WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA RODRIGUEZ, *Applicant*

vs.

GENESIS HC WASHINGTON CENTER; AIG INSURANCE, adjusted by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ12739899
San Jose District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant Genesis HC Washington Center, insured by AIG Insurance, adjusted by Sedgwick Claims Management Services (defendant) seeks reconsideration of the July 5, 2024 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (O&O), wherein we rescinded the April 12, 2024 Findings and Order issued by the Workers' Compensation Administrative Law Judge (WCJ) that denied applicant's January 12, 2024 Petition for Penalties and Enforcement. Our O&O substituted new Findings of Fact granting applicant's Petition for Enforcement and determined that defendant is liable for the remaining amount of payment up to $55,000 based on the Order Approving of November 16, 2023, together with amounts owing pursuant to Labor Code[1] section 4650(d) and interest pursuant to section 5800. We deferred the issue of penalties and attorney fees pursuant to sections 5814 and 5814.5.

Defendant contends the provision in the Compromise and Release document that "defendant to receive credit for all PD advances, subject to proof," is clear and unambiguous, and that relevant case law requires that defendant be allowed credit for all advances made prior to the issuance of the Order Approving Compromise and Release.

We have received an Answer from applicant.

[1] All further references are to the Labor Code unless otherwise noted.

We have considered the Petition for Reconsideration, and the Answer, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

I.

The factual background is set forth in our O&O as follows:

> Applicant claimed injury to her low back while employed as a Certified Nursing Assistant (CNA) by defendant Genesis HC Washington Center Health Care on October 22, 2019.
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> On or about November 6, 2023, the parties entered a Compromise and Release (C&R) agreement, resolving the case in chief. Paragraph Six of the agreement describes indemnity previously paid on the claim, including temporary disability indemnity in the amount of $18,037. The amount of permanent disability indemnity advances is listed as "0." Paragraph Seven of the document notes a gross settlement amount of $55,000, with a deduction for attorney fees of $8,250. There is no figure listed for permanent disability advances (PDAs). Paragraph Nine contains additional comments, including the statement that "Defendant to receive credit for all PD advances, subject to proof."
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> On November 16, 2023, the WCJ issued an Order Approving Compromise and Release (OACR), in which it is noted that the parties had filed a proposed settlement in the amount of $55,000, and that the settlement was payable "forthwith to the applicant in one lump sum, less credit to defendants for permanent disability in the sum of $-0- and otherwise to be adjusted by the parties for continuing payments and/or as set forth in the Compromise and Release, and with jurisdiction reserved, less $8,250.00 payable to The Law Offices of Noel Hibbard as a reasonable attorney's fee."
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> On January 12, 2024, applicant filed a Petition for Penalties seeking enforcement of the C&R, penalties pursuant to section 5814, attorney fees pursuant to section 5814.5, and statutory interest pursuant to section 5800. Applicant alleged that notwithstanding the terms of both the C&R and the OACR which stated that defendant was seeking credit for zero dollars in PDAs, defendant had nonetheless issued a settlement check that reflected credit for $18,270 in PDAs. (Petition for Penalties, dated January 12, 2024, at p. 2:13.)
> On April 4, 2024, the parties proceeded to trial on the sole issue of applicant's Petition for Penalties.
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> On April 12, 2024, the WCJ issued her F&O, denying applicant's Petition for Penalties. The WCJ noted that it was undisputed that applicant actually received the PDAs in question, and that any omission of the PDAs from the settlement documents was the result of mutual mistake. (Finding of Fact No. 15; Opinion on Decision, at p. 5.)
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> (O&O, at pp. 2-3.)

II.

Former 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, section 5909 was amended to state in relevant part that:

> (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.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under 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 July 29, 2024, and 60 days from the date of transmission is September 27, 2024. This decision is issued by or on September 27, 2024, so that we have timely acted on the petition as required by section 5909(a).

Here, since this is a Petition filed in response to our decision, we did not receive a Report and Recommendation by a workers' compensation administrative law judge, and no other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with the notice of transmission required by section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on July 29, 2024.

