WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TERENCE CHRISMAN, *Applicant*

vs.

A.C. TRANSIT, PERMISSIBLY SELF- INSURED, BY ATHENS ADMINISTRATORS, *Defendants*

Adjudication Number: ADJ8606673
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will grant reconsideration, amend Order "a", and otherwise affirm the findings and order. The Appeals Board may correct clerical errors at any time. (*Toccalino v. Worker's Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145].)

I.

Former Labor Code section 5909[1] 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 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.

[1] All statutory references are to the Labor Code unless otherwise stated.

(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 September 13, 2024, and 60 days from the date of transmission is Tuesday, November 12, 2024. This decision is issued by or on Tuesday, November 12, 2024, 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 September 13, 2024, and the case was transmitted to the Appeals Board on September 13, 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 September 13, 2024.

II.

We note that the issues addressed at trial and the WCJ's Order addresses only applicant's allegations that the Compromise and Release (C&R) was based on extrinsic fraud. Here, in his

Report, in response to applicant's Petition, the WCJ also addresses the issues of mutual mistake and undue influence. We agree with the WCJ that applicant has failed to carry their burden to set aside the C&R. However, to the extent that we understand applicant's petition to raise issues arising out of the scope of the claims settled by the C&R, specifically paragraph 3 of the C&R, we emphasize that no determinations resolving the scope of the settlement has been litigated in these proceedings. Applicant is free to litigate those issues in the cases he has filed or intends to file.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of July 5, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of July 5, 2024 is **AMENDED** as follows:

ORDERS

a. Applicant's Exhibit 12, is admitted into evidence over defendant's objection.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 12, 2024

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

TERENCE CHRISMAN
COHEN ASSOCIATES
J. THOMAS THOMBADORE
OFFICE OF THE DIRECTOR, LEGAL
SUBSEQUENT INJURIES BENEFIT TRUST FUND

LN/md/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

By a timely and verified Petition for Reconsideration (Petition) filed on July 24, 2024, Applicant in pro per, seeks reconsideration of the Findings & Orders with Opinion on Decision (F&O) dated and served on July 5, 2024. That F&O in relevant part found the Applicant failed to meet his burden to set aside the previously approved C&R dating from January 21, 2021. I apologize to the Board and the parties for the delay in the filing of this Report and Recommendation. I note the recent amendment of Labor Code 5909, effective July 2, 2024, which indicates 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."

Although the Petition uses a pre-printed form alleging all five possible grounds for Reconsideration, the substantive portion of Applicant's Petition, consists of 12 unnumbered single spaced typed pages which from page 5 on, seem to consist of cut and paste sections of the Labor Code, administrative Rules, and/or caselaw, the relevance of which is not immediately obvious. As best I can discern, the Petition essentially alleges the trial and resulting F&O in this case was "unfair" because the Applicant's evidence involving claims of "mutual mistakes of fact, undue influence, and fraud" was not acknowledged and/or considered by the court. (Petition at what would page 1 of the typed attachment to the 2-page form.)

Defense counsel e-filed an Answer to the Petition on August 8, 2024, which asserts the F&O was within the powers of the Board, that the OACR/C&R was not the result of fraud, that the findings in the F&O are supported by substantial evidence in the record, that the Applicant has not presented any new evidence since the trial that he could not have produced at the trial, that the facts support the Order denying Applicant's petition to set aside the C&R, and that because the Petition to Set Aside the Order Approving C&R was filed more than five years after the DOI, the Board no longer has jurisdiction to rescind, alter, or amend the Order Approving C&R (OACR), since extrinsic fraud has not been proven. (***Id.*** at pp. 1-2.) It further argues that the Applicant's failure to return the settlement proceeds and/or to put them in a trust, bars relief in this case as that is a perquisite for such action. (***Id.*** at pp. 5-6.) Finally, it asserts that the Petition fails to satisfy the requirements of Labor Code section 5902, and by implication Rule 10972, which indicates Petitions for Reconsideration may be denied or dismissed if they are "unsupported by specific references to the record and to the principles of law involved." (Id. at p. 8.)

BACKGROUND

As noted in the F&O's Opinion on Decision, this case was tried and submitted on April 8, 2024, which included trial testimony from the unrepresented Applicant and his cousin Nicholas Penland. The Opinion on Decision includes a summary of the lengthy procedural history, basic facts, and the relevant testimony from the two witnesses. (Opinion on Decision at pp. 3-7.) The highlights of that summary are as follows. Applicant was a long time bus driver employed by AC Transit. He suffered a series of industrial injuries and was represented by Justin Litvack, who had e-filed the original application in this case on October 31, 2012. At an MSC in this case on January 20, 2021, where per his own trial testimony, the Applicant did not appear, and Mr. Litvack was excused by agreement with opposing counsel, defense counsel submitted a C&R for $119,675.00, inclusive of a CMS approved MSA for $56,955.00, which the Applicant was to self-administer, to resolve this specific injury dating from December 30, 2011, which involved the right knee, left foot, psyche, back and skin/rash, along with a number of earlier claims that seemingly were medical only, and were listed in Section 10 of Addendum A of the C&R. The C&R was timely paid and the Applicant and counsel received the funds.

Over a year and a half later, on October 6, 2022, the Applicant himself filed an application for benefits in this case against the Subsequent Injuries Benefits Trust Fund (SIBTF), which is not relevant to the current dispute. SIBTF and OD Legal were joined as parties, but that claim has not been activated or litigated since, and SIBTF/OD Legal have not appeared and/or participated in any of the hearings and/or litigation over Applicant's petition to set aside the January 21, 2021, Order Approving C&R. A day later on October 7, 2022, the Applicant filed a notice of the same date dismissing Mr. Litvack as counsel. [Although the date on the actual notice is 10-7-2023, that is obviously a typographical error since it was in fact filed on October 10, 2022, and all the other documentation related to that filing was filed at the same time.] Thereafter, nothing happened until Applicant filed a DOR on April 6, 2023 requesting a status conference with all issue boxes checked on the form and writing "Psychiatric/Physical Injuries, Labor Code 132a, 4553, Industrial disability retirement, retroactive pay, left foot/rashes, mileage, prescription, out of pocket medical bills, DFEH right to sue, and personal injury."

A status conference set per that DOR was held on August 23, 2023, when it became evident that Applicant's real intent and desire was to seek to set aside the prior C&R settlement. At the time, the pro per Applicant was provided with contact information for the Information & Assistance office, and the case was continued to an MSC on October 18, 2023. Thereafter, as directed by this judge at the MSC, Applicant filed a Petition to Set Aside C&R on August 31, 2023. At the MSC on October 18, 2023, and after a long discussion with the parties,

the matter was set for trial before the undersigned on December 18, 2023. The understanding was that defense counsel was going to subpoena prior Applicant's attorney Justin Litvack to appear at trial as a trial witness, as both parties listed him as a witness and sought his testimony, so Mr. Chrisman did not have to issue his own subpoena. (See original PTCS dated October 18, 2023.)

At the scheduled trial on December 18, 2023, Applicant appeared with his cousin and listed witness, Nicholas Penland, and defense counsel appeared with their listed witness, Meliza Navarro, who had been the handling defense attorney for the Cohen office at the time of the C&R settlement and approval. However, it soon became evident that defense counsel had not properly and/or timely subpoenaed Mr. Litvack. Instead, defense counsel had served Mr. Litvack's attorney, J. Thomas Trombadore, the previous Friday, who objected to the subpoena, and neither Mr. Litvack nor Mr. Trombadore was present. Although he has never filed a formal Notice of Representation, Mr. Trombadore, has specially appeared in this case on behalf of Mr. Litvack, including appearances by telephone and at the ultimate trial, and has also filed a number of pleadings, which are in EAMS/Filenet.

Since Applicant intended to question Mr. Litvack, and had reasonably relied on the promise expectation that defense counsel would serve the subpoena on Mr. Litvack, the trial was continued to February 22, 2024, with an informal in-person status conference set on January 25, 2024. At that status conference, the Applicant, defense counsel Karlo Nebres, and Applicant's cousin, Nicholas Penland, all appeared. That day the parties and this judge spent well over an hour reviewing and streamlining the Pretrial Conference Statement (PTCS) with respect to issues and the plan for trial, with the result and an updated PTCS dated January 25, 2024 was agreed upon and uploaded into EAMS. That PTCS limited the issues and the number of witnesses and potential exhibits significantly. Defense counsel Mr. Nebres was again directed and agreed to subpoena Mr. Litvack as a trial witness for the rescheduled trial on February 22, 2024.

On February 14, 2024, defense counsel wrote the court requesting a continuance of the February 22, 2024 trial, on the basis that Mr. Trombadore via letter to him dated February 13, 2024, objected to his most recent attempt to serve a subpoena for Mr. Litvack's attendance, advising Mr. Litvack would be out of town on the date of trial on a long scheduled family vacation that day, and further asserting Mr. Litvack could not be compelled to testify on the basis of attorney client and other potential privileges. Mr. Nebres requested a new trial date and an order directing Mr. Litvack to appear at the continued trial.

On February 14, 2024, in response to Mr. Nebres' request, as documented in the related MOH, I continued the trial from February 22, to April 8, 2024, to insure that Mr. Litvack would be present. Thereafter, a second informal phone conference with the parties, including Mr. Trombadore, was held on April 2, 2024. At that hearing, Mr. Trombadore, who had that morning filed a lengthy

Petition to Quash defendant's trial subpoena of Mr. Litvack, with multiple attached exhibits, agreed to voluntarily appear specially with Mr. Litvack at the April 8, 2024 trial, reserving all rights and potential objections of improper service of the subpoena and his argument that he could not be compelled to testify on the basis he was ethically barred from doing so by the attorney client privilege, and that Applicant, so long as he was unrepresented, could not knowingly waive that privilege.

On April 8, 2024, all parties, including Mr. Litvack and Mr. Trombadore, appeared for a full day trial, as noted in the MOH/SOE. As reflected in the MOH/SOE at pages 6-8, after a long off the record discussion, defense counsel Mr. Nebres withdrew his subpoena and no longer sought to have Mr. Litvack testify. However, Mr. Chrisman still sought to question Mr. Litvack. After it was clear Mr. Trombadore would not allow his client to be questioned by any party under oath at trial on the basis of attorney client privilege objections, and after I allowed Mr. Trombadore to make an oral argument outlining the basis for his position, which was summarized in the MOH/SOE, Mr. Litvack and Mr. Trombadore were excused from the proceedings, that day and the trial proceeded. (See MOH/SOE at pp. 6-7.) I advised the parties that if I felt the record would be sufficient to render a decision without Mr. Litvack and/or the need to litigate his objection to being compelled to testify, I would. Mr. Chrisman also confirmed on the record that the proceeds of the C&R have been spent and he does not have funds to either return the proceeds of the C&R, or to put them in trust as a precedent for setting aside this C&R. (***Id.*** at p. 7.)

The only two witnesses to testify at trial were the Applicant and Mr. Penland. Applicant testified in relevant part as follows. He stated he believes the C&R should be set aside because Mr. Litvack never explained the settlement terms of the C&R to him. (***Id.*** at p. 8.) He asserted "stuff was missing" from the C&R and/or was "added later" and that he could not believe this was all he would be receiving to settle his various injuries. (***Id.***) He emailed a copy of page 6 of the C&R to his cousin Mr. Penland on the night of January 19, 2020, [that date is either a typographical error in the MOH/SOE or Applicant misremembered the year when he testified, as it is clear from the entirety of the record, that the actual date would have been January 19, 2021] with the itemized dollars of the settlement, saying they did not seem right. (***Id.***) He spoke with Mr. Litvack the next morning, expressing his concerns and Mr. Litvack at that point agreed to reduce his attorney fee from $16,000.00 to $12,000.00. (***Id.***) He acknowledges e-signing the change in the attorney fee, and the addendum regarding the MSA after it was emailed to him by Mr. Litvack. (***Id.***) He believes the alleged 132a claims and/or Serious and Willful claim were improperly included in the C&R. [However, no 132a claim and/or Serious and Willful claim was ever filed in this case which is evident from a review of EAMS/Filenet, and so far, as I can tell, no applications were ever filed for the other claims, seemingly medical only, that had been filed against AC Transit by the Applicant and which were settled by this C&R, as referenced in the C&R's Addendum A, section 10.] (***Id.*** at p.

9.) In short, he believes that Mr. Litvack was "playing him" and that something "felt wrong" about the C&R. (***Id.*** at p. 11.) His niece passed away on September 20, 2019, and he was "a total wreck." (***Id.***) he claimed he was never sent the entire C&R on January 20, 2021. (***Id.***) He asserts that at the time he signed the C&R "he was having a nervous breakdown," that it took him two years to figure out what the problem was, and that he was "unduly pressured" into signing the C&R. (***Id.*** at p. 12.)

On cross-examination, he acknowledged he never contacted Mr. Litvack after approval of the C&R because he was "pissed off" at him because of all that he had gone through and that he felt the money in the C&R was insufficient for his injuries. (***Id.*** at p. 13.) He further testified he was "incapacitated" at the time because of his psyche claim and related symptoms, and that because he had lost his job, he was on welfare and had to file for bankruptcy in part because the IRS was "on him." (***Id.***)

The second witness, Mr. Penland, called by Applicant, testified very briefly, to the effect that he reviewed a one page excerpt of the proposed C&R at Mr. Chrisman's request, and after doing so, he recommended Mr. Chrisman talk with Mr. Litvack to try and get him reduce his fee so as to increase the Applicant's net. (***Id.*** at p. 14.) He did not recall attending an AC Transit Board meeting with the Applicant where a union rep. was present and where the Board was considering the Applicant's disability retirement application. (***Id.***)

APPLICANT'S CLAIMS OF ERROR

As noted in defendant's Answer at p. 8, Applicant's Petition, which in large part consists of the boilerplate Petition for Reconsideration form (and which is missing the case number), quotes and/or cites to statute and caselaw including WCAB panel decisions, without context or argument as to how they apply and/or support Applicant's claims, and in general fails to specify the exact grounds and arguments he is making with respect to his claims of error, which makes it difficult to issue a point by point response. My best interpretation of the Petition is that he claims the court did not consider and/or ignored his evidence, which he claims proves mutual mistakes of fact, undue influence, and/or fraud. (Page 1 of what would be the un-numbered 12 page typed attachment to the 2 page Petition for Recon form.)

I disagree with this assertion. First, it is not clear what specific evidence he is referring to in the record. Having reviewed the C&R and the other documents admitted into evidence, I do not see any evidence of a mutual mistake of fact between the parties. Applicant seems to imply that he was not aware of what was included in the C&R, and that this somehow constituted a mutual mistake of fact. Without having heard from Mr. Litvack, it is harder to assess the relative credibility of Applicant's testimony, but I note that Applicant made similar claims in his complaint against Mr. Litvack to the State Bar, and after an

