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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALEKSANDR YAMNITSKY,

Applicant,

vs.

**MORROW-MEADOWS CORPORATION;
ST. PAUL TRAVELERS,**

Defendant(s).

Case No. ADJ1403472 (LAO 0833148)

**OPINION AND ORDERS
DISMISSING REQUEST FOR REMOVAL,
GRANTING RECONSIDERATION,
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of, and alternatively requests removal from, the November 17, 2009 Order Dismissing Application for Adjudication of Claim issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ dismissed applicant's Application for Adjudication of Claim (Application) in this matter. The underlying case involves applicant's claim of industrial injury to multiple body parts while employed as an electrician from December 11, 2002 to March 19, 2003.

Applicant contends that the WCJ violated his procedural and substantive right to due process by dismissing his Application without notice and the opportunity to be heard and for not allowing him to testify or offer evidence at the November 4, 2009 trial. In addition, applicant requests costs and sanctions against defendant for intentionally denying his right to due process.

Defendant filed an Answer, and the WCJ issued a Report and Recommendation on Petition for Reconsideration and/or Removal (Report) recommending that we deny applicant's Petition.

Based on our review of the record and for the reasons discussed below, we will dismiss applicant's request for removal, grant reconsideration, rescind the WCJ's Decision, and return this matter to the trial level for further proceedings and decision by the WCJ.

1 On December 29, 2008, we issued an Opinion and Order Denying Petition for Removal in
2 this matter. We adopt and incorporate that December 29, 2008 Opinion and Order Denying
3 Petition for Removal in this opinion to the extent that it is relevant to the present issues. Therein,
4 we denied defendant's petition for removal wherein it contended that the WCJ's refusal to dismiss
5 the Application in this matter would cause it irreparable harm. At that time, we noted that, in
6 seeking dismissal of the Application pursuant to Labor Code¹ section 3201.5, defendant had not
7 presented an appropriate eligibility letter operative at the time of applicant's injury. Therefore, this
8 matter was returned to the trial level for defendant to provide evidence as required by *Kaiser v.*
9 *California Electric* (1998) 63 Cal.Comp.Cases 1391 (Significant Panel Decision) and otherwise
10 demonstrate that this case comes within the provisions of section 3201.5. We also noted that, if
11 applicant wished to attack the validity of the October 1, 1994 Alternative Disputes Resolution
12 Agreement (ADR) between the 9th District, International Brotherhood of Electrical Workers and
13 District 9, National Electric Contractors Association, he must overcome or distinguish the Court of
14 Appeal's decision in *Costa v. Workers' Comp. Appeals Bd.* (1998) 65 Cal.App.4th 1177 [63
15 Cal.Comp.Cases 814]. Finally, we noted that:

16 "In *Kaiser v. California Electric* (1998) 63 Cal.Comp.Cases 1391 (significant
17 panel decision), the panel held: 'where a motion is made, or a petition [is]
18 filed, requesting that an application be dismissed on the basis that the case
19 comes within the provisions of Labor Code section 3201.5, the WCJ must
20 determine: (1) whether there is a collective bargaining agreement as described
21 in Labor Code section 3201.5, to which both parties were subject at the time of
22 the alleged injury; and (2) whether the Administrative Director has issued an
appropriate letter of eligibility in connection with that collective bargaining
agreement. Thus, the WCJ must have a record to justify a finding that the
parties are subject to the provisions of Labor Code section 3201.5 (63
Cal.Comp.Cases at 1393).'"

23 Since that time, this matter has been continued several times and defendant filed a second
24 Petition for Removal on September 17, 2009 which was denied based on the WCJ's
25 recommendation.

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27 ¹ All further statutory references are to the Labor Code, unless otherwise noted.

1 This matter then proceeded to trial on November 4, 2009. However, the WCJ did not
2 frame any stipulations or issues, did not receive any exhibits into evidence, or make any findings of
3 fact. Instead, the WCJ ordered the matter off calendar and ordered defendant "to file a new
4 petition re: dismissal for ADR [illegible] to include the eligibility letter referenced by the WCAB's
5 removal response dated 12-29-08. [Applicant's attorney] to have 10 days to respond." Applicant
6 did not seek reconsideration or request removal from this Order.

7 On November 17, 2009, defendant filed Defendant's Petition to Dismiss Application for
8 Adjudication of Claim Pursuant to Labor Code §3201.5 (Revised Petition) (Petition for Dismissal).
9 Among the documents attached to its Petition for Dismissal, defendant attached an October 1, 1994
10 Alternative Dispute Resolution Agreement between the Chapter of the National Electrical
11 Contractors Association (NECA) and the Local Union of the International Brotherhood of
12 Electrical Workers (Union). Defendant also attached an August 13, 2001 letter from then
13 Administrative Director, Richard P. Gannon, addressed to Morrow-Meadows Corporation, IBEW,
14 Local Union No. 11, and NECA/IBEW Workers' Compensation Trust, stating that:

15 "I am pleased to advise you that, based on a review of the documents and
16 materials submitted in July 2001 by NECA/IBEW Workers' Compensation
17 Trust and various insurance companies updating our information regarding
18 your multi-employer bargaining group, I have found that the parties continue
19 to meet the eligibility requirements of Labor Code Section 3201.5. The terms
20 and conditions of the letter of August 14, 1995, remain in full force and effect.

21 "This letter of eligibility is effective August 15, 2001 and will expire on
22 August 14, 2004."

23 On the same day, the WCJ issued the November 17, 2009 Order Dismissing Application
24 for Adjudication of Claim (Order) from which applicant seeks reconsideration herein. The WCJ's
25 November 17, 2009 Order states:

26 "GOOD CAUSE HAVING BEEN SHOWN by defendant's Petition
27 submitted herein, original jurisdiction to determine disputed issues is properly
within an Alternative Dispute Resolution Program as adopted and approved
under Labor Code section §3201.5. Appropriate documentation has been
provided confirming both the employers' and employees' participation in the
approved plan.

1 **THEREFORE**, the application for adjudication of claim and all amended
2 applications for adjudication of claim filed at the Worker's Compensation
3 appeals Board are hereby dismissed.

4 **IT IS SO ORDERED.**

5 Initially, we note that California Code of Regulations, title 8, section 10843 provides that in
6 seeking removal a petitioner must "demonstrate that reconsideration will not be an adequate
7 remedy after the issuance of a final order, decision or award." (Cal. Code Regs., tit. 8, § 10843.) A
8 "final" order has been defined as one "which determines any substantive right or liability of those
9 involved in the case." (*Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104
10 Cal.App.3d 528 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp.*
11 *Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39 [43 Cal.Comp.Cases 660].) This case involves the
12 dismissal of an Application and, thus, pertains to substantive rights of the parties involved.
13 Therefore the WCJ's decision is a final order and reconsideration, not removal, is the proper
14 remedy. Accordingly, we will dismiss applicant's request for removal.

15 Turning to the applicant's contentions, Appeals Board Rule 10780 provides that:

16 "Except as provided in Rule 10562 and 10582 and unless good cause to the
17 contrary appears, orders of dismissal of claim forms for injuries on or after
18 January 1, 1990 and before January 1, 1994, and orders of dismissal of
19 applications for adjudication for injuries before January 1, 1990 and on or after
20 January 1, 1994, shall issue forthwith when requested by the employee. All
21 other orders of dismissal of claim forms for injuries occurring on or after
22 January 1, 1990 and before January 1, 1994, or orders of dismissal of
23 applications for adjudication for injuries occurring before January 1, 1990 and
24 on or after January 1, 1994, shall issue only after service of a notice of
25 intention allowing at least fifteen (15) days for the adverse parties to show
26 good cause to the contrary, and not by an order with a clause rendering the
27 order null and void if an objection showing good cause is filed." (Cal. Code of
28 Regs., tit. 8, §10780.)

29 Here, the dismissal of the Application was not requested by applicant and did not involve
30 applicant's failure to appear (Appeals Board Rule 10562) or the failure to prosecute his claim
31 (Appeals Board Rule 10582). Therefore, it was improper for the WCJ to issue an order of
32 dismissal without issuing a notice of intention to dismiss and allowing applicant 15 days to
33 respond as required by Appeals Board Rule 10780. Therefore, we will rescind the November 17,

1 2009 Order Dismissing Application for Adjudication of Claim.

2 In addition, we note that the WCJ did not comply with the instructions in our December 29,
3 2008 Opinion and Order Denying Petition for Removal. Therein, we stated that, "the WCJ must
4 determine: (1) whether there is a collective bargaining agreement as described in Labor Code
5 section 3201.5, to which both parties were subject at the time of the alleged injury; and (2) whether
6 the Administrative Director has issued an appropriate letter of eligibility in connection with that
7 collective bargaining agreement. Thus, the WCJ must have a record to justify a finding that the
8 parties are subject to the provisions of Labor Code section 3201.5."

9 The record in this matter does not include any stipulations or the framing of issues and the
10 WCJ has not received any exhibits into evidence or made any findings of fact as required by our en
11 banc decision in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals
12 Board en banc). Therefore, upon this matter's return, the WCJ should conduct further proceedings
13 as necessary to create an adequate record and issue a new decision.

14 Finally, costs and sanctions pursuant to section 5813 are discretionary. We are not
15 persuaded that applicant has established that defendant has committed "bad-faith actions or tactics
16 that are frivolous or solely intended to cause unnecessary delay." (Lab. Code, §5813.) Therefore,
17 we deny applicant's request in this regard.

18 Accordingly, we will dismiss applicant's request for removal, grant reconsideration, rescind
19 the WCJ's decision, and return this matter to the trial level for further proceedings and decision by
20 the WCJ consistent with this decision.

21 For the foregoing reasons,

22 **IT IS ORDERED** that applicant's Request for Removal from the
23 November 17, 2009 Order Dismissing Application for Adjudication of Claim be, and the same
24 hereby is **DISMISSED**.

25 **IT IS FURTHER ORDERED** that applicant's Petition for Reconsideration of the
26 November 17, 2009 Order Dismissing Application for Adjudication of Claim be, and the same
27 hereby is **GRANTED**.

