WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

BARBARA ARMBRUST, ***Applicant***

vs.

SUTTER SELECT;
STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Number: ADJ166453
Santa Rosa 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 the Petition as one seeking reconsideration.

If a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the

petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes a finding regarding a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd*. (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) Here, for the reasons stated in the WCJ's report, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

Therefore, we will deny the Petition as one seeking 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/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 14, 2023

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

BARBARA ARMBRUST
TIMOTHY EGAN
STATE COMPENSATION INSURANCE FUND

LN/pm

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

Applicant, Barbara Armbrust, through her attorney of record, Timothy Egan, filed a timely Petition for Reconsideration challenging the Findings and Award dated November 22, 2022.

Applicant suffered an industrial injury on a cumulative basis to her neck, bilateral wrists, and bilateral arms through May 13, 2002 during the course of her employment for the employer Sutter Connect Human Resources. The applicant's occupation and group number were deferred at the time of trial. The injury occurred as a result of performing repetitive job duties. She was age 42 on the date of injury.

A trial was held on the issues of parts of body injured, permanent and stationary date, permanent disability, apportionment, liability for self-procured medical treatment, attorney fees and whether there was a settlement agreement between the parties. In the F&O, the undersigned WCJ found that there was a no valid or enforceable settlement agreement or Compromise and Release between the parties.

Petitioner contends:

a. It would prove to be a mockery of the system if a party is allowed to unilaterally withdraw from a settlement agreement simply because that same party did not fulfill its obligation to perform the contingencies which it agreed to perform at a judicially supervised MSC. *Petition; p. 13, lines 6-11*
b. The evidence in this case supports a valid contractual written (email) contract for settlement entered into in a judicial proceeding which would otherwise be fully enforceable and valid but for the failure of the defendant to follow through with the contingencies (preparing a written C&R and CMS submission) to which it agreed. *Petition p. 13, lines 21-27*

II
FACTS

Applicant Barbara Armbrust sustained an industrial injury on a cumulative basis ending on May 13, 2002 at Healdsburg, California by her employer Sutter Connect Human Resources to her neck, bilateral wrists, and bilateral arms. Liability for her bilateral shoulders, bilateral upper extremities and headaches have been denied. The applicant's occupation and group number were deferred at the time of trial.

Peter Mandell, M.D. was utilized as the parties' Agreed Medical Evaluator. His involvement in this case commenced in 2003. Based on his report of May 28,

2021, a Consultative Rating Determination issued at 65% permanent disability. (EAMS Doc. No.74793765)

In anticipation of a Mandatory Settlement Conference on August 30, 2021, the parties exchanged emails regarding a potential Compromise and Release earlier that day.(App. Exh. I.) Their settlement discussions are set forth below:

From Applicant Attorney:

> "Charles,
> I have spoken to my client and I have authority for $280,000 under the current record with the understanding that we can move forward with the settlement. In the event CMS comes back at a higher amount, SCIF will pay additional amount into my clients MSA with a proportional attorney fee for the increased amount. We would dismiss all penalty petitions w/prejudice (including the 132a). My client will self-administer the MSA.
>
> The decrease of the current MSA over the prior MSA was just over $50k. I split the difference and reduced the prior agreement by half or $25k which is where we get the $280k."

From Defense Attorney:

> "We are good to go as long as it resolves everything and pending CMS approval."

From Applicant Attorney:

> "Great. I just sent an email with a copy of the SCIF addendum relating to CMS. I am-ok with that if your client is willing on a non-submit. Otherwise we can wait for CMS review, but that will take a while. I was hoping to get this done as soon as possible.
> Thanks
> Tim Egan"

From Defense Attorney:

> "Claims did send over to ISO to check and see if it was possible to get a non submit and were (sic) waiting to hear from them. Charles Flores, atty SCIF RP Legal []"

From Applicant Attorney:

> "Charles
> I will await settlement documents. Hopefully we can get the non-submit addendum and get tl1is case done, It has been a long time in the making. Your professional courtesy is always appreciated.

Tim Egan"
(App. Exh. 1.)

At a Mandatory Settlement Conference that afternoon, the case was taken off calendar noting that "settlement circulating for signature'. (EAMS Doc. No. 74593667.) However, the settlement documents were never drafted nor executed.

This matter was tried on the primary issue of whether the emails exchanged between the parties on August 30, 2021 constitute an enforceable settlement agreement. At trial, tl1e applicant testified in substance as follows. The applicant understands the purpose of the MSC was to settle her case and she provided authority to her attorney to settle. (MOH/SOE, p. 4, lines 45-46.) The applicant understood that if a settlement agreement was not reached, then her case would proceed to trial. (MOH/SOE, p 4, line 46-p. 5, line 1.)