investigation into Applicant's complaint, which included feedback from Mr. Litvack, the investigator Juli Finnila, on behalf of the Chief Trial Counsel of the State Bar, found no basis on which to pursue any potential discipline or further action under the Ethics Code against Mr. Litvack and the matter was closed. (See Applicant's Exhibits 3 & 4.) [As to Applicant's Exhibit 3, the original filed letter of July 7, 2022 was missing everything after page 2, and Mr. Chrisman advised he could not find the additional pages, so that is why it is incomplete.] The investigator in her letter to the Applicant dated September 12, 2022, in a detailed summary of what facts following the investigation, noted that the evidence "demonstrates a long history of negotiations that culminated in the Compromise and Release you signed on January 20, 2021. The evidence reflects that you signed the [C&R] agreement immediately after your 73 minutes telephone conversation with Mr. Litvack and he sent you a complete executed copy of the Compromise and Release, Addendums, and Order approving the matter on January 22, 2021." (Exhibit 4 at p. 3.) Subsequently, Applicant sought to appeal and/or reopen the complaint, but this request was denied, as was his later appeal to the California Supreme Court. (See Applicant's Exhibits 5, 6, 7, & 8.)

Furthermore, I do not see any compelling evidence of "undue influence" in the record sufficient to constitute fraud. It is true that Applicant testified at trial that he had been "a wreck" when his niece died in the fall of 2020, but it was never explained how or why this affected him four months later when he e-signed the C&R in late January of 2021. There is no evidence of fraud in Applicant's Exhibits 1 through 11, or in Applicant's Exhibit 12, which was admitted or meant to be admitted into evidence as part of the F&O, as discussed in detail below. In essence, Applicant's per his trial testimony claims that his attorney, Mr. Litvack, did not explain what was being settled and/or the terms of the C&R before he signed it, that he did not see the entirety of the document before signing it, and/or that he did not know what he was doing when he signed the C&R. Although no explicit findings were made, the State Bar investigators, after what appears to be a thorough investigation, appear to have concluded otherwise. Finally, even if Applicant's allegations as to Mr. Litvack were true, and there is significant evidence to suggest that is not the case, this does not constitute evidence of fraud.

The legal standard that applies to this case when determining whether Applicant has established a factual and legal basis to set aside the Order Approving C&R (OACR), is more restrictive than others due to the fact we are more than five years after the original date of injury. See Labor Code section 5804 generally. ("No award of compensation shall be rescinded, altered, or amended after five years from the date of injury except upon a petition by a party in interest filed within such five years…") On facts similar to this case, the Court of Appeal in *Smith v. Workers' Comp. Appeals Board* (1985) 168 Cal.App.3d 1160, 50 Cal.Comp.Cases 311, where the court affirmed the WCAB's decision after reconsideration which affirmed the trial judge's decision to not set aside a C&R

where the petition was made years after the fact, and well beyond 5 years after the DOI, a limited exception was recognized where the petitioning party could prove "extrinsic fraud." Despite acknowledged "procedural irregularities" and *apparent negligent misrepresentation by Applicant's attorney* in that case, the Board, and the Court of Appeal in *Smith*, agreed that there was no evidence of fraud and that accordingly, the WCJ and the Board lacked jurisdiction to set aside the C&R on those facts.

In this case, as in *Smith*, however, I found that the Applicant has failed to prove such fraud by a preponderance of the evidence (See Labor Code section 3202.5), and nothing in the Petition causes me to change or question that finding. Applicant's Petition cites to no specific evidence in the record and provides no analysis as to exactly what "fraud" he is alleging, and/or how it is proven by the admitted evidence. A finding of extrinsic fraud requires a showing of intent to defraud or deceive. (See *McRoberts v. Workers' Comp. Appeals Bd.*, 66 Cal.Comp.Cases 775 (Writ den. 2001) and *Maxwell v. Workers' Comp. Appeals Bd.,* 65 Cal.Comp.Cases 92 (Writ den. 2000).) There is no evidence in this record to support such an intent by any party. Since I found in the F&O that Applicant had not proven extrinsic fraud by the preponderance of the evidence, and since the Petition to Set Aside the C&R was filed more than five years after the date of injury, I find that the Board no longer has jurisdiction to rescind/amend and/or otherwise modify the OACR in this case.

