

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

KHUBAIB SHEIKH, *Applicant*

vs.

**WALMART STORES INCORPORATED; ACE AMERICAN INSURANCE administered
by YORK RISK SERVICES, *Defendants***

**Adjudication Number: ADJ10987864
Fresno District Office**

**OPINION AND ORDER
DENYING PETITION FOR
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 deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 29, 2021

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

**KHUBAIB SHEIKH
STANDER REUBENS THOMAS & KINSEY**

PAG/bea

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

**REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

I

INTRODUCTION

- | | |
|---|--|
| 1. Applicant's Occupation: | Pharmacist |
| Age at Injury: | 35 |
| Date of Injury: | 7/28/2017 |
| Parts of Body Alleged Injured: | Left knee |
| Mariner in Which Injury Alleged Occurred: | Struck his knee on edge of a metal table |
2. Identity of Petitioner: Applicant
- Timeliness: The Petition was timely filed on 3/12/21
- Verification: The Petition was Verified.
3. Date of Order: 3/1/2021
4. Petitioner contends:
- a. The Order Approving Compromise and Release should be set aside because the applicant was under severe emotional distress.
 - b. That the PR4 report of Dr. Clark was not used to analyze the disability and restrictions.
 - c. The defendant made false allegations of overpayment of TTD benefits and amount/percentage of permanent disability which does not justify the findings of fact.
 - d. The applicant has discovered new evidence that could not have been discovered at trial which consists of worsening of his condition.

II

FACTS

Applicant's case was set for trial on September 4, 2019, before the undersigned on multiple issues including temporary disability, permanent and stationary date, permanent disability and apportionment, occupation and group number, need for further medical treatment, whether sub rosa video and subpoenaed records from State Controller's Office demonstrate applicant was working while receiving temporary disability benefits entitling defendant to credit and whether the QME reports constitute substantial medical evidence. (Exh. 3, Pretrial Conference Statement, 6/27/19.)

On the day of trial the parties submitted a Compromise and Release settlement which was reviewed and approved by the undersigned. (Order Approving Compromise and Release dated 9/4/19, EAMS ID #71030964)

On September 6, 2019, Applicant's prior attorney filed and served a Petition to Set Aside Order Approving Compromise and Release indicating that Applicant had experienced a "change of heart" and was not in agreement with the settlement. (Petition to Set Aside Compromise and Release dated 9/6/19, EAMS ID #71214173) On the same date, Applicant filed a Dismissal of Attorney. (Dismissal of Attorney dated 9/6/19, EAMS ID #71146246)

On September 30, 2019, Applicant filed and served an Amended Petition to Request to Set Aside Order Approving C&R indicated other issues besides a "change of heart" including pressure by his prior attorney, misunderstanding of the complete details and not having a chance to analyze the situation and defendant's offer. (Amended Petition to Request to Set Aside Order Approving C&R, dated 9/30/19, EAMS ID #71240439)

On December 1, 2020, the matter came to trial on the issue of whether the Order Approving Compromise and Release agreement dated 9/4/19 should be set aside.

At trial, the applicant testified that when he signed the C & R agreement he was under severe emotional distress because of the issue listed on the pretrial conference statement indicating that there were subpoenaed records and sub rosa films showing that he was allegedly working while receiving temporary disability benefits and that defendant was seeking a credit for the TD overpayment. He testified that he was told that he would have to payback approximately \$20,000 to the defendant which caused him undue stress. (MOH/SOE, 12/1/20, 3:23 -4:4.)

Applicant further testified that he believed that the Findings of Fact did not support the C & R agreement because the QME relied upon the report of Dr. Jody who was selected by the defendant to provide an opinion favorable to them. (MOH/SOE, 12/1/20, 4:5 - 8.) He also testified that he had new evidence consisting of worsening of his condition with pain down his leg and into his foot. (MOH/SOE, 12/1/20, 4:11 - 13.)

The undersigned found that the applicant failed to establish good cause to set aside the Compromise and Release agreement signed by the parties on 9/4/19 and

Ordered the Order Approving Compromise and Release to be reinstated. It is from this finding and Order that Applicant seeks reconsideration.

III

DISCUSSION

The Court in *Johnson v. Workmen's Comp. Appeals Bd* (1970) 2 Cal.3d 964 [471 P.2d 1002, 88 Cal. Rptr. 202] [35 Cal.Comp.Cases 362, 368] noted: "[A] workmen's compensation release[rests] 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.' (*Raischell & Cottrell, Inc. v. Workmen's Comp. Appeals Bd* (1967) 249 Cal.App.2d 991, 997 [32 Cal.Comp.Cases 135, 58 Cal. Rptr. 159].)"

As noted in *Hall v. Valley Media* (2003) 67 Cal.Comp.Cases 1147, 1151, fn. 3 (Appeals Board significant panel decision): "We note that a request to set aside an OAC&R after it has become final will not be granted, absent a showing of good cause. This would require a showing of fraud, mutual mistake of fact, duress or undue influence. (See *Smith v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 1160 [50 Cal.Comp.Cases 311]; *Carmichael v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 311 [30 Cal.Comp.Cases 169]; *Silva v. Industrial Acc. Com.* (1924) 68 Cal. App. 510 [11 IAC 266]. See also *City of Beverly Hills v. Workers' Comp. Appeals Bd (Dowdle)* (1997) 62 Cal.Comp.Cases 1691 (writ denied); *Bullocks, Inc. v. Industrial Acc. Com.* (1951) 16 Cal.Comp.Cases 253 (writ denied); *Pac. Indem. Co. v. Industrial Acc. Com. (Forrest)* (1946) 11 Cal.Comp.Cases 117 (writ denied).)

Applicant contends that the defendant induced him to enter into the compromise and release agreement through fraudulent and false accusations contained in the pretrial conference statement. One of the issues that had been set for trial was "Sub Rosa and records from State Controllers Office show applicant working while TTD at Chowchilla women's correctional facility from 12/17-10/18 entitling defence (sic.) to credit." The applicant claims that the sub rosa video and the records from the State Controllers Office were not provided to him. However, the court takes Judicial Notice of the Proof of Service of defendant's trial exhibits which shows they were served on applicant's attorney on August 14, 2019. (POS trial exhibits, 8/14/19, EAMS ID 30022685.) Allowing 5 days for mail, the applicant had at least 20 days in which to meet with his attorney and review the

exhibits which included the sub rosa video and the records from the State Controllers Office. Applicant also claims that he was told that he might have to reimburse defendant \$20,000 if the defendant prevailed at trial. However, the pretrial conference statement only asserts a credit for the alleged TD overpayment not reimbursement.

The applicant contends that raising a triable issue on a pretrial conference statement has the same legal effect as an intentional false statement of fact that is used to persuade a party to enter into an agreement that is against their interests. Raising an issue for trial even if it is not eventually proven does not constitute fraud. The applicant was represented by an attorney at the time he entered into the compromise and release agreement who would have been able to advise him as to the strength or weakness of defendant's allegations. The purpose of a Compromise and Release agreement is to avoid the inherent risks of trial. If the applicant had not been working during the periods in which he was receiving temporary disability benefits, then his fear of possibly having the defendant take a credit for those benefits was ungrounded and unreasonable and not an adequate basis to set aside a Compromise and Release agreement.

The purpose of judicial review of a proposed Compromise and Release agreement is to ensure that it provides adequate compensation for the injured worker. In this case, the PQME report of Dr. Bernhard provides for 1% PD after apportionment which has a value of \$870.00 with only provision for exercise for future medical treatment. The treating physician's report of Dr. Clark provides for 6% PD which has a value of \$5,220.00. In addition, it is noted that Dr. Clark opined that there was no apportionment based upon a lack of a history of prior injuries to the left knee. This appears to be an incomplete apportionment analysis since the doctor fails to comment upon any contribution to causation of permanent disability by the osteoarthritis of the left knee noted on MRI. As such the Compromise and Release agreement for \$2,500.00 is within the range of a split in the medical evidence even without any consideration of the alleged TD overpayment.

Applicant also contends that his condition has worsened which constitutes new evidence which could not with reasonable diligence have been discovered and produced at hearing. The Court of Appeals has held that newly discovered medical evidence showing a change in condition is not a basis to set aside a Compromise and Release. Also, a

difference in medical opinion is not an adequate basis to set aside a Compromise and Release. (*Portola Motors v. WCAB (Garcia)* (1992) 57 CCC 115 (writ denied).)

Applicant claims that his own attorney did not act in accordance with the applicant's best interests because of the extra work involved. However, it is noted that applicant has another unresolved claim for which he continues to be represented by the same attorney. (MOH/SOE, 12/1/20, 5:24 - 6:1.)

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

DATE: 3/26/21

/s/ Debra Sandoval

Debra Sandoval
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE