WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JUAN SANTIAGO, ***Applicant***

vs.

WEST STAR NORTH DAIRY; BERKSHIRE HATHAWAY HOMESTATE COMPANIES, ***Defendants***

Adjudication Number: ADJ11907609; ADJ11093493
Fresno District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the October 12, 2020 Findings of Fact and Award issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that defendant paid permanent disability advances (PDAs) in the amount of $9,537.14 prior to signing a Compromise and Release (C&R) approved on August 12, 2019; that defendant failed to secure a credit of the PDAs in the C&R; that applicant is entitled to payment of $9,537.14; and that defendant is subject to a 25% penalty pursuant to Labor Code[1] section 5814 and interest pursuant to section 5800 on the unpaid amount. On January 21, 2021, defendant filed a Supplemental Petition for Reconsideration without requesting permissions to do so. Pursuant to our authority, we reject defendant's supplemental pleading. (Cal. Code Regs., tit. 8, former § 10848, now § 10964 (eff. Jan. 1, 2020).)

In its petition, defendant contends that the WCJ erred in finding applicant entitled to payment of $9,537.14, arguing that it reasonably asserted credit for that amount for benefits paid and that applicant is estopped, barred by laches, and would be unjustly enriched by receiving that payment. Defendant further contends that the section 5814 penalties are excessive arguing that it timely paid the OACR and any delay was caused by applicant's failure to dispute the asserted credit.

[1] All further statutory references are to the Labor Code, unless otherwise noted.

Applicant who is pro per did not file an answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration recommending that we deny reconsideration.

Based on our review of the record and for the reasons discussed below, we will deny reconsideration.

Contrary to the WCJ, we find defendant's Petition for Reconsideration timely filed. The WCJ issued her decision on October 12, 2020. The October 12, 2020 Proof of Service lists the parties on the Official Address Record, with each parties' designated preferred address for service, and states "GILSON DAUB IS DESIGNATED TO SERVE ALL PARTIES…." The Proof of Service lists both a physical address and an email address (INCOMING@GILSONDAUB.COM) for defense firm Gilson Daub. EAMS also contains a purported proof of email showing that the October 12, 2020 Findings of Fact and Award was not mailed to the email address on the Official Address Record but rather to ADRIANA.MALDONADO@GILSONDAUB.COM on October 12, 2020. Moreover, WCAB Rule 10628 states that "The Workers' Compensation Appeals Board shall not designate a party, or their attorney or agent of record, to serve any final order, decision or award relating to a submitted issue." (Cal. Code Regs., tit. 8, former § 10500, now § 10628 (eff. Jan. 1, 2020).) The Appeals Board's March 18, 2020 In Re: COVID-19 State of Emergency En Banc (Misc. No. 260) Order does not authorize the designation of service of final decisions, orders, or awards. Rather, it suspends only the portion of WCAB Rule 10628 that requires service by the WCAB by regular mail. (Cal. Code Regs., tit. 8, former § 10500, now § 10628 (eff. Jan. 1, 2020).) The en banc order (misc. No. 260) states that service by the WCAB may be performed electronically with or without parties' consent. It does not state that the WCAB may designate a party to serve a final decision, order or award. The district offices should continue to serve all parties of record with all final decisions, orders or awards (whether electronically or otherwise) and not designate a party to do so. Because petitioner was not properly served by the WCAB, its petition is timely and we will address the merits.

We adopt and incorporate the following quote from the Opinion on Decision:

> The relevant facts are as follows:
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> 1) During a regularly scheduled conference on August 12, 2019, the parties negotiated and drafted a compromise and release at the WCAB, executed the C&R, appeared before a WCJ and obtained an OACR.
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> 2) At issue are the terms of the C&R (Exhibit XX), focusing on page 6, section 7, indicating the settlement value is $62,000.00; there is noted a credit for TEMPORARY DISABILITY overpayment of $563.85, and an attorney fee of $9,300.00; leaving a balance of $52,136.15 due and payable to the applicant.
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> 3) The line for PDA deductions is left blank, as is the date through which the advances had been paid, and through which the defendant is claiming a credit.
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> 4) There are no addendums which might otherwise shed light on this issue.
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> 5) The last paragraph of Exhibit XX, section 7, includes boilerplate language that reads: "LEAVING A BALANCE OF $52,136.15, after deducting the amounts *set forth above*, and less further permanent disability advances made *after the date set forth above*." (Emphasis added.)
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> 6) The OACR (Exhibit YY) contains boilerplate language which is germane to the issue and reads in pertinent part: "IT IS ORDERED that the Compromise and Release be approved. AWARD IS MADE in favor of: Juan Santiago, against Berkshire Hathaway, LESS: any permanent disability advances, subject to proof, as per the Compromise and Release Agreement…" (Bold emphasis was written in; Italic emphasis is added).
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> Applicant and his attorney had severed their relationship on January 20, 2020. Applicant had informed the court, off the record, that his attorney was less than responsive to the issue of an underpaid settlement, and this was why he was pursuing the matter himself. Defense attorney had presented emails (Exhibit A) between she and applicant's attorney, post OACR but prior to applicant becoming in propria persona, which discussed the PDA, but without reaching a resolution.
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> ….
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> A 25% penalty is due because the amount owed to the applicant ($9,537.14) was not paid within 30 days, and defendant did nothing to remedy the situation. Likewise, the unpaid balance of the approved settlement was withheld from the applicant, therefore interest accrues at the statutory rate from the date of the OACR, until the first date of trial (notwithstanding the clause that interest accrues from the date of initiation until the date the principle is paid). One of the terms of the C&R is that penalties and interest are waived if settlement is paid

within 30 days of the OACR (Exhibit XX; 7: COMMENTS). As full payment was not made within the allotted time, penalties and interest are applicable.

