

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

XIANG HU, *Applicant*

vs.

**MIKKON CORPORATION;
BERKSHIRE HATHAWAY, MARKEL INSURANCE,
GLEN ALLEN, *Defendants***

**Adjudication Number: ADJ10275231
Pomona 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.

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 below, we will rescind the December 8, 2020 Order Reducing Lien and Order to Pay Lien Claimant, and return this matter to the WCJ for further proceedings and decision

The WCJ's Report provides the following summary of facts:

Lien trial was scheduled December 8, 2020, on the sole issue of the lien of Optimal Health Institute. Defendant was represented (Mr. Lodge) and lien claimant was represented (Mr. Rodriguez) as noted in the Minutes of Hearing dated December 8, 2020. The Minutes of Hearing and Order Reducing Lien and Order to Pay Lien Claim, both dated December 8, 2020, confirmed after discussion with the parties an agreement was reached for settlement of the lien of Optimal Health Institute. The Minutes of Hearing and Order Reducing Lien and Order to Pay Lien Claim both specified how payment to lien claimant would be made between both defendants.

Defendant filed proof of service of the Minutes of Hearing and Order Reducing Lien and Order to Pay Lien Claim dated December 8, 2020. Those documents

were served by mail December 11, 2020. Those documents did not show any objection to that settlement. No objection was served to the Minutes of Hearing and Order Reducing Lien and Order to Pay Lien Claim until the pending Petition for Reconsideration was filed. No objection to the waiver of Labor Code Section 5313 was served until the filing of the pending Petition for Reconsideration was filed. The parties did not go on the record and after settlement discussions there was an agreement to an order for a reduced amount in satisfaction of the lien claim. Lien claimant Optimal Health Institute did not object to the Order Reducing Lien and Order to Pay Lien Claim at the time of the hearing December 8, 2020. Lien claimant had the option and ability to request to go forward with lien trial but elected to not do so and elected to accept the settlement. (Report, at pp. 1-2.)

DISCUSSION

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] (*Rucker*).) 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*, 82 Cal.App.4th at pp. 157-158.)

Additionally, section 5313 requires the WCJ to "make and file findings upon all facts involved in the controversy and [make and file] an award, order or decision stating the determination as to the rights of the parties... [and include] a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made...." The WCJ's decision "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc), and the decision must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) In *Hamilton*, we held that the record of proceedings must contain,

at a minimum, “the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence.” (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 475.)

Here, the WCJ avers that “an agreement was reached for settlement.” (Report at p. 1.) However, there is no evidence of such an agreement in the record such as a stipulation signed by the parties. Moreover, the WCJ’s brief handwritten notes in the December 8, 2020 Minute Order do not meet the due process requirements discussed above. Ultimately, there is no record upon which to address the dispute raised by the Petition for Reconsideration and, without an evidentiary record, we are unable to determine whether the WCJ’s decision is supported by substantial evidence. Therefore, we will rescind the WCJ’s decision and return this matter to the trial level. Any party may file a Declaration of Readiness to Proceed (DOR) to put this matter back on calendar.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 8, 2020 Order Reducing Lien and Order to Pay Lien Claimant is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 24, 2022

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

**OPTIMAL HEALTH INSTITUTE]
HANNA BROPHY
LAW OFFICES OF JIE CI DING, INC.
STOCKWELL HARRIS**

PAG/abs

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