III.

Our July 5, 2024 O&O observed that the approval of a proposed Compromise and Release agreement requires the WCJ to assess the adequacy of the settlement. Here, the WCJ originally

determined that the proposed settlement was adequate in the amount of $55,000, without deduction for prior permanent disability advances. (O&O, at pp. 3-4.) We also noted that the Compromise and Release agreement disclaimed credit for permanent disability at paragraphs six and listed no permanent disability advances at paragraph seven. We therefore concluded that, "based on the clear language of the OACR and based on the clear language of the agreement, defendant is not entitled to permanent disability advances for amounts paid in 2021 and 2022, before the execution of the agreement." (*Id.* at p. 4.)

Defendant's Petition does not substantively address the issue of adequacy. Section 5001 specifies that "[n]o release of liability or compromise agreement is valid unless it is approved by the appeals board or referee." (Lab. Code, § 5001.) WCAB Rule 10700(b) (Cal. Code Regs., tit. 8, § 10700(b)) requires the WCJ to make inquiry "into the adequacy of all Compromise and Release agreements and Stipulations with Request for Award," and empowers the WCJ or the WCAB to "set the matter for hearing to take evidence when necessary to determine whether the agreement should be approved or disapproved, or issue findings and awards."

The court of appeal in *Camacho v. Target Corp*. (2018) 24 Cal.App.5th 291 [83 Cal.Comp.Cases 1014] discussed the importance of the adequacy determination as follows:

> In addition, to safeguard injured workers from agreeing to unfair or unwise settlements, Labor Code section 5001 provides that no settlement is valid unless the Workers' Compensation Appeals Board or a workers' compensation referee approves the settlement. (*Steller v. Sears, Roebuck & Co.* (2010) 189 Cal.App.4th 175, 180 [116 Cal. Rptr. 3d 824].) The board or referee must inquire into the fairness and adequacy of a settlement and may set the matter for hearing to take evidence when necessary to determine whether to approve the settlement. (*Id*. at p. 181; Cal. Code Regs., tit. 8, §§ 10870, 10882.) "These safeguards against improvident releases place a workmen's compensation release upon a higher plane than a private contractual release; it is a judgment, with 'the same force and effect as an award made after a full hearing.' [Citation.]" (*Johnson v. Workmen's Comp. App. Bd.* (1970) 2 Cal.3d 964, 973 [88 Cal.Rptr. 202, 471 P.2d 1002]; see also *Steller*, at p. 181.)
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> (*Id.* at pp. 301-302.)

Here, the WCJ evaluated the adequacy of the proposed settlement at the time it was submitted for review and approval. (Lab. Code, § 5001; Cal. Code Regs., tit. 8, § 10700(b).) The WCJ then issued an Order Approving, stating that the WCJ's "review of the record indicates that the proposed settlement agreement is adequate…." (Order Approving Compromise and Release,

November 16, 2023.) It is undisputed that the proposed settlement documents submitted to the WCJ for her review of adequacy stated that no permanent disability had been advanced. The resulting Order Approving Compromise and Release reflected that the gross sum of $55,000 was "less credit to defendant for permanent disability in the sum of $-0- and otherwise to be adjusted by the parties for continuing payments and/or as set forth in the Compromise and Release." (Order Approving Compromise and Release, November 16, 2023.) As noted in *Camacho*, *supra,* the order approving the settlement document issued only after a review of the adequacy of the settlement, thus placing the settlement "upon a higher plane than a private contractual release; it is a judgment, with the same force and effect as an award made after a full hearing." (*Camacho, supra*, at p. 302.)

However, following approval of the Compromise and Release, and notwithstanding the representations in the Compromise and Release and the amounts set forth in the Order Approving Compromise and Release, the defendant took credit for prior permanent disability advances, issuing a settlement check that was reduced by $18,270. (Finding of Fact No. 14.) Thus, the settlement proceeds received by applicant were fundamentally altered from that which was reflected in the settlement documents and the order approving the settlement.