(Opinion on Decision, at pp. 3-5, 7.)

This matter proceeded to trial on August 13, 2020. The only issues framed for trial were "1. Payment of the Compromise and Release" and "2. Whether or not the Defendant is entitled to apply a credit for permanent disability advances of $9,537.14." (Minutes of Hearing and Summary of Evidence (MOH/SOE), 8/13/20, at p. 4:11-13.) The affirmative defenses of estoppel, laches, unjust enrichment, and mutual mistake of fact were not raised as issues at either the mandatory settlement conference (MSC) or at trial and were therefore waived. Issues not raised at the first opportunity that they may properly be raised are waived. (Lab. Code, § 5502(e)(3), see also *Gould v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1059 [57 Cal.Comp.Cases 157], *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260 [54 Cal.Comp.Cases 145].)

Next, we address the payment of the C&R based on its language. A written stipulation is subject to the general rules of contract enforcement and interpretation. (*Maggio v. Windward Capital Management Co.* (2000) 80 Cal.App.4th 1210, 1214.) The California Supreme Court has stated: "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Civ. Code, § 1638.) (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 [10 Cal.Rptr. 2d 538].)

The C&R settlement provides that "The parties agree to settle the above claim(s) on account of the injury(ies) by the payment of the SUM OF $62,000.00." (C&R, at p. 6, Exhibit XX.) The agreement provided for deductions in the amounts of $563.85 for temporary disability indemnity overpayment and $9,300.00 for attorney fees "LEAVING A BALANCE OF $52,136.15, after deducting the amounts set forth above and less further permanent disability advances made after the date set forth above. Interest under Labor Code section 5800 is included if the sums set forth herein are paid within 30 days after the date of approval of this agreement." (*Id.*) The lines intended for the entry of the amount of PDAs and for the dates of those payments were left blank and there are no addendums addressing the issue of PDAs.

The August 12, 2019 Joint Order Approving Compromise and Release states "The parties to the above-entitled action, having filed a Compromise and Release settling this case for $62,000.00 ***in addition to all sums which may have been paid previously***, and requesting that it

be approved, and this Board having considered the entire record, including said Compromise and Release, now finds that it is fair and adequate and should be approved…. IT IS ORDERED that the Compromise and Release be approved. AWARD IS MADE in favor of: Juan Santiago, against Berkshire Hathaway, ***LESS: any permanent disability advances, subject to proof, as per the Compromise and Release Agreement***, LESS $9,300.00 payable in one lump sum to Cervantes Hodges Law Firm as reasonable attorney fees, ***WITH balance to Applicant***." (OACR, 8/12/20, emphasis added.)

The clear and explicit language of the C&R does not address the existence of PDAs made prior to the signing of that agreement, nor provide that any would be deducted from the settlement. The OACR states that the parties agreed to a settlement of "$62,000.00 ***in addition to all sums which may have been paid previously***,…." less the deductions provided for "as per the Compromise and Release Agreement… WITH balance to Applicant." Again, the clear and explicit language of the OACR provides only for deductions "as per the Compromise and Release Agreement," which as previously stated does not provide for the deduction of PDAs and indicates that the $62,000.00 negotiated settlement amount was "in addition to all sums which may have been paid previously."

In its verified Petition for Reconsideration, defendant admits that the settlement was paid on August 16, 2019 less a credit for permanent disability advances in the amount of $9,537.14. (Petition for Reconsideration, at p. 2:14-15.) While the Petition for Reconsideration repeatedly refers to a "right" to assert that credit, defendant cites to no legal authority to support its claim. In fact, the allowance of a credit is a matter of judicial discretion and not a legal entitlement. (Lab. Code, § 4909; (*Herrera v. Workmen's Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 258 [34 Cal.Comp.Cases 382][holding that the allowance of credit is within the Appeals Board's discretion].) Thus, defendant had no legal basis for unilaterally asserting a credit.

Moreover, the taking of a unilateral credit against monies owed under a settlement amounts to an unreasonable delay. (*Rohrback v. Workers' Comp. Appeals Bd.* (1983) 144 Cal.App.3d 896 [48 Cal.Comp.Cases 78]; *Delta Airlines v. Workers' Compensation Appeals Bd.* (*Fox*) (2000) 65 Cal.Comp.Cases 177 [writ den.].) In *Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324 (Appeals Board en banc), the Appeals Board set forth the factors to be considered in determining the amount of a penalty. Here, we agree to affirm the WCJ's award of a 25% penalty based on the reasons stated in the Opinion on Decision, as quoted above, and based

on the following additional *Ramirez* factors: (1) The $9,537.14 improperly withheld by defendant is a significant portion, approximately 18%, of applicant's net recovery from the settlement. (2) The delay in payment has been significantly long. The OACR issued on August 12, 2019, approximately one year and five months ago. Defendant's assertion that applicant is responsible for any delay in this case is wholly without merit. (3) Defendant intentionally asserted a unilateral credit for which it had no legal right and did not promptly correct its error when it became clear that applicant disputed it, which according to defendant was on April 7, 2020 (Petition for Reconsideration, at p. 5:19-20), approximately nine months ago. (5) Defendant is in violation of the clear and unambiguous language of the August 12, 2019 OACR.

Accordingly, for the reasons stated above, we deny reconsideration.

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/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 3, 2021

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

JUAN SANTIAGO
GILSON DAUB

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*