

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

ROBERT FASSETT (Deceased), *Applicant*

vs.

**BRUCE K. HALL CONSTRUCTION, INC.,
ACE USA, administered by ESIS, INC., *Defendants***

**Adjudication Number: ADJ6547120
Fresno District Office**

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION AND
DECISION AFTER RECONSIDERATION**

Applicant in pro per, Vicky Fassett as successor-in-interest to Robert Fassett, seeks reconsideration¹ of the Findings of Fact, Orders & Opinion (F&O) issued June 18, 2025, wherein the workers' compensation administrative law judge (WCJ) found that (1) applicant Robert Fassett (deceased) was involved in a work-related motor vehicle accident; (2) applicant recovered the net sum of \$271,558.92 from a third party; (3) applicant did not establish that employer negligence contributed to the automobile accident; (4) Ace American Insurance Company was the insurance carrier and provided workers compensation benefits to the applicant; (5) Ace American was administered by ESIS at the time of the accident; (6) the Stipulation and Award and/or Order dated January 11, 2017, is set aside because it incorrectly names ESIS as the entity entitled to a credit; and (7) Ace American is entitled to a credit of \$271,558.92.

The WCJ ordered that defendant receive a credit of \$271,558.92 applicable against any and all workers compensation benefits due or owing pursuant to Labor Code section 3861, subject to a showing of exhaustion of credit.

Applicant argues that the WCJ erroneously found that (1) the Stipulation and Award and/or Order dated January 11, 2017 should be set aside; and (2) applicant did not establish that employer

¹ Commissioner Lowe, who was on the panel that heard the previous petition for reconsideration in this matter, no longer serves on the Appeals Board. Commissioner Capurro has been substituted in her place.

negligence contributed to the automobile accident.² Applicant also argues that the correct date of Stipulation and/or Order is January 11, 2018.

We did not receive an Answer.

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

We have considered the allegations of the Petition and the contents of the Report. Based on our review of the record, and as discussed below, we will grant reconsideration and, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend to state that the date of the Stipulation and Award and/or Order is January 11, 2018.

FACTUAL BACKGROUND

The matter proceeded to trial on February 26, 2025 on the following issues.

1. Validity of the 3rd party Credit entered on or about December 8th 2015 [See discussion below regarding the record as to the correct date of this document]. Rectification of award to reflect carrier/insurer name ACE USA rather than 3rd party administrator ESIS. Applicant's entitlement to retro TTD, PD, mileage and out-of-pocket expenses deferred.

(Minutes of Hearing and Summary of Evidence, February 26, 2025, p. 2:18-19.)

Vicky Fassett testified that on the day of the accident, her now-deceased husband, Robert Fassett, was driving from his home to his employer's office when he was involved in a motor vehicle accident. The pickup truck he was driving was registered in his own name, and he maintained it. Defendant had no control over the vehicle. (Minutes of Hearing and Summary of Evidence, April 3, 2025, p. 4:8-10.)

There was a third-party judgment from a jury trial in a third-party civil case, where defendant's negligence was not raised. (*Id.*, p. 4:12-17.) Defendant had called applicant to come to the shop before the accident occurred and did not violate any safety regulations with respect to the accident. (*Id.*, p. 4:19-20.)

In the F&O, the WCJ states:

On or about 1/11/2018, the applicant signed a Stipulation and Award and/or Order per Labor Code § 3861, that ESIS, INC., is allowed a credit in the sum of

² The Petition also asserts that applicant signed the Stipulation and Award and/or Order because he was "coerced" and that defendant engaged in fraud "9 years before the stipulation" that "had nothing to do with the stipulation." (Petition, pp. 10:16, 13:26.) We conclude that these assertions have no bearing on reconsideration because the Petition argues not that the Stipulation and Award and/or Order should be rescinded, but that it was error for the WCJ to set it aside.

\$271,558.92 to be applied against any and all species of benefits in Applicant's workers' compensation cases. The amount was the applicant's net recovery from the 3rd party civil case. The document is signed by both Robert and Vicky Fassett.

There was an error in the Stipulation and Award and/or Order which indicated that ESIS, a third-party administrator, is named as the entity entitled to the credit, instead of ACE AMERICAN INSURANCE COMPANY (ACE), the insurance company. There was also an error with the date. The Stipulation was actually signed on 1/11/2018, and not 1/11/2017. (Exhibit B)

...