The Petition at what would be page 4, appears to complain that the Applicant somehow was unaware of what defendant originally filed as Defendant's proposed Exhibit G, specifically an email from Mr. Litvack to defense counsel Meliza Navarro, dated January 20, 2021 at 8:47 AM, forwarding the signed C&R, asking that she add language that payment will issue within 20 days, and noting language in the proposed draft OACR that the Hartman addendum is approved. Defense counsel later withdrew and did not offer this specific exhibit into evidence and the other proposed defense exhibits were either renumbered as joint and/or renumbered and admitted as different letters. I note this potential exhibit was e-filed by defense counsel and can be found in Filenet as EAMS document 51288807. However, it was never admitted into evidence. Mr. Chrisman, seemingly now wants to admit this into evidence. Per the attached proof of service to defendant's Trial Exhibit List dated April 5, 2024, that index and proposed Exhibits D through J, which includes this Exhibit G, were served on the Applicant at his home on Vernan St. in Oakland on April 5, 2024, and the Petition at what would be page 4, seems to indicate that after he got home from the trial, he had two envelopes in the mail with defendant's exhibits.
Even if this exhibit had been offered into evidence by either the defendant or the Applicant, it does not constitute evidence of fraud and has no relevance to the issue of fraud, and would not have changed my findings and legal conclusions in the FA&O in any way. Nor does the petition explain how or why this potential exhibit is relevant and/or constitutes evidence of fraud even if it had been admitted. Additionally, the other cited decisions in the Petition, including

Orellana v. United Care Services, Inc., 2015 Cal.Wrk.Comp. P.D. LEXIS 761, (Petition pages 5-7, Kessler v. E & J Gallo Winery (BPD) 46 CWCR 61, (Petition pages 7-9) and *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd.* fail to support any of the Applicant's claims.

Finally, defendant argues in its Answer at pages 5-6, that caselaw requires the Applicant to return the C&R settlement proceeds as a condition precedent to having the C&R set aside. As noted in the MOH/SOE at page 7, the Applicant admits and acknowledges that the proceeds of the C&R have been spent and that he is not able to return them and/or put them in trust. However, there are at least two WCAB panel decisions that do not find such a requirement. See *Barron v. Entertainment Partners*, 27 CWCR 160 (BPD 1999), and *Jones v. McDonnell Douglas Corp*., 11 CWCR 225 (BPD 1983). On that basis, I do not base my F&O on the fact that Applicant failed to return the proceed money as a condition precedent to pursuing his Petition to Set Aside the OACR, but rather do so on the merits, as discussed above.

CLERICAL ERROR REGARDING ADMISSION OF EXHIBIT 11

After reviewing the entirety of the case and record again in order to prepare this Report and Recommendation, I belatedly noticed a typographic error in the FA&O, specifically Order a., at the bottom of page 1, which states: "Applicant's Exhibit 11, is admitted into evidence over defendant's objection." Per the MOH/SOE at page 5, it is clear that Applicant's Exhibit 11, had been admitted into evidence, along with Applicant's 1-10, and that I had deferred a ruling on the admission of Applicant's 12, which was a release signed by the Applicant authorizing Sedgwick and/or its agents to communicate with CMS with respect to the MSA that was being obtained and later submitted to CMS for approval. In retrospect it is clear that in order a. I intended and meant to order Applicant's Exhibit 12 into evidence, and not Exhibit
11. This was my mistake.

RECOMMENDATION

In sum, for the reasons explained above, I recommend that Applicant's Petition for Reconsideration be granted for the limited purpose of correcting a typographic error, and specifically to indicate that Order a. is amended to indicate, "Applicant's Exhibit *12*, is admitted into evidence over defendant's objection." In all other respects, I recommend that the Petition be denied.

NOTICE OF TRANSMISSION TO THE APPEALS BOARD

On September 13, 2024, this matter is transmitted to the Reconsideration Unit of the Appeals Board.

DATED: September 12, 2024

Thomas J. Russell, Jr.
Workers' Compensation
Administrative Law Judge