Following trial on the applicant's petition to enforce, the WCJ's opinion did not address the issue of adequacy, or why the settlement would continue to be adequate notwithstanding a net reduction of $18,270. We also note that notwithstanding our discussion of adequacy as integral to our analysis in the O&O, defendant's Petition declines to address the issue.

We are therefore not persuaded that defendant properly took credit for sums that it failed to disclose in the settlement agreement, especially in light of the fact that allowing such credit would fundamentally alter the analysis of adequacy that supported approval of the settlement in the first instance.

Defendant contends the language in paragraph 9 of the Compromise and Release entitles defendant to take credit for permanent disability advances even though the credit amount exceeds the amount specified in paragraph 6 of the compromise and release. (Petition, at p. 7:10.) Defendant directs our attention to the opinion in *County of San Joaquin v. Workers' Comp. Appeals Bd.* (*Sepulveda*) (2004) 117 Cal.App.4th 1180 [69 Cal.Comp.Cases 193] (*Sepulveda*) as mandatory authority in this matter.

In *Sepulveda*, the parties entered into a Compromise and Release agreement which provided that defendant would pay the gross amount of the settlement "less amounts set forth in

Paragraph No. 6," which in turn stated the specific amount defendant had previously advanced, $2,442.87. (*Id.* at p. 1183.) The document calculated the net proceeds to the applicant, but also included a hand-written sentence, "[l]ess credit for further PDA subject to proof." (*Ibid*.) Following a WCJ's approval of the settlement, defendant issued a settlement check that included credit in excess of the amount specified in the compromise and release agreement, based on permanent disability advances made after the original drafting of the settlement documents.

In supplemental proceedings, the WCJ determined that defendant was not entitled to credit for advances beyond those specified in the settlement agreement, and the WCAB affirmed. Following defendant's appeal, the court in *Sepulveda* reversed, noting that "the language of a contract governs its interpretation, if the language is clear," and that "a contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (*Id.* at p. 1184.) The Court of Appeal then noted that the settlement agreement addressed the PDAs in two ways: "[f]irst, a specific amount was listed in a box provided for that purpose in paragraph 6 … [s]econd, the handwritten notation indicating the possibility of further advances, and giving the employer credit therefor, was added to the end of paragraph 6." Thus, the facial meaning of the language was to give credit for "further" permanent disability advances, beyond the amount stated, if the employer proved such had been paid.

Unlike *Sepulveda*, however, the parties in this case made no provision for deduction of any prior advances. The recitation of permanent disability paid at paragraph 6 states affirmatively that a total of "0" was paid, while paragraph 7 makes no provision for credit of any kind from the net proceeds of the settlement, save attorney fees. The space in paragraph seven in which the parties may list any permanent disability advances has been left blank. Thus, the comment in paragraph 9 that "defendant to receive credit for all PD advances, subject to proof," contradicts defendant's affirmative statement in *the same settlement documents* that no such advances had been made, and that no such credit was being claimed. (Compromise and Release, pp. 5-6.) Accordingly, and contrary to defendant's assertions, we do not find the claimed right to credit to be clear or unambiguous.

As was noted by the court in *Camacho, supra*, we must "interpret a contract to give effect to the mutual intention of the parties at the time they formed the contract." (*Camacho, supra,* at p. 306, citing Civ. Code, § 1636.) "We discern the parties' intention based on the written contract

alone, if possible, but may also consider the circumstances under which the contract was made and its subject matter … We consider the contract as a whole, and interpret contested provisions in their context, not in isolation, with the aim of giving effect to all provisions, if doing so is reasonably possible. (*Ibid.*)

We acknowledge that the Order Approving Compromise and Release, which provides defendant with credit of "$-0-" in permanent disability also allows for adjustment by the parties for "continuing payments and/or as set forth in the Compromise and Release." Thus, the Order Approving precludes credit for *past* advances, but as was the case in *Sepulveda*, *supra*, would allow for credit for continuing advances made after the settlement agreement was reached and/or approved. Here, however, there is no assertion of advances made after the parties reached the settlement agreement.

