Dismissal according to proof of service located in the evidentiary record.

On July 7, 2020, applicant's attorney filed a Petition to Vacate Dismissal alleging that at the time of dismissal, applicant had lost contact with his attorney due to homelessness, but he was now ready to proceed. (Petition to Vacate Dismissal, July 7, 2020, pp. 1-2.)

At the May 12, 2021 mandatory settlement conference, WCJ Seymour set the matter for trial and on August 23, 2021, applicant, his counsel, and defense counsel appeared for said trial. At the request of the parties, the WCJ continued the matter to a further trial date for additional discovery. Under "Comments" the WCJ listed, in relevant part, as follows:

[N]o [applicant] appearance at [February 25, 2016] hearing. [A Notice of Intent to Dismiss (NOI) was] issued [on February 25, 2016] stating if no appearance [was made] at [the March 14, 2016] hearing, then [a] dismissal [would issue] despite AME [reports]. [A] dismissal [was] issued [on March 24, 2016] as no appearance [was made by applicant] ([dismissal was completed via] walk through after the hearing before Pollak). [The NOI] [i]ssued w/out prejudice but [given that it has been] more than 5[ ]years since [the DOI, it was] effectively with prejudice. HOWEVER, [there is] no proof of service that the [NOI] was served on [applicant's attorney] or [applicant.] Plus, [the matter was] set for a couple lien conf[erences] since that time and no petition to vacate [was filed] until 4 years later in 2020.

(Minutes of Hearing, August 23, 2021.)

On December 16, 2021, the matter was tried and submitted on applicant's Petition to Vacate Dismissal. Applicant did not testify.

On January 3, 2022, the WCJ issued an F&O which held, in relevant part, that there was no good cause to vacate the Order of Dismissal dated March 23, 2016. The WCJ also found that

in the absence of estoppel, the court has no continuing jurisdiction over the matter. (F&O, pp. 1-2.)

## DISCUSSION

### I.

Turning now to the merits of the Petition, former WCAB Rule 10562, which, as of January 1, 2020, was replaced by current WCAB Rule 10755, states, in relevant part that:

(b) Where a party served with notice of a mandatory settlement conference fails to appear at the conference, the workers' compensation judge may

(1) dismiss the application after issuing a ten (10) day notice of intention to dismiss, or

(2) close discovery and forward the case to the presiding workers' compensation judge to set for trial.

(c) Where a party, after notice, fails to appear at either a trial or a conference and 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.

(Cal. Code Regs., tit. 8, § 10562, repealed and replaced by Cal. Code Regs., tit. 8, § 10755.)

Former WCAB Rule 10563 (Cal. Code Regs., tit. 8, § 10563), which was repealed as of January 1, 2020, required, in relevant part, that a represented applicant "personally appear" at a mandatory settlement conference. No such requirement was outlined under new WCAB Rule 10755 above.

Here, the WCJ issued a NIT on February 25, 2016, and defendant was designated for service. Proof of service of the NIT, however, was not located in the evidentiary record and the WCJ confirmed as much in his August 23, 2021 Minutes of Hearing. Given that valid service was not completed, the NIT and the subsequent March 23, 2021 Order of Dismissal are thus void in ab initio.

Further, Labor Code section<sup>2</sup> 5313 requires that the WCJ produce "a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (See *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-22.) As explained

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<sup>2</sup> All further statutory references will be to the Labor Code unless otherwise indicated.

in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [33 Cal.Comp.Cases 350- 351], a decision “must be based on admitted evidence in the record” (*Id.* at p. 478) and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers’ Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Aside from providing assurance that due process is being provided, this “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton, supra*, at p. 476, citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

Due process also 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].) 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].) A fair hearing is “... one of ‘the rudiments of fair play’ assured to every litigant ...” (*Id.* at 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, “the commission ... must find facts and declare and enforce rights and liabilities, - in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law.” (*Id.* at p. 577.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin, supra*, at p. 710.)

As noted above, an Order of Dismissal was issued by the WCJ on March 23, 2016, but no record was created regarding whether applicant was present at the February 25, 2016, and March 14, 2016, hearings, and no record was created as to whether applicant received notice of said hearings. Although both applicant’s attorney and the defense attorney were listed as present in the Minutes of Hearing, applicant’s presence was not indicated one way or another, and the WCJ who

presided over the March 14, 2016 hearing, was not the same WCJ who ultimately issued the March 23, 2016 Order of Dismissal.

We note also that the Order of Dismissal is defective on its face since the NIT is based upon a failure to appear, and the Order is based on an ostensible Petition for Dismissal by defendant, which, as noted above, was not located in the record. Thus, even if the NIT had not been void ab initio, on this basis alone, the Order of Dismissal is rendered void. As parties are aware, WCAB Rule 10515 provides that “Demurrers, petitions for judgment on the pleadings and petitions for summary judgment are not permitted.” (Cal. Code Regs., tit. 8, § 10515.) WCJ’s issuance of an Order of Dismissal, however, was akin to a summary judgement, in contravention to WCAB Rule 10515, *Hamilton*, and applicant’s right to due process.

Applicant’s attorney contends that evidence of applicant’s homelessness and psychiatric illness are sufficient to show good cause to vacate the Order of Dismissal. (Petition, p. 3.) We agree, but since, as noted above, the Order of Dismissal is defective on its face and void as a matter of law, we do not address this issue.

Lastly, respect to the issue of estoppel and lack of continuing jurisdiction, the Legislature has expressly provided that the Appeals Board has “continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division[.]” (§ 5803.) Thus, while the ability to alter a final award five years after the date of injury requires good cause under sections 5410 and 5804, *at no time does the Appeals Board lose jurisdiction*. Further, the Appeals Board has broad equitable powers with respect to matters within its jurisdiction. (*Dyer v. Workers’ Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [59 Cal.Comp.Cases 96].) In *Maples v. Workers’ Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827 [45 Cal.Comp.Cases 1106], the court observed that equitable principles are frequently applied to workers’ compensation matters. In that case, the court held that based upon the principles of equitable estoppel, the Appeals Board erred in permitting the insurance carrier in that case to claim an overpayment of temporary disability against applicant’s permanent disability since the carrier unreasonably delayed in filing the medical report used to terminate benefits. (*Id.* at pp. 837-838.)

Here, based upon the evidence presented on what appears to be an admitted claim with benefits still due and owing, including benefit printouts and AME reports, equitable principles should similarly be applied to prevent defendant’s unjust enrichment and enable applicant to proceed with his claim.

Taking all the above into consideration, we rescind the F&O and substitute it with a new F&O which finds that the Order of Dismissal dated March 23, 2016, is void and therefore ordered vacated.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 3, 2022 Findings and Order is **RESCINDED** and the following **SUBSTITUTED** therefor:

#### **FINDINGS OF FACT**

1. Applicant, Micle Kaplowitz, born [], while employed on February 27, 2009, as a laborer in Burbank, California, by Cast and Crew Entertainment Services, insured by Zurich Insurance North America, sustained injury arising out of and in the course of the employment to the cervical and lumbar spine, gastrointestinal system, and sleep disturbance.
2. The Order of Dismissal issued on March 23, 2016, is void ab initio.

**ORDER**

The Order of Dismissal issued March 23, 2016, is hereby ordered vacated.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ CRAIG L. SNELLINGS, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**DECEMBER 17, 2025**

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

**MICLE KAPLOWITZ  
LAW OFFICES OF PENNINGTON & TRODDEN  
VALENZUELA & GINZBURG**

**RL/cs**

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