[D]ue to the fact that Stipulation and Award/Order dated 1/17/2017 (1/17/2018) was dated incorrectly and a TPA does not have credit rights pursuant to Labor Code § 3861, the Stipulation is invalid and will be set aside.

...

Whether or not there was a stipulation does not effect the employer or the insurance carrier's rights to credit where there is a third-party recovery. The rights of the employer and insurance carrier credit right are based upon Labor Code § 3861.

The applicant testified that the recovery from the civil case was \$458,148.19. However, Mr. Fassett netted \$271,558.19. (MOH/SOE 4/3/2025 Pg. 4:4-5)

ACE is entitled to credit in the amount of that net recovery. ACE as the insurer, that provided workers compensation benefits in this situation is entitled to the credit.

...

There was no evidence submitted to substantiate any negligence on the part of the employer regarding the motor vehicle accident that injured the applicant. (MOH/SOE 4/3/2025, Pg.4:8-11) Therefore, the ACE would be entitled to full credit from the employee's net third party settlement.

(F&O, pp. 3-4.)

In the Report, the WCJ states:

The applicant filed a Petition for Rescission of Signature on Stipulation for Credit, Disqualification of Judge Diamond for Ex parte Communication-not following WCAB Decision of 4/4/16, 1/12/17 on or about April 18, 2018. (EAMS # 66834776) alleging that the applicant was misled by the WCJ and was coerced into signing the Stipulation for credit. The defendant objected to the Rescission of Signature on the Stipulation for Credit dated April 25, 2018. (EAMS Doc ID #26152800)

The applicant filed a Petition for Removal and Disqualification of Judge. The issues pertained a medical question and removal of WCJ Diamond. (EAMS Doc ID#67143497)

...

The WCAB addressed these issues in the Opinion and Decision after Reconsideration and Order Petition for Removal dated April 20, 2020. The court recommended that the WCJ address the issues of whether an evidentiary foundation existed for the Stipulation and Award/Order and, if so, whether its terms were enforceable. (EAMS Doc ID#72621331)

The court pointed out that the Stipulation and Award/Order was allegedly signed by the WCJ on January 11, 2018, however, the document is dated January 11, 2017. EAMS record shows that it was “received” or filed on January 11, 2018. The record was unclear as to whether the Stipulation and Award/Order at issue was the one available in EAMS. (Id)

Secondly, the court discussed that the Stipulation and Award/Order cited section 3861 as authority for the credit. The parties listed the third-party administrator (hereafter TPA), ESIS, Inc., to receive the credit in the amount of applicant’s third-party recovery. . . . Since ESIS, Inc. is not applicant’s employer (and not the employer’s insurer), but a third-party claims administrator who cannot be directly or indirectly liable as a result of applicant’s workers’ compensation claim, and because section 3861 authorizes a credit to the employer, there are no separate grounds to award a credit to ESIS, Inc. (Id)

The court noted that the Stipulation and Award/Order as currently drafted may not be enforceable because of the apparent clerical error. The Court recommended that the WCJ should address this issue. The court returned the case to the trial level with instructions for the WCJ schedule a hearing so that the parties could present evidence in support of their arguments and create a record. (Id)

...

The Petition points out that there is an error with regarding to Finding of Fact #7, regarding the date of the Stipulation and Award/Order. The date noted is December 18, 2015, however, it should read January 11, 2018.

...

The Stipulation incorrectly notes that the TPA is awarded the credit when it does not have that right under Labor Code § 3861. (Exhibit B) The statute does not indicate that a TPA has credit rights. This error was probably of a clerical nature that could be corrected by the parties. However, the Petitioner objected to making any correction as evidenced by the extensive ongoing litigation in this case. Therefore, since the intent of the parties cannot be reconciled, and the credit is substantial, the Stipulation with Award/Order must be set aside.

...

The Stipulation and Award/Order does not have the correct date. . . .The incorrect date does not invalidate the document by itself, however, coupled with the TPA being named instead of the Employer (or insurance carrier) weighs against its reliability and enforcement.

Petitioner argues that it is too late to assert the credit because it is beyond the 5 years and cites Labor Code § 5804.

...

The Petitioner also raises the issue of Res Judicata to argue that the Stipulation cannot be altered. The Petitioner wrote that: “ The issue of credit is res judicata already been judged the unenforceable credit has already been awarded, according to code 10966 it cannot be corrected pursuant to Labor Code 5804.”

The Petitioner’s Res Judicata argument is not well taken. The Doctrine of Res Judicata give certain conclusive effect to a former judgement in subsequent litigation involving the same controversy. The reasoning behind this doctrine is that a party has litigated, or had an opportunity to litigate, the same matter is a former action in a court of competent jurisdiction and should not be permitted to litigate it again to the harassment and vexation of one’s opponent.

In this instance, there has been no litigation about the validity of the Stipulation and Award/Order until the herein trial. The controversy involves whether an agreement for credit is valid. Therefore, Res Judicata is not applicable in the instant case.

(Report, pp. 2-7.)

DISCUSSION

I.

Former Labor Code section 5909³ 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. (§ 5909.) Effective July 2, 2024, 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 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.”

³ Unless otherwise stated, all further statutory references are to the Labor Code.

Here, according to Events, the case was transmitted to the Appeals Board on July 28, 2025 and 60 days from the date of transmission is September 26, 2025. This decision is issued by or on September 26 2025, so that we have timely acted on the petition as required by section 5909(a).

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. 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 July 28, 2025, and the case was transmitted to the Appeals Board on July 28, 2025. 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 section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 28, 2025.

II.

Before addressing the merits of the Petition, we note that (1) applicant asserts that the F&O incorrectly states "under heading Stipulations . . . [that the] Third Party Credit was December 8, 2015. It was not it was January 11, 2018"; and (2) the WCJ states that the F&O incorrectly refers to the date of Stipulation and Award as January 11, 2017, and that these mistakes result from clerical error. (Petition, p. 12:14-15; Report, p. 6.)

Because there is no dispute that the correct date of the Stipulation and Award and/or Order is January 11, 2018, and because the date of the Stipulation and Award and/or Order was misidentified in the F&O through mistakes in the recording of the actual date, we conclude that the F&O should be amended to state that the Stipulation and Award and/or Order is dated January 11, 2018, wherever it is incorrectly dated therein. (See *Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543 [47 Cal.Comp.Cases 145, 154–155] (stating that the Appeals Board may correct a clerical error at any time without the need for further hearings); *In re Candelario* (1970) 3 Cal.3d 702, 705, 91 (stating that the term "clerical error" includes all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. In determining whether

an error is clerical or substantive, it must be determined whether the mistake was made in rendering the judgment or in recording the judgment which was rendered).)

Accordingly, we will amend the F&O to state that the date of the Stipulation and Award and/or Order is January 11, 2018.

Applicant contends that the WCJ erroneously found that the Stipulation and Award and/or Order should be set aside because it (1) is subject to the doctrine of res judicata; (2) is outside the period in which it may be set aside under Rule 10966 and section 5804; and (3) contractually binds defendant. (Petition, pp. 10:27-11:2, 14:24.)

As to whether the Stipulation and Award and/or Order is subject to res judicata, we observe that res judicata, or claim preclusion, prevents re-litigation of the same cause of action in a second suit between the same parties or parties in privity with them. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal. 4th 888.)

Here, as the WCJ states in the Report, the issue of the validity of the Stipulation and Award and/or Order was not previously litigated; and, as such, is not subject to res judicata. (Report, pp. 6-7.) Accordingly, are unable to discern support for applicant's argument.

As to whether the Stipulation and Award and/or Order is outside the period in which it may be set aside under Rule 10966, we observe that rule provides:

§ 10966. Correction of Errors

Before a petition for reconsideration is filed, a workers' compensation judge may . . . amend the decision for good cause under the authority and subject to the limitations set out in section[] . . . 5804 of the Labor Code.

(Cal. Code Regs., tit. 8, § 10966.)

Because Rule 10966 permits the WCJ to correct errors in a decision before a petition for reconsideration has been filed but does not provide substantive time limitations for the WCJ to determine an issue framed for trial, it has no bearing on the question of whether the F&O was issued outside the WCJ's jurisdiction.

Section 5804 provides:

§ 5804. Continuing jurisdiction; After five years

No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years and any counterpetition seeking other relief filed by the adverse

party within 30 days of the original petition raising issues in addition to those raised by such original petition.

(§ 5804.)

In *Hodge v. Workers' Comp. Appeals Bd.* (1981), 123 Cal.App. 3d 501 [46 Cal.Comp.Cases 1034], the Court of Appeal held that section 5804 does not bar the WCAB from awarding a credit more than five years after the date of injury to the employer for any sums the employer paid the applicant which were attributable to a third-party tortfeasor's negligence.

Under *Hodge*, then, the WCJ maintains jurisdiction to determine the issue of whether the Stipulation and Award and/or Order should be set aside and to award a credit to defendant for \$271,558.92 applicant received from a third party more than five years after the date of injury.

Section 3850(b) provides:

As used in this chapter: . . . "Employer" includes insurer as defined in this division.

(§ 3850(b).)

Section 3861 provides:

The *appeals board* is empowered to and *shall allow*, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorneys' fees, pursuant to the provisions of Sections 3856, 3858, and 3860 of this code, or has not been applied to reimburse the employer.

(§ 3861 [emphasis added].)

As to whether the parties are contractually bound by the Stipulation and Award and/or Order, we agree with the WCJ that it is unenforceable because it purports to award a credit to third-party administrator ESIS—and section 3861 provides no authority to award a credit to such a party. (Report, pp. 4-5.)

Rather, section 3861 authorizes the WCJ to allow a credit to the employer or the employer's insurer. (§ 3850(b).)

Accordingly, we are unable to discern support for applicant's argument that the WCJ erroneously found that the Stipulation and Award and/or Order should be set aside.

We next address applicant's contention that the WCJ erroneously found that applicant failed to establish that employer negligence contributed to the automobile accident. Specifically, applicant argues that defendant was negligent because it asked applicant to go to the office to obtain tools when it "had a stockman that delivered tools and materials to the job." (Petition, p. 12:18.)

Section 3861 requires allowance of a credit of the amount of any recovery by the employee for his injury that was not previously applied to the payment of expenses or attorneys. (§ 3861.) The credit may be reduced to the extent that the injury for which there was a recovery was caused by the employer's negligence. (*Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (Cole)* (1978) 22 Cal.3d 829 [43 Cal.Comp.Cases 1333].) But where there is insufficient evidence of negligence on the part of the employer in causing the injury, the credit may not be precluded or reduced. (*Rodriguez v. Workers' Compensation Appeals Bd.*, 74 Cal Comp.Cases 1404.)

Here, applicant testified that the accident occurred when applicant was driving from his home to defendant's office in a vehicle over which defendant had no ownership or control. (Minutes of Hearing and Summary of Evidence, April 3, 2025, p. 4:8-10.) Applicant further testified that defendant did not violate any safety regulations relating to the accident. (*Id.*, p. 4:19-20.)

Although defendant may have asked applicant to drive to the office, there is no evidence that the request was negligent or caused or contributed to the accident.

Accordingly, we conclude that applicant's argument that the WCJ erroneously found that defendant's negligence did not contribute to the accident is without support.

Accordingly, we will grant reconsideration, and, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend to state that the date of the Stipulation and Award and/or Order is January 11, 2018.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings of Fact, Orders & Opinion issued June 18, 2025 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact, Orders & Opinion issued June 18, 2025 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

STIPULATIONS

7. Parties agreed to bifurcate all pending issues except for the validity of the third-party credit entered on or about January 11, 2018.

ISSUES

The validity of the third-party credit entered on or about January 11, 2018. Rectification of award to reflect carrier/insurer name ACE U.S.A. rather than third party administrator ESIS. Applicant's entitled to retro TTD, PD, mileage, and out of pocket expenses deferred.

FINDINGS OF FACT

6. The Stipulation and Award and/or Order dated January 11, 2018 is set aside because it incorrectly names ESIS as the entity entitled to a credit.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 26, 2025

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

**VICKI FASSETT
GOLDMAN MAGDALIN STRAATSMA, LLP
EMPLOYMENT DEVELOPMENT DEPARTMENT**

SRO/bp

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