

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

**GEORGE PATTON, *Applicant***

**vs.**

**SHERWIN-WILLIAMS CO.;  
ACE AMERICAN INSURANCE COMPANY,  
adjusted by GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ12371456  
San Luis Obispo District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of Order Approving Compromise and Release (OACR) issued by the workers' compensation administrative law judge (WCJ) on November 17, 2020. In the alternative, defendant filed a Petition to set aside the OACR.

Defendant contends that the parties, both acting in pro per<sup>1</sup>, erroneously stipulated that applicant had no reasonable expectation of becoming a Medicare beneficiary within 30 months of the compromise and release (C&R) and that the OACR should be vacated or set aside to allow the parties to reach a Medicare Set-Aside (MSA) arrangement.

We have not received an answer from applicant.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of defendant's Petition and the contents of the WCJ's Report with respect thereto.

Based on our review of the record and for the reasons discussed below, we will vacate our February 2, 2021 Order granting defendant's petition for reconsideration, dismiss defendant's

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<sup>1</sup> At the time of the agreement, applicant was not represented by counsel.

Petition as premature, and return this matter to the trial level for consideration of the Petition as one to set aside the OACR.

### **FACTUAL BACKGROUND**

Applicant claimed injury to various body parts on December 5, 2018, while employed by defendant as an associate.

In May 2020, the parties entered into a C&R based on the findings of Qualified Medical Examiner (QME) Dr. Steven Pearson, dated June 14, 2019. The C&R was served on September 16, 2020.

The unrepresented parties stipulated in pertinent part as follows:

Settlement based upon the QME Dr. Steven Pearson's report dated 6/14/19. This settlement to resolve any and all claims arising from the date of injury. Applicant is not a Medicare beneficiary, is not receiving social security benefits, and otherwise has no reasonable expectation of becoming a beneficiary within the next 30 months. Penalties and interest to be waived if payment of OACR is made within 30 days of approval.

(C&R, p. 9.)

On September 16, 2020, defendant's hearing representative submitted the C&R to the WCJ for approval by way of regular mail.

On November 17, 2020, without holding a hearing<sup>2</sup>, the WCJ issued the OACR, which states as follows:

Based upon a review of the medical file, the disability factors contained therein, and the reasons for settlement set forth in the agreement, the Compromise and Release is deemed adequate.

In determining the adequacy of the Agreement, the following has been considered:

(x) The Court has considered release of applicant's dependents' rights to death benefits in determining the adequacy of the Compromise and Release. The settlement of the Applicant's dependents' potential rights to claim death benefits is hereby approved.

(November 17, 2020 OACR, p. 1.)

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<sup>2</sup> Based on a review of the record, no Minutes of Hearing or Summary of Evidence (MOH/SOE) were filed.

On December 4, 2020, defendant filed a Petition for reconsideration or, in the alternative, a Petition to set aside order approving compromise and release.<sup>3</sup>

## DISCUSSION

“The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of [Division 4] . . . At any time, upon notice and after the opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.” (Lab. Code, § 5803.<sup>4</sup>) “The Workers’ Compensation Appeals Board shall inquire into the adequacy of all Compromise and Release agreements and Stipulations with Request for Award, and may 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.” (Cal. Code Regs., tit. 8, § 10700(b) (eff. Jan. 1, 2020).) The Appeals Board’s record of proceedings is maintained in the adjudication file and includes: the pleadings, minutes of hearing, summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits identified but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards, and the arbitrator’s file, if any. “Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings.” (Cal. Code Regs., tit. 8, former § 10750, now § 10803 (eff. Jan. 1, 2020).)

Because no hearing was held, the WCJ did not have the opportunity to assess the basis of the parties’ understanding of the stipulation that the applicant was not and would not become a Medicare recipient within 30 months. Given the applicant’s stated age was 64 years old when the C&R was signed and thus he was 65 at the time the WCJ approved the OACR, applicant would likely be eligible for age-related Medicare benefits. Consequently, the record as to whether the Compromise and Release agreement was adequate is insufficient.

A WCJ’s decision must be based on admitted evidence and must be supported by substantial evidence (Lab. Code, §§ 5903, 5952(d); *Hamilton v. Lockheed Corporation* (2001) 66

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<sup>3</sup> The Petition was accepted into EAMS on December 4, 2020, although this cannot be verified by the proof of service because it is a Microsoft Word document and the date fields automatically show the current date. Because no objection was raised we infer that service was timely. However, we admonish counsel to comply with WCAB Rule 10625(c). (Cal. Code Regs., tit. 8, former § 10505, now § 10625 (eff. Jan. 1, 2020).)

<sup>4</sup> All further statutory references are to the Labor Code unless otherwise stated.

Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd. (Garza)* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]). "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra*, at p. 475.)

The WCJ is "charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at pp. 475-476; see Lab. Code, § 5313 and *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-22.) Pursuant to section 5313:

The appeals board or the workers' compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made. (Lab. Code, § 5313.)

Further, all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is ". . . one of 'the rudiments of fair play' assured to every litigant . . ." (*Id.* at p. 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, "the commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law." (*Id.* at p. 577.) A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

Accordingly, we will vacate our February 2, 2021 Order granting defendant's petition for reconsideration, dismiss defendant's Petition as premature, and return this matter to the trial level. Upon return of this matter to the trial level, we recommend that the WCJ treat defendant's Petition as a petition to set aside and set a hearing so defendant can provide evidence in support of the arguments contained in the Petition and create a record upon which a decision can be made by the WCJ.

For the foregoing reasons,

**IT IS ORDERED** as the Decision after Reconsideration of the Workers' Compensation Appeals Board that our February 2, 2021 Opinion and Order Granting Petition for Reconsideration is **VACATED**.

**IT IS FURTHER ORDERED** that the Petition for Reconsideration, filed December 4, 2020, is **DISMISSED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ KATHERINE ZALEWSKI, CHAIR**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**August 30, 2021**

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

**GEORGE PATTON  
COLEMAN CHAVEZ**

**JB/abs**

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