The applicant further testified that she believed that they were trying to get State Fund to file the MSA to CMS, but they wouldn't do it. (MOH/SOE, p. 5, lines 16-17.) She was aware that the settlement had to be approved by a Workers' Compensation Judge and she was also aware that a settlement had to take Medicare's interests into account. It was her belief that neither of these conditions were done at the MSC of August 30, 2021. (MOH/SOE, p. 5, lines 18-22.)

The undersigned WCJ vacated submission at the applicant's request to admit the CMS approval dated August 18, 2022, which was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference of April 25, 2022, pursuant to Labor Code §5502(d)(3). CMS determined that $17,927.00 adequately considered Medicare’s interests with respect to Medicare-covered future medical treatment. (App. Exh. 2.) The matter was resubmitted as of September 20, 2022.

In the F&O, the undersigned WCJ found that the emails between the parties do not constitute a valid or enforceable settlement agreement pursuant to Labor Code §§5002 and 5003. All other issues were deferred pending further discovery.

It is from this Findings and Order that the petitioner seek reconsideration.

III
DISCUSSION

The legal principles governing compromise and release agreements are the same as those governing other contracts. For a compromise and release to be effective, the necessary elements of a contract must exist, including an offer of settlement of a disputed claim by one of the parties, and an acceptance by the other. (*Burbank Studios v. WCAB (Yount)* (1982) 47 CCC 832, 836.) A court has no

authority to fashion a compromise and release agreement to which the parties have not themselves agreed. (*Burgess v. California Mul. Bldg. & Loan Assoc.* (1930) 210 Cal. 180.)

Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement. (Kruse v. Bank of America (1988) 202 Cal.App.3d 38, 59 [248 Cal.Rptr. 217].) Under basic contract law "[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer." (*Panagotacos v. Bank of America* (1998) 60 Cal.App.4th 851,855-856 [70 Cal.Rptr.2d 595].)
Here, contrary to petitioner's assertion, it is found that the parties' emails constituted settlement negotiations and settlement agreement was never reached. As explained in the court's Opinion on Decision,

> " ... at the time of the email settlement negotiations, it remained unclear as to if the claims would approve a non-submit MSA. (App. Exh. 1.) There was no "meeting of the minds", as it appeared that the applicant assumed the MSA would not be submitted to CMS while the defendant seemingly disagreed and ultimately obtained CMS approval. (App. Exh. 2.) The subsequent CMS approval of August 18, 2022, further evinces the ambiguity of the parties' negotiations.
>
> Further, in this case, there was no executed Compromise and Release. The Compromise and Release was not drafted, signed, or submitted to the board for approval. The emails between the parties show they were in the midst of finalizing settlement terms. Yet, the emails, by themselves, are insufficient to demonstrate a valid or enforceable contract. While it is recognized that settlement is favored over protracted litigation, it does not provide a basis to ignore or circumvent the statutory requirements of a valid Compromise and Release."
> (Opinion on Decision, EAMS Doc. No. 76162659)

No compromise agreement is valid unless it is approved by the appeals board or referee. (Lab.·code, § 5001). Labor Code §5003 states, "Every release or compromise agreement shall be ... duly executed, and the signature of the employee or other beneficiary shall be attested to by two disinterested witnesses or acknowledged before a notary public." If an employee does not sign the settlement document, it is not valid. (*TJ Maxx v. WCAB (Christian)* (2008) 73 CCC 718 (writ denied).)

In the petitioner's own rendition of facts, he concedes that settlement was contingent on CMS approval of a proposed MSA in the amount of $15,052.58 and Board Approval. (Petition, p. 3, lines 13-14.) However, CMS subsequently approved a larger MSA in the amount of$17,927.00. (App. Exh. 2.) If the CMS

approves an amount different from that submitted by the patties, there was not a meeting of the minds by the parties regarding the amount needed to address the interests of Medicare, and Board declined to approve the settlement. *(Pollex v. Crestwood Hospital,* 2016 Cal. Wrk. Comp. P.D. LEXIS 381.)

It appears from the emails, that the terms were not certain and the settlement was contingent on CMS approval. The parties could not have had a meeting of the minds regarding the amount of money needed to address the interests of Medicare at the time of the email communications. The settlement terms would likely have to be reconsidered to include the higher-than-anticipated Medicare Set Aside amount approved by CMS.

The petitioner fails to cite any legal authority that would automatically bind parties to settlement terms while engaging in preliminary negotiations. To hold otherwise, would create a stifling effect on attorneys casually discussing settlement details in the fear of creating a binding and enforceable contract, without even drafting a single document.

Finally, contrary to the legal precedent relied on by the petitioner, there is no settlement to set aside in this case. The Compromise and Release had never been drafted, executed, or approved.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Dated: December 27, 2022

Katie F. Boriolo
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE