WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

AMANDA QUINTANILLA, *Applicant*

vs.

SUN HEALTHCARE GROUP dba PROCARE ONE; NATIONAL UNION INSURANCE, administered by BROADSPIRE, *Defendants*

Adjudication Number: ADJ8710457
Anaheim District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted petitions for reconsideration filed by applicant and defendant on September 14, 2018 in order to further study the legal and factual issues raised by the petitions, and to enable us to reach a just and reasoned decision. This is our Opinion and Decision after Reconsideration.

Both applicant and defendant seek reconsideration of the Findings & Order (F&O) issued on June 29, 2018 by a workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant sustained injury arising out of and in the course of her employment (AOE/COE) as a nurse on August 3, 2012 to her left upper extremities; that defendant is not barred from obtaining a third-party credit pursuant to the Medical Injury Compensation Reform Act of 1975 (MICRA), Civil Code section 3333.1 (section 3333.1); and, that defendant is entitled to a third-party credit in the amount of $184,547.28 for compensation benefits due or that may become due on behalf of applicant. The WCJ ordered that defendant is entitled to the third-party credit as found.

Applicant contends that defendant is barred by section 3333.1 from seeking third-party credit because the settlement was "demonstrably reduced" by the likely application MICRA to her claim (*Graham v. Workers' Comp. Appeals Bd.* (1989) 210 Cal.App.3d 499 [54 Cal.Comp.Cases 160] (*Graham*)).

Defendant did not file an answer to applicant's Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending

that defendant's Petition for Reconsideration be denied because defendant was not aggrieved by the F&O; and, that applicant's Petition for Reconsideration be denied because there was no substantial evidence that applicant's civil settlement was demonstrably reduced to reflect collateral source contributions.

We have considered the record in this case, the allegations of both petitions for reconsideration, the Answer, as well as the contents of the Report. For the reasons set forth below, it is our decision after reconsideration to rescind the WCJ's decision that defendant is not barred from obtaining third-party credit pursuant to Civil Code section 3333.1 (F&O, Findings of Fact, Nos. 2-3, and Order). It is also our decision after reconsideration to amend the WCJ's decision to include his determination that "the description of the causes of action in the [civil] complaint and the facts set forth in Plaintiff's [applicant's] mediation brief, do establish facts that are sufficient to state a cause of action for professional negligence" pursuant to section 3333.1 and *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75 [2016 Cal. LEXIS 2561] (*Flores*).[1]

I.

The above captioned matter went to trial on June 12, 2018 on the sole issue of whether defendant is entitled to a credit against the net proceeds from the settlement of applicant's civil lawsuit against third-party Mission Hospital Regional Medical Hospital (civil action). (Minutes of Hearing and Summary of Evidence, June 12, 2018, p. 2.)[2] The parties introduced and the WCJ admitted additional evidence. (MOH, pp. 2-3.) However, neither party introduced the settlement agreement in the civil action into evidence. (*Id.*, Exhibits, pp. 2-3; see Minutes of Hearing and Summary of Evidence (MOH), March 8, 2016, Exhibits, pp. 3-4.)

Pursuant to the civil action Statement of Accounting, applicant settled the civil action for $350,000. (Def. Exh. M, June 22, 2015.) It is undisputed that the net amount, i.e., the potential third-party credit, was $184,547.28. (*Ibid*.)

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[1] The WCJ granted the relief requested by defendant, and therefore, defendant was not aggrieved by the F&O. (Lab. Code, § 5900(a).) We therefore do not address the merits of defendant's Petition for Reconsideration.

[2] This issue was deferred pursuant to the Opinion and Decision after Reconsideration issued on March 14, 2017 by this panel. (*Quintanilla v. Sun Healthcare Group* (2017) 82 Cal. Comp. Cases 549, [2017 Cal.Wrk.Comp. P.D. LEXIS 527].) In particular, this panel deferred the issue because there was a change in the law regarding the definition of professional negligence during the course of proceedings in this case. (*Id.*, *17-25; see *Flores, supra;* see also, *Aldana v. Stillwagon* (2016) 2 Cal.App.5th 1 [2016 Cal. App. LEXIS 639].)

The Statement of Accounting also identified a $204,294.00 workers' compensation lien that was not deducted from the $350,000.00 settlement. (*Ibid.*) The Statement of Accounting stated that:

> *I UNDERSTAND THAT THE WORKERS' COMPENSATION CARRIER IS NOT PRESENTLY ASSERTING A SUBROGATION LIEN BUT HAS INDICATED THAT IT IS RESERVING THE RIGHT TO LATER ASSERT SUCH LIEN FOR BOTH PAST & FUTURE (CREDIT) PAYMENT (*Ibid.,* emphasis in the original.)

Contemporaneous correspondence between applicant's civil action attorney, Gordon Phillips, and the workers' compensation carrier (carrier) clarifies why the carrier declined to pursue the lien during the civil case. (App. Exh. 6, E-mail from Gordon Phillips to Terra McKee, May 28, 2015; App. Exh. 5, E-mail from Gordon Phillips to Terra McKee, June 10, 2015.)

On May 28, 2015, Mr. Phillips sent the carrier a letter stating that they tried to reach them during mediation to keep it apprised of the "inapplicability of Worker's Compensation Lien and credit obligations in the factual circumstances involved in the third party civil aspects of the MICRA case." (App. Exh. 6, E-mail from Gordon Phillips to Terra McKee, May 28, 2015, p. 1, emphasis added.) The letter details the legal support for the application of MICRA in the civil action, and hence, the application of the MICRA general damages cap and introduction of collateral source benefits to reduce special damages. (*Id.*, pp. 2-7.) Mr. Phillips concluded that:

> In *Graham v. Workers' Comp. Appeals Bd*. (1989) 210 Cal.App.3d 499, the Court of Appeal held section 3333.1 applies to future workers' compensation benefits. *Id*. at 503-506. The workers' compensation subrogation statutes include both reimbursement provisions and credit provisions that apply when an injured employee recovers from a third party tortfeasor. *Id*. at 503. "[R]eimbursement applies to benefits paid *prior to* a third party judgment or settlement. With respect to *future* workers' compensation benefits due the injured party, a different mechanism applies - credit. An employer is entitled to a credit against its obligation to pay further compensation benefits in the amount of the worker's net recovery against the third party tortfeasor. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (1997) 53 Cal.App.4th 579, 583 (emphasis in original). The *Graham* court concluded, "the sensible interpretation of Civil Code [section 3333.1 is that it includes [i.e., bars] the employer's credit remedies as well as its reimbursement remedies." *Graham, supra* 210 Cal.App.3d at 506. The court explained, "the California Supreme Court noted in *Fein* [*v. Permanente Medical Group* (1985) 38 Cal.3d 137] that the medical malpractice defendant may introduce evidence of benefits *received by payable to* the plaintiff, and that the Legislature assumed that the jury would reduce the

> plaintiffs damages to reflect such benefits. (*Fein, supra* 38 Cal.3d at 164-165.)" **Unless section 3333.1, subdivision (b) precludes the employer from exercising its credit rights as to the plaintiff s future workers' compensation benefits, the plaintiffs [*sic*] tort recovery could be hit by a double deduction.** *Ibid*. (*Id.*, p. 7, emphasis added.)

On June 10, 2015, plaintiff's counsel emailed the carrier confirming a conversation they had about the correspondence, above. (App. Exh. 5, E-mail from Gordon Phillips to Terra McKee, June 10, 2015.)

> This will confirm we just spoke on the phone and you stated: "We do not intend to assert a lien or seek subrogation at this time." I asked you to confirm our conversation in writing and you indicated that you would not be able to do so. I then responded that I would confirm this with you in writing and you said that was acceptable.
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> **You did indicate that an attorney had reviewed our position paper and believes there is a case that may be appealed and receive a published opinion sometime in the future that would change the current state of the law. Having said that, your company had decided that it would not subrogate at the present time but may seek to do so in the future depending on how that case may turn out.**[3]
>
> Based on your statements we will proceed to distribute funds to our client without reserving any funds for the existing workers compensation benefits paid to date, i.e. approx. $205,000.
>
> I am interpreting your position to indicate that you may, in the future, choose to attempt to exercise a credit as to future amounts payable against the total net amount received by the Plaintiff in her third party MICRA case, i.e. continuing T.D. and/or any future P.D. determination.
>
> I will so advise my client and her workers' compensation attorneys, Baziak and Steevens.
>
> If the foregoing is any anyway inaccurate please let me know immediately. (*Id*., p. 1, emphasis added.)[4]

[3] Civil counsel were most likely referring to the MICRA case that came out and was discussed in the panel's prior decision. (See fn. 2, *supra* discussing *Flores*.) Applicant's civil attorney testified at trial that he thought *Flores* would narrow the scope of MICRA application, i.e., it may have helped him, but it issued after the settlement. Naturally, defendant would have needed to reserve their right to credit should *Flores* affect any determination in the workers' compensation case that the civil case was not a MICRA case.

[4] There is no correspondence responsive to the June 10, 2015 e-mail in the record.

Mr. Phillips testified at the June 7, 2018 trial that the settlement value of the civil action was demonstrably reduced because of the threat of MICRA. (MOH, June 7, 2018, pp. 6-8.)

> The witness testified that defendant raised professional negligence as a defense to applicant's complaint pursuant to Civil Code Sections 3333.1, 3333.2 and 3333.3. These are known as the MICRA Medical Injury Compensation Reform Act. This allows the insurance carriers for the medical industry to raise this affirmative defense. This is good for the defense and bad for the plaintiff because it limits the plaintiff's recovery for general damages and prevents the admission of collateral source payment which in effect reduces the amount of recovery.
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> The witness testified that he did conduct research which included being provided case and statutory law by Mission Hospital on the issue of professional negligence.
>
> **The witness believed that professional liability was a viable defense in this case.** Mission Hospital did raise professional negligence as an affirmative defense in their mediation brief. The issue of professional negligence was concerned in the mediation and was a big part of defendant's defense.
>
> The mediation occurred on May 21, 2015. Trial in the case was scheduled for June 6th or 8th. **The professional negligence defense did affect the settlement of the case. Specifically, professional negligence demonstrably reduced the settlement value of the case**.
> ...
>
> The witness testified he prepared a Mediation Brief. **The brief included a settlement demand of 2.5 million dollars. The case eventually settled for about $300,000.00.** This was above the MICRA cap which is $250,000.00. **Professional negligence was a consideration in how they came to that figure**. The witness testified he did speak to the workers' compensation carrier before settlement of the case regarding the subrogation claim. He tried to convey to them that their subrogation claim was barred by case and statutory law. (*Id.*, pp-5-6, emphasis added.)

In addition, he testified that the amount of the carrier's lien was not deducted from the settlement proceeds, but that this is not an indication that MICRA was *not* considered when agreeing to the reduced settlement. (*Id.*)

> When asked if the work comp carrier was unwilling to waive their subrogation lien, the witness testified not initially. **At some point later they indicated they were not willing to waive it because something might happen in the future.** There is an asterisk on page 46 and in the last paragraph it states the workers' compensation carrier is not asserting a worker's compensation lien, but it

reserves its right to do so later. **The witness testified the reservation of the work comp insurer regarding the subrogation lien is not relevant because the law in effect at the time of settlement indicated that their subrogation claim was barred**.

...

He did not respond to the MICRA issue in his Mediation Brief. The witness did not respond to the MICRA issue even though he felt it applied because he did not want to damage his negotiating position.

...

The worker's compensation lien in the amount of $204,294.00 is referred to as a collateral source. There was no deduction [of] this amount from the settlement. This does not mean that the MICRA statute or professional negligence was not a consideration by defendant. The witness believed that the workers' compensation carrier had no subrogation claim or entitlement to the applicant's settlement to make money because of the MICRA Statute. At the time the civil case settled, the workers' compensation carrier had not filed a complaint in intervention, and it did not appear that they were pursuing their subrogation claim.

After the civil case was settled, the case of *Flores versus Presbyterian Intercommunity Hospital* came down. The witness reviewed it. He does not believe it applied to applicant's case because the fact pattern is different. That case narrowed the scope of the application of the MICRA statute. Also, the ***Flores*** **case was issued after the settlement in the civil case. The *Flores* case involved a janitor, and in the applicant's case it was the fact indicated that cleaning was done to maintain the JCAHO certification because of medical concerns**. (MOH, pp. 7-8, emphasis added.)

Applicant also introduced the Declaration of Gordon Phillips, Esquire, dated March 8, 2018, which was consistent with Mr. Phillips' testimony during trial. (App. Exh. 4, Declaration of Gordon Phillips, Esquire, March 8, 2018.)

3.) The Complaint that I filed on her behalf in that action did NOT plead professional negligence against the hospital because claiming that as a theory of recovery would have immediately placed her claim within the limitations afforded by California Civil Code Sec. 3333.2 which specifically LIMITS the amount that may be recovered to $250,000. I, as her attorney, did not voluntarily place her in a position wherein her damages would have been limited. Instead, I tried to allege that this was a traditional premises liability slip and fall case against a landowner/business proprietor. Before the passage of C.C. 3333.2 this would have been a permitted theory of recovery...

...

> Thus, a health care provider defendant does not have the typical exposure to a workers compensation lien that a non-health care provider defendant does, and thus offer less money to settle the case because the plaintiff cannot say they have to reimburse the workers compensation lien and thus needs more money to net an acceptable amount in a settlement.
> ...
>
> 4.) The Defendants in the personal injury action, i.e. Mission Hospital Regional Medical Center plead the defense and DAMAGES LIMITATION against the claim as an affirmative first in their responsive pleading, i.e. their Answer to Plaintiffs Complaint, and continued to vigorously argue that limitation applied throughout the pendency of the action. **The brief the defendants presented in their points and authorities cited several cases wherein the facts were very similar to ours and the damages limitation was held to apply. This was very worrisome to me. This reduced the verdict exposure of the defendant and thus decreased the settlement value of the case.**
> ...
>
> 9.) I continued to argue that the MICRA limitation did not apply in the settlement negotiations trying to keep the threat of being able to go for money beyond the "cap" but **I was fearful that if a judge ruled that MICRA was applicable the defendant would either substantially reduce or completely withdraw their prior offers.**
>
> 10.) **Based on the foregoing factors the applicability of the MICRA statute had a substantial effect upon the ultimate settlement value of the case**. (*Id*., pp. 1-3, emphasis added.)

II.

MICRA precludes all subrogation under the Labor code, including claims in intervention, liens, and an employer credit for future payments. (*Graham, supra*, 210 Cal. App. 3d at pp. 505-506; see *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137 [1985 Cal. LEXIS 254]; *Miller v. Sciaroni* (1985) 172 Cal.App.3d 306, 315 [1985 Cal.App. LEXIS 2523] [Section 3333.1 intended not just to prevent double recovery by plaintiffs, but to reduce medical malpractice insurance costs by "redistributing certain damage risks to other indemnitors by precluding both plaintiff and collateral benefit sources from recovering from defendant's malpractice insurer benefits already conferred by that collateral source."].)[5]

[5] MICRA provisions are liberally construed. (*Rupp v. United States* (2009) 2009 U.S. Dist. LEXIS 145015, *7, citing *Preferred Risk Mut. Ins. Co. v. Reiswig* (1999) 21 Cal.4th 208 [1999 Cal. LEXIS 4997].)

The Court in *Graham* harmonized section 3333.1 with the Labor Code credit provisions by interpreting section 3333.1 as "impliedly creating an exception to the credit provisions whenever an injured party has demonstrably had his recovery reduced to reflect collateral source contributions." (*Graham, supra,* 210 Cal.App.3d at p. 508.)

> A more restrictive construction would shift a portion of the costs of medical malpractice to the injured party, contrary to the purposes of both MICRA and the workers' compensation statutes. In this case, the parties in the underlying medical malpractice case made an adequate factual record that Graham's settlement was reduced to exclude any recovery for collateral source benefits. (*Ibid.*)

MICRA preclusions on WC carrier subrogation include cases that are settled, as well as those that are tried. (*Graham, supra*, 210 Cal.App.3d at pp. 506-507.)

> If we were to interpret the statute to require a trial before the employer is precluded from seeking credit or reimbursement, plaintiffs would be forced to try their cases unless medical malpractice defendants agreed to settle for sums sufficient to cover employers' costs. The legislative history of MICRA reflects deep concern with the cost of litigation. We cannot construe the collateral source benefit rules in a way that would discourage settlements and thus defeat the major purpose of the legislation. (*Ibid*.)

Thus, the initial legal question necessary to determine whether defendant is entitled to a third-party credit in this case was whether applicant's civil lawsuit against third-party Mission Hospital Regional Medical Hospital (civil action), stated a claim for professional negligence under MICRA (Civ. Code, § 3333.1 et seq.). If so, then the second question was whether applicant produced substantial evidence that the settlement of the civil action was "demonstrably reduced" to reflect collateral source contributions (*Graham, supra*). The WCJ determined the first question in the affirmative. (See F&O, Opinion on Decision, pp. 4-9.) Applicant does not dispute this determination.[6]

However, the WCJ determined the second question in the negative, i.e., that applicant failed to produce substantial evidence that her civil action settlement was "demonstrably reduced" to "reflect collateral source contributions." (*Id.*, pp. 10-11.) Thus, the F