WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JENNIFER LEE REINO, ***Applicant***

vs.

ARMSTRONG WORLD INDUSTRIES, INCORPORATED, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES; VONS, permissibly self-insured, administered by ALBERTSON$ HOLDINGS, LLC, ***Defendants***

Adjudication Numbers: ADJ3362746 (BGN 0109461); ADJ2142330 (BGN 0139432); ADJ2701589 (BGN 0131002); ADJ915001 (BGN 0139433)
Long Beach District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision 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 and Opinion, which are both adopted and incorporated herein, except as noted below, we will deny reconsideration.

We do not adopt or incorporate the first full paragraph under the heading "APPLICATION OF CONTRACT LAW in the Opinion on Decision, which begins with the word "This" and ends with the word "addressed."

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 3, 2021

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

PURINTON LAW
SAMUELSON GONZALEZ

PAG/*pc*

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

I
INTRODUCTION

The Appeals Board previously issued an Opinion on Decision After Reconsideration, dated 02/26/2021, wherein the Appeals Board returned the matter to this WCJ to further clarify the issues raised by the parties at the 08/27/2020 trial. It is requested that the Appeals Board review their prior Opinion on Decision After Reconsideration, dated 02/26/2021, as part of their review regarding this current petition for reconsideration filed by Vons.

Currently, Vons has filed a timely Petition for Reconsideration from the undersigned WCJ's Joint Findings and Orders, dated 09/14/2021, regarding enforcement proceedings regarding the Joint Stipulations with Request for Award, dated 10/23/1990, wherein this WCJ found that Vons stipulated, in the Joint Stipulations With Request for Award dated 10/23/1990, to be responsible for 50% of the cost of future medical care and that such stipulation and liability was not extinguished in the subsequent bilateral Compromise & Release between Vons and the applicant, dated 10/23/2009. For the reasons stated in this WCJ's Opinion on Decision, dated 09/14/2021, which this WCJ incorporates in this Report, and for the reasons stated below, the Petition for Reconsideration should be denied.

II
FACTS

Upon return of this matter by the Appeals Board, a trial was conducted by this WCJ on 05/27/2021 clarifying the issues originally raised by the parties at the 08/27/2020 trial. Those issues are set forth and discussed in the Opinion on Decision, dated 09/14/2021. On the present petition for reconsideration it is apparent that Vons has abandoned all issues raised except the issue that Vons did not raise at the original trial of 08/27/2020, which is the application of contract law. It is from this finding regarding the application of contract law that Vons petitions for reconsideration.

III
DISCUSSION

This WCJ does not have anything further to add in this report beyond that which is set forth in the Opinion on Decision, dated 09/14/2021, other than to agree with Armstrong's assertions in their answer regarding Vons's unsupported argument that the subsequent C&R entered into between only applicant and Vons was a "novation" replacing all terms of the Joint Stipulations With Request for Award with the new terms in the C&R of 10/23/2009. This is due to the fact

that novation is only possible with the consent of all the original contracting parties, as well as any new party. (See Cal. Civil Code Sec. 1531). As set forth in the Opinion on Decision, that did not occur here as Armstrong, one of the original contracting parties in the Joint Stipulations With Request for Award, was not included in the C&R and did not consent to the new terms. As such, Vons remains obligated to pay 50% of the future medical costs pursuant to the Joint Award issued 10/23/1990.

IV
RECOMMENDATION

Based on the above discussion it is respectfully recommended that Vons's petition for reconsideration be denied.

DATE: October 21, 2021
Michael T. Justice
WORKERS' COMPENSATION JUDGE

OPINION ON DECISION

ENFORCEMENT OF JOINT AWARD (10/23/1990)

This matter is decided for a second time after the issuance of the Opinion and Decision After Reconsideration issued by the Appeals Board on 02/26/2021. The Appeals Board remanded the matter as it was unclear whether or not Vons arguments on petition for reconsideration concerning the statute of limitations, laches and waiver were formally raised as issued at the trial of 08/27/2020 and that the matter was returned to the trial level for the parties to clarify issues submitted for adjudication and to create a complete record.

Turning the Minutes of Hearing of 08/27/2020, it is clear that the issues were and are as follows:

1. Enforcement of Award of 10/23/1990.
2. Reimbursement from Vons to Armstrong for medical care per the Award.
3. Vons asserting in defenses of:
    a) Statute of Limitations
    b) Doctrine of Laches
    c) Doctrine of Waiver
4. In addition, Vons asserted they have no liability for reimbursement herein.
5. Both parties sought attorney's fees and costs against one another.

Vons, at the trial of 05/27/2021 additionally raised:

d) Issue of reimbursement resolved by Stipulation and Order of Arbitrator Phillip Mark, 09/09/2011.

e) Application of contract law as it might apply to the Stipulations and Request for Award and Award of 10/23/1990.

To be clear, the primary issue before the WCAB is enforcement of the Award of 10/23/1990. All other "issues", other than the attorney's fees and costs sought by the parties, are defenses to the enforcement of the Award of 10/23/1990.

THE AWARD OF 10/23/1990

It is undisputed that the parties entered into a Joint Stipulations and Award and an Award issued thereon 10/23/1990. In the joint stipulations, paragraph No. 8, the parties agreed, in pertinent part, as follows:

> *"The Defendants agree to be responsible for the cost of future medical care in equal shares of 50% each to be administered by Vons/Comco."*

This agreement was entered into by applicant, Vons and Armstrong. The compromise and release that Vons and applicant entered into on 10/23/2009 does not in any shape, form or fashion change this binding agreement between Vons and Armstrong regarding the costs of future medical care at 50% to each defendant. This WCJ previously addressed this and the conclusion remains the same:

> "The Joint Stipulations was signed by Applicant, Vons and Armstrong – a three-way settlement agreement. The C&R was signed by Applicant and Vons – a two-way settlement agreement. Vons asserts that two of the parties to the original Joint Stipulations agreement (Applicant and Vons) may enter into a the subsequent C&R settlement agreement that fundamentally alters the Joint Stipulations three-way agreement and is enforceable against Armstrong, though it essentially rescinds a three-way negotiated and agreed upon portion of the Joint Stipulations to the detriment of Armstrong. However, this assertion by Vons violates Armstrong's rights under the Joint Stipulations without any expressed or implied right to do so, and is fundamentally unfair to Armstrong as it violates the express language in Paragraph No.8 of the Joint Stipulations and Award, all to Armstrong's detriment." (Opinion on Decision – 09/13/2020)

As such, the Award of 10/23/1990 is a final order and is enforceable between Vons and Armstrong as to the reimbursement to the other of 50% of future medical care paid for. In this instance, Armstrong has been administered the future medical care for a number of years and seeks the enforcement of this binding provision of the Award against Vons. Now, this WCJ reviews the defenses raised by Vons.

STATUTE OF LIMITATIONS

Labor Code Sec. 5803 "Appeals board continuing jurisdiction" states in pertinent part:

> *"The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division, . . . "*

In addition to Sec. 5803, the appeals board, where there are multiple insurers, may continue to enforce a prior stipulated award in which both insures are liable for an award of future medical care. (See: Paris v. T.P.I.R./Mark Goodson Prod., 2010 Cal. Wrk. Comp. P.D. Lexis 495).

There is no provision of a statute of limitations on an enforcement of an award. Enforcement can often take place years after the issuance of the award where benefits, usually future medical care, has been denied. Here, the provision of future medical care to the applicant was awarded as set forth in the stipulations with request for award and the Award of 10/23/1990, which included the 50% liability for future medical care to each defendant. This provision is part of the 10/23/1990 Award that issued and there is no order altering, modifying or rescinding this part of the Award. The Award language therefore stands and is enforceable regarding future medical care and expenses to the applicant at anytime and the unilateral action of Vons in entering into the C&R with applicant does not extinguish it. As stated in the case of San Juan Unified School District, PSI, Fireman's Fund Insurance Company v. WCAB, 66 CCC 1145 (Writ denied 2001): *"The latter carrier who seeks to settle by way of Compromise and Release does so at its own peril."* (Id at 1147). Vons entered into the subsequent C&R at their own peril and that peril is the Vons remains liable for 50% of the future medical care as awarded on 10/23/1990 and Armstrong is entitled to reimbursement as sought herein.

DOCTRINE OF LACHES

The Appeals Board addressed this in their Opinion and Decision After Reconsideration issued 02/26/2021. They specifically stated:

> *"In addition, we note that, while the equitable doctrine of laches may apply in workers' compensation proceedings, in order to apply the doctrine, the California Supreme Court has state that, '[t]he defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.' (Conti v. Board of Civil Service Commissioners (1969) 1 Cal.App.3d 351, 359, 360, see also Johnson v. City of Loma Linda, (2000) 24 Cal.4th 61, 77.) Therefore, unreasonable delay alone is not sufficient to establish laches; prejudice to the defendant resulting from the delay and/or acquiescence must be established. (See Ragan v. City of Hawthorne (1989) 222 Cal.App.3d 1361, 1367.)* (Op. and Dec. after Recon. Pg. 3) (Emphasis added)

Though the Appeals Board provided this succinct roadmap to Vons there is no mention of any facts in line with supporting case law by Vons in their trial brief to support the application of the Doctrine of Laches. Simply put, it seems certain there was delay on the part of Armstrong in seeking enforcement of the

Award and reimbursement from Vons, but Vons has failed to establish any prejudice to them resulting from the alleged delay and/or acquiescence of Armstrong in seeking enforcement of the Award and reimbursement of the 50% of medical care costs to applicant. As such, the Doctrine of Laches does not apply.

DOCTRINE OF WAIVER

The Doctrine of waiver, as defined by Black's Law Dictionary, is the intentional or voluntary relinquishment of a known right. Vons offered no evidence, nor does their trial brief set forth, any intentional or voluntary relinquishment of a known right by Armstrong. As indicated above, the Award made provision of future medical care to applicant. The defendants mutually stipulated, as part of the Award, to share in future medical care costs of 50% each. Also, as stated above, there is no statute of limitations for the enforcement of an award of future medical care awarded. Therefore, absent a clear showing that Armstrong had intentionally or voluntarily relinquished its right to seek enforcement of the award of future medical care costs, there is no waiver. There being no evidence provided in this regard, the Doctrine of Waiver does not apply.

VON'S ASSERTION OF NO LIABILITY/STIPULATION AND ORDER OF ARBITRATOR

The defenses of "no liability" from the 08/27/2020 trial proceedings and "Issue of reimbursement resolved by Stipulation and Order of Arbitrator Phillip Mark, 09/09/2011, are the same issue with the latter being merely an expansion of the former.

Regarding the stipulation and order of Arbitrator Phillip Mark, dated 09/09/2011, this WCJ is in agreement with Armstrong's trial brief assertions. This stipulation and order emanates from actions taken by Vons, after the C&R of 10/23/2009, to enforce the Award of 10/23/1990, regarding the future medical care costs of 50% to each defendant with Vons seeking reimbursement through such award enforcement in the amount of $60,500.00. This is the amount that the arbitrator, Phillip Mark, ordered paid to Vons from Armstrong. This is entirely incongruent with Vons' current assertions as to the cause and effect of the C&R regarding the future medical costs of 50% between defendants as set forth in the Award. At the time of the arbitration Vons asserted that the provisions of the future medical care costs of 50% between defendants was viable and sought enforcement of that provision, and rightly so. Now, however, when the assertions work against Vons suddenly their assertion is that the C&R nullified that finding of the WCAB referenced in the Award and Armstrong has no right to seek enforcement of the Award and reimbursement. This situational view of the viability of the enforcement of the Award by Vons is rejected by this

WCJ. And, the stipulation and order of the arbitrator did not resolve the reimbursement sought by Armstrong against Vons.

APPLICATION OF CONTRACT LAW

This issue was not one of the issues or defenses at the 08/27/2020 trial proceedings and was not previously raised until Vons filed their petition for reconsideration. To that extent, it is not an issue that is properly before the WCAB as it was not timely raised by Vons. However, to the extent it may be raised as a defense it is hereby addressed:

As indicated above, this is an issue of enforcement of an award. An award from a Stipulations with Request for Award has the same force and effect as a Findings and Award, the difference being the parties reducing the "findings" to a series of stipulations that parallel a findings that the WCAB issues. So, what we are dealing with here is a findings and award from a set of stipulations between the parties. The Award that issued 10/23/1990 made provision for future medical care to the applicant. It additionally included the equal division of liability for such future medical care between the defendants. There has been no order modifying this provision in the Award as to do so would require the acquiescence of all parties, which would include Armstrong. Armstrong has not so acquiesced and Vons cannot act in a unilateral manner against Armstrong to extinguish the future medical care findings in the Award. Vons did act in such a unilateral manner by entering into the C&R with the applicant, but did so at their own peril, as set forth above. Since action is necessary by the WCAB to rescind, alter or modify an award and no such action has been taken by the WCAB regarding the Award of 10/23/1990, the application of contract law as asserted by Vons in their trial brief has no application herein.

SERVICE/KNOWLEDGE OF THE C&R

The effect of the C&R is interwoven throughout Vons' trial brief so, this WCJ will comment accordingly.

Vons has not provided any evidence that the C&R was served to Armstrong at any time and any speculation or surmise by Vons as to when Armstrong likely knew of the C&R is unsupported. Armstrong asserts, under penalty of perjury, that the first time defense for Armstrong was served with a copy of the 2009 C&R was 11/02/2018. There is nothing to indicate otherwise and this WCJ accepts that is the date of service. None of this effects the opinion on decision herein, but is merely stated for clarity sake in light of the assertions of Vons.

CONCLUSION

Based on the above, it is found that Armstrong is entitled to 50% of the medical costs herein from Vons, as set forth in the Joint Stipulations and Request for Award, dated 10/23/1990, in an amount(s) to be adjusted between the parties, with jurisdiction reserved in the event of a dispute between the parties as to the amount(s) to be paid.

ATTORNEY'S FEES AND COSTS

The parties have mutually sought attorney's fees and costs against one another regarding these enforcement proceedings. It is found that neither party acted in bad-faith in their assertions which would give rise to the application of Labor Code Sec. 5813. Therefore, the mutual petitions for attorney's fees and costs are denied.

DATE: September 14, 2021

Michael T. Justice
WORKERS' COMPENSATION JUDGE