WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE GARCIA, *Applicant*

vs.

COUNTY OF ORANGE, PSI, administered by YORK RISK SERVICES GROUP, INC., *Defendants*

Adjudication Number: ADJ9464655
Anaheim District Office

OPINION AND DECISION AFTER RECONSIDERATION

We issued an Opinion and Order Granting Petition for Reconsideration on Board Motion in this matter on February 18, 2021 (February Order) to study further the legal and factual issues raised by the Petition for Reconsideration. (Lab. Code, § 5900(b).) This is our Opinion and Decision after Reconsideration.

We now correct the Opinion and Decision after Reconsideration issued on December 21, 2020 (December Decision), to reflect the comparative negligence of third-party employee truck driver, Jeremy Bell, and to reflect the method of calculation of credit pursuant to *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 829 [43 Cal.Comp.Cases 1333]. These two corrections require that we rescind the Findings and Order issued by a workers' compensation administrative law judge (WCJ) on October 29, 2018 and replace it with a new Findings and Order.

On page 5 of the December Decision, we stated:

> Multiplying the gross settlement of $26,000.00 x .95 for the percentage of negligence attributed to defendant results in $24,700.00. Deducting $24,700 from the $17,500.00 net recovery to applicant results in zero third party credit.
>
> We also concur with the WCJ that despite applicant's 5% comparative negligence, defendant is not entitled to a credit. (See *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 829 [43 Cal.Comp.Cases 1333].)[5] In other words, although defendant is not barred from seeking credit, it is also not entitled to a credit under the circumstances of this case. Defendant is at fault for 95% of the civil damages to which applicant is

entitled pursuant to the $26,000.00 settlement, i.e., $24,700.00 ($26,000.00 x .95). Given that credit is only available to defendant for the net proceeds of the civil settlement, i.e., $17,500.00, defendant's contribution based on its 95% comparative fault exceeds its potential claim for credit.

Accordingly, given that the WCJ failed to address the comparative negligence of applicant, it is our decision after reconsideration to amend Findings of Fact numbers 2 and 3 to reflect applicant's 5% comparative negligence in this case.

5 "[T]he board must determine (1) the degree of fault of the employer, and (2) the total damages to which the employee is entitled. The board must then deny the employer credit until the ratio of his contribution to the employee's damages corresponds to his proportional share of fault. Once the employer's workers' compensation contribution reaches this level, he should be granted a credit for the full amount available under section 3861. Only when such level of contribution has been reached, however, will grant of the statutory credit adequately accommodate the principle that a negligent employer should not profit from his own wrong." (*Associated Construction, supra*, 22 Cal.3d at p. 843.)

(December Decision, p. 5.)

This portion of the December Decision is hereby replaced with the following:

Although defendant is not barred from seeking credit, it is not necessarily entitled to a credit under the circumstances of this case. (See *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 829 [43 Cal.Comp.Cases 1333].)

> [T]he board must determine (1) the degree of fault of the employer, and (2) *the total damages to which the employee is entitled*. The board must then deny the employer credit until the ratio of his contribution to the employee's damages corresponds to his proportional share of fault. Once the employer's workers' compensation contribution reaches this level, he should be granted a credit for the full amount available under section 3861. Only when such level of contribution has been reached, however, will grant of the statutory credit adequately accommodate the principle that a negligent employer should not profit from his own wrong."

(*Associated Construction, supra,* 22 Cal.3d at p. 843, italics added.)[1]

[1] "An employer who has paid workers' compensation benefits to an injured employee has the right to be reimbursed for the sums paid and for certain other expenditures, except to the extent that fault attributable to the employer caused the worker's civil damages. (Lab. Code, § 3852) Reimbursement can be obtained: (1) by an independent lawsuit against the third party; (2) by intervention in the injured worker's lawsuit against the third party; or (3) by asserting a lien against the worker's recovery from the third party. (Lab. Code, § 3852, 3853, 3856, subd. (b).) . . . We hold that SCE cannot include the $40,000 it received by way of settlement [from the third party on its asserted lien in applicant's third-party lawsuit] as part of its previous payments made to employee..." (*S. Cal. Edison Co. v. Workers' Comp. Appeals Bd. (Tate)* (1997) 58 Cal.App.4th 766, 769 [62 Cal.Comp.Cases 1403].)

Accordingly, it is our decision after reconsideration to rescind the F&O and replace it with new findings of fact to reflect the original WCJ finding of 5% comparative negligence to applicant due to the limited evidence of applicant's negligence; to reflect this decision and attribute 5% comparative negligence to Mr. Bell due to the limited evidence of Mr. Bell's negligence; and, to attribute the remaining 90% comparative negligence to defendant.

It is also our decision after reconsideration to order defendant's petition for an award of a third-party credit against future benefits deferred pending the WCJ's determination of whether defendant is entitled to such a credit in this case pursuant to the method employed in *Associated Construction*. This determination must consider "the total damages to which the employee is entitled." (*Associated Construction, supra,* 22 Cal.3d at p. 843.) In other words, and as a correction to the December Decision, the determination will not be based on the amount of applicant's settlement, but on the WCJ's determination of applicant's *total civil damages.* (*Ibid.*; see *Rodgers v. Workers' Comp. Appeals Bd.* (1984) 36 Cal.3d 330, 336 and at fn. 4 [49 Cal.Comp.Cases 513] (*Rodgers*).) The following example should be followed by the WCJ in making this determination:

> In the accompanying footnote 10, we illustrated the application of the credit procedure we had adopted through the following hypothetical: "Assume an employee receives $ 20,000 in workers' compensation benefits. **He later sues a third party to recover for the same injury, which suit is settled without the consent of the employer. Out of the settlement, the employee actually receives, after the payment of 'expenses or attorneys' fees' within the meaning of section 3861, the sum of $25,000. The employee then seeks further benefits from the board, and his employer claims a credit in the amount of the $25,000 settlement recovery. Under the principles announced herein, the board would then determine the employer's degree of fault <u>and the employee's total damages.</u>** Should the board find the employer free of negligence, of course, the employer would receive the benefit of the entire $25,000 settlement as a credit against future payments. **Were the board, however, to determine that the employer was 50 percent negligent, <u>and that the employee is entitled to $100,000 in damages</u>, then the employer could not claim a credit until he contributed an additional $30,000 in benefits.** The employer would then have contributed a total of $50,000 to the employee's recovery, or 50 percent of the employee's total damages of $100,000 and the ratio of his contribution to the employee's damages would correspond to *his degree of fault*." (Italics added.) (*Id*. at p. 843, fn. 10.)

(*Rodgers, supra*, 36 Cal.3d at p. 336, bold and underline added.)

In all other respects, we adopt and incorporate the December Decision as though fully set forth herein.

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on October 29, 2018 by a workers' compensation administrative law judge is **RESCINDED** and **REPLACED** with the following:

FINDINGS OF FACT

1. The applicant, JOSE GARCIA, born [], while employed on 2/4/2014, as a maintenance crew supervisor at Costa Mesa, California, by COUNTY OF ORANGE administered by YORK RISK SERVICES GROUP, INC, sustained injury arising out of and occurring in the course of employment to his employment to his lumbar spine, right hip, and right knee.

2. The comparative fault for the February 4, 2014 accident resulting in applicant's industrial injury is as follows: 90% due to the negligence of defendant County of Orange employees other than applicant; 5% due to the negligence of third-party truck driver Jeremy Bell; and, 5% due to applicant's negligence.

ORDER

IT IS ORDERED that defendant's petition for an award of a third-party credit against future benefits is deferred pending determination by the workers' compensation administration law judge of defendant's entitlement to such a credit pursuant to the method enunciated in *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 829, 843 and fn. 10 [43 Cal.Comp.Cases 1333].

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 22, 2024

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

JOSE GARCIA
LEVITON, DIAZ & GINOCCHIO, INC.
THOMAS KINSEY, LLP

AJF/abs

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