WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SCOTT MCNALLY, *Applicant*

vs.

TAFT ELECTRIC COMPANY; OLD REPUBLIC INSURANCE COMPANY, administered by GALLAGHER BASSETT SERVICES, INC., *Defendants*

Adjudication Number: ADJ16306548
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the "Order Denying Applicant's Petition to Remove Claim from Alternative Dispute Resolution (ADR) and Affirming Previous Order Dismissing Case for Lack of Jurisdiction" (Order) issued on November 8, 2024, wherein the workers' compensation administrative law judge (WCJ) denied applicant's petition to remove his case from ADR and proceed before the WCAB and that the previous order dismissing the case for lack of WCAB remains in effect.

Applicant contends that the ADR agreement violates Labor Code section 3201.5(b) because it violates his right to a fair hearing on his claim.

We received an Answer from defendant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based upon our review of the record, and as discussed below, we will grant the Petition, rescind the Order and return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On June 16, 2022, applicant filed an application for adjudication, alleging that he sustained cumulative injury to his neck, back and foot while employed as a foreman by defendant during the period of November 12, 2020 through November 12, 2021. (Application for Adjudication, June 16, 2022, p. 4.)

On August 22, 2022, defendant filed a petition for dismissal, alleging that the "parties were subject to the terms and conditions of the collectively bargained [ADR] agreement," that, "although jurisdiction is conferred upon the Appeals Board by Section 3201.5, all parties preserve their rights by following the alternative system procedures," and that dismissal of the application for adjudication was therefore warranted. (Petition for Dismissal, August 22, 2022, p. 2:2-23.)

On September 19, 2022, the WCJ granted the petition for dismissal, stating that the claim was dismissed with prejudice on the grounds that the alleged ADR agreement established that "the WCAB lacks jurisdiction." (Order Granting Petition for Dismissal Per ADR Carveout, September 19, 2022.) The order states that "timely objection within 10 days of service showing good cause voids the order." The order reflects that it was emailed to defendant's attorney and that defendant's attorney was designated to serve it upon all parties. (*Id.*)

On October 4, 2022, defendant's attorney filed a proof of service of the order upon applicant and applicant's attorney. (Proof of Service, October 4, 2022.)

On August 21, 2023, applicant filed a petition to have his claim removed from ADR and proceed with his claim at the WCAB.

On April 17, 2024, the parties appeared for a mandatory settlement conference on the issue of the petition. The WCJ advised that he would issue a formal order denying applicant's petition, and he ordered the case off calendar.

On November 8, 2024, the WCJ issued the Order.

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:

> (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 case was transmitted to the Appeals Board on December 11, 2024, and 60 days from the date of transmission is February 10, 2025. This decision is issued by or on February 10, 2025, 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 case 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 December 11, 2024, and the case was transmitted to the Appeals Board on December 11, 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 December 11, 2024.

II.

Applicant contends that the ADR agreement violates Labor Code section 3201.5(b) because it violates his right to a fair hearing on his claim.

Labor Code section 5502(d) provides in pertinent part:

> (2) The settlement conference shall be conducted by a workers' compensation administrative law judge . . . At the mandatory settlement conference, the . . . workers' compensation administrative law judge shall

> have the authority to resolve the dispute, including the authority to approve a compromise and release or issue a stipulated finding and award, **and if the dispute cannot be resolved, to frame the issues and stipulations for trial**. . . .

(Lab. Code § 5502(d)(2) [Emphasis added].)

> WCAB Rule 10515 provides:
>
> Demurrers, petitions for judgment on the pleadings and petitions for summary judgment are not permitted.

(Cal. Code Regs., tit. 8, § 10515.)

Here, the record reveals that the WCJ granted the Petition for Dismissal without holding a settlement conference, framing the issues for trial, or holding a hearing in violation of Labor Code section 5502(d)(2). Applicant's petition essentially sought to set aside the September 19, 2022 order dismissing the case for lack of jurisdiction. The result of this process was the Order served to terminate applicant's case in a manner akin to summary judgment. However, pursuant to WCAB Rule 10515, summary judgment proceedings are not permitted in the workers' compensation system and contested matters are to be tried by way of hearing on the record. (Cal. Code Regs., tit. 8, § 10515.)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Furthermore, decisions of the Appeals Board 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. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) 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, § 10787.) "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]).)

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.) 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*, 82 Cal.App.4th at 157-158; *Katzin v. Workers' Comp. Appeals Bd*. (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) Due process requires "a 'hearing appropriate to the nature of the case.'" (*In re James Q.* (2000) 81 Cal.App.4th 255, 265, 96 Cal. Rptr. 2d 595 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865).) Although due process is "a flexible concept which depends upon the circumstances and a balancing of various factors," it generally requires the right to present relevant evidence. (*In re Jeanette V*. (1998) 68 Cal.App.4th 811, 817, 80 Cal. Rptr. 2d 534.)

The Appeals Board has continuing jurisdiction over all its orders, decisions, and awards made and entered and may rescind, alter, or amend any order, decision, or award, for good cause. (Lab. Code § 5803; *Barnes v. Workers' Comp. Appeals Bd*. (2000) 23 Cal.4th 679, 687 [65 Cal.Comp.Cases 780]; *Hodge v. Workers' Comp. Appeals Bd*. (1981) 123 Cal.App.3d 501, 509 [46 Cal.Comp.Cases 1034].)

Here, the record does not show that the WCJ served the September 19, 2022 order dismissing the case, a final order, as required by WCAB Rules 10628(a) and 10832(c) (Cal. Code Regs., tit. 8, §§ 10628(a), 10832(c)). Yet, he states in his Report that it became final when applicant failed to timely object or seek reconsideration of it. (Report, p. 8.) We observe that "self destruct" orders such as the one here illustrate why use of this type of notice and order is disfavored. Whether good cause is presented is an issue of fact that requires a record, and because the moment that the order becomes "void" is dependent on whether and when a good cause objection is filed, it makes it difficult to determine exactly when or if the order is void. Thus, upon return, in addition to considering the merits of applicant's petition to have his claim removed from ADR and proceed with his claim at the WCAB, the WCJ should consider whether the issue of service and lack of due process in the form of a hearing is grounds to set aside the order.

Because the September 19, 2022 order dismissing the case and the November 8, 2024 Order were issued without a hearing, we are persuaded that the orders violate applicant's right of due process. Accordingly, we will rescind the Order and return the matter to the trial level so that the record may be developed on the parties' respective contentions regarding the enforceability of the ADR agreement. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].)

Accordingly, we will grant the Petition, rescind the Order and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Order Denying Applicant's Petition to Remove Claim from ADR and Affirming Previous Order Dismissing Case for Lack of Jurisdiction issued on November 8, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration that the Order Denying Applicant's Petition to Remove Claim from ADR and Affirming Previous Order Dismissing Case for Lack of Jurisdiction issued on November 8, 2024 is **RESCINDED.**

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 10, 2025

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

SCOTT MCNALLY
LAW OFFICE OF DAVID L. HART
MULLEN & FILIPPI

SRO/*cs*

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