We also note that insofar as the settlement documents themselves are ambiguous as to the nature of the credit for permanent disability advances allowed, the evidentiary record provides contemporaneous evidence of the parties' intent as set forth in their email correspondence. On November 6, 2023 at 4:39 PM, applicant's counsel messaged defense counsel, stating, "[w]e have a deal if you can confirm $55k, with voucher, less PDAs (of zero)." (Ex. 1, E-mails Between the Applicant's Attorney and Defense Attorney, dated November 6, 2023, at p. 10.) Four minutes later, defense counsel responded, "Confirmed. Thank you." (*Ibid*.) The parties obtained approval of the settlement ten days later, on November 16, 2023.

Thus, both parties entered into this agreement with the express understanding of a gross settlement of $55,000, less permanent disability advances of zero dollars. The parties' mutual understanding is reflected in the WCJ's Order Approving Compromise and Release, which likewise makes provision for zero dollars of credit for past permanent disability advances. It was not until January 10, 2024, more than a month *after* the parties agreed there were no prior permanent disability advances, and only after the settlement was approved, that defendant tendered its printout of permanent disability benefits paid. (Petition, at p. 6:15.) The evidentiary record thus establishes that the parties *did not agree* to a credit of $18,270 for past permanent disability advances when they entered into the Compromise and Release agreement. Accordingly, it remains our opinion that our interpretation of the settlement agreement gives effect to the mutual intention of the parties at the time they formed the contract. (Civ. Code, § 1636; *Camacho, supra,* at p. 306.)

We continue to find the facts of this case to be much more aligned with the facts in *Olton v. Workers' Comp. Appeals Bd.* (1991) 56 Cal.Comp.Cases 141 [1991 Cal. Wrk. Comp. LEXIS 2439] (writ den.) (*Olton*), wherein the parties entered into a Compromise and Release in which it was stipulated that no permanent disability indemnity had been paid but also that defendant claimed "credit for all PD advanced, if any." (*Id.* at pp. 1-2.) Just as in the present matter, the defendant in *Olton* unilaterally reduced the settlement proceeds by an amount of claimed past permanent disability advances. Following applicant's petition for enforcement of the Compromise and Release agreement, the WCJ disallowed the claimed credit. In response to defendant's Petition for Reconsideration, we affirmed the WCJ's denial of credit, and agreed with the WCJ's conclusion that counsel for the defendant had drafted the language in the Compromise and Release, and that no provision had been made for credit. We concluded that the language reciting that no permanent disability indemnity had been paid was controlling over the non-specific "boilerplate" clause that simply recited that credit could be taken for permanent disability advances "if any." We also noted that this conclusion was supported by a letter from defense counsel stating that the settlement waived any alleged permanent disability advances. The Second District Court of Appeal denied defendant's petition for writ of review.

Here, the defendant has similarly drafted a settlement document that affirmatively states that no permanent disability has been advanced at paragraph 6 and claims no specific credit at paragraph 7. And here, as in *Olton*, contemporaneous evidence establishes that at the time the parties negotiated the settlement agreement, the parties understood that there were no advances for which defendant would seek credit. (*Olton, supra*, at p. 2.) Accordingly, we are not persuaded that our O&O was decided in error.

We will also address defendant's contention that our substituted Findings of Fact in the O&O are inconsistent. Defendant avers, "Finding # 3 states that 'Applicant's Petition for §5814 Penalties and Petition for Enforcement of Award and Request for Attorney Fees pursuant to §5814.5...' is granted, yet Finding #3 states 'the issue of penalties pursuant to Labor Code sections 5814 and 5814.5 is deferred.'" (Petition, at p. 20.) We observe, however, that applicant's January 12, 2024 petition sought both *enforcement* of the settlement, as well as *penalties* pursuant to section 5814 and attorney fees pursuant to section 5814.5. (Petition for §5814 Penalties and Petition for Enforcement of Award and Request for Attorney Fees Pursuant to §5814.5 and Request for Interest Per Labor Code §5800, dated January 12, 2024.) Our O&O determined that

applicant was entitled to the full amount of her settlement, less attorney fees, and thus granted applicant's January 12, 2024 petition insofar as it sought enforcement of the Compromise and Release agreement, but deferred the collateral issues of penalties and attorney fees pursuant to sections 5814 and 5814.5. (O&O, Findings of Fact Nos. 3, 4 and 5.)

In summary, we observe that the WCJ deemed the original Compromise and Release agreement to be adequate without provision for credit for past permanent disability advances. Our O&O observed that the because the WCJ's subsequent decision allowing a credit for advances fundamentally altered the amount payable to applicant, it was error to allow the credit without addressing the issue of whether the settlement less credit continued to be adequate. Because defendant's Petition does not address the issue of adequacy, we are not persuaded that we erred in our analysis. We also observe that while the Order Approving Compromise and Release did allow for credit for ongoing payments, the record does not establish that any such payments were made. Finally, we note that to the extent the terms in the settlement document as drafted by the defendant were ambiguous, the evidentiary record establishes that the parties intended to settle without credit for past permanent disability advances.

We will deny reconsideration, accordingly.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

I DISSENT (See Dissenting Opinion),

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 23, 2024

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

MARIA RODRIGUEZ
LAW OFFICES OF NOEL HIBBARD
LAW OFFICES OF SASSANO & FLEISCHER

SAR/abs

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

DISSENTING OPINION OF COMMISSIONER RAZO

I dissent. For the reasons discussed in my July 5, 2024 Dissenting Opinion, which I adopt and incorporate herein, I continue to believe that defendant appropriately took credit for the sums it advanced in good faith from the net proceeds of a settlement reached after arms-length negotiations by counsel for both parties.

The Compromise and Release agreement specifies at paragraph 6 the amount of permanent disability previously advanced. In this case, the parties mistakenly listed the amount of "zero," despite multiple instances of notice to the applicant and her attorney of the permanent disability indemnity advanced by defendant. The stipulation of the parties at paragraph 9 provides for credit for advances made *without qualification* and allowed defendant to apply credit for advances made in excess of those listed in paragraph 6.

I therefore agree with defendant that the analysis in *County of San Joaquin v. Workers' Comp. Appeals Bd. (Sepulveda)* (2004) 117 Cal.App.4th 1180 [69 Cal.Comp.Cases 193] would be applicable to the instant dispute.

Moreover, disallowing defendant from taking credit for sums it previously advanced runs counter to our constitutional mandate to accomplish substantial justice. (Cal. Const., art. XIV, § 4 ("The Legislature is … expressly vested with plenary power … to create, and enforce a complete system of workers' compensation … [including] full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character…."); Code Civ. Proc., § 475 ("The court must, in every stage of an action, disregard any error … which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error … unless it shall appear from the record that such error … was prejudicial, and also that by reason of such error … the said party complaining or appealing sustained and suffered substantial injury …"); *Klein v. Superior Court* (1988) 198 Cal. App. 3d 894, 908, 244 Cal. Rptr. 226 ("Judicial scrutiny is necessary to prevent technicalities from overcoming substantial justice").)

Here, the defendant met its statutory obligation to advance permanent disability prior to the finalization of applicant's claim. (Lab. Code, § 4650(b).) There is no dispute that applicant received $18,270 in advances timely issued by defendant. Consequently, I believe that the reliance on clerical error as a basis to deny credit for those same advances, especially when there has been no demonstrable prejudice to applicant, is incompatible with principles of substantial justice and judicial review. This is a case in which the WCAB should exercise its judicial scrutiny "to prevent technicalities from overcoming substantial justice." (*Klein, supra*, 198 Cal.App.3d at p. 908.)

Accordingly, I would grant defendant's Petition for Reconsideration and amend our July 5, 2024 Opinion and Order to affirm the WCJ's denial of applicant's Petition for Enforcement and Penalties.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 23, 2024

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

MARIA RODRIGUEZ
LAW OFFICES OF NOEL HIBBARD
LAW OFFICES OF SASSANO & FLEISCHER

SAR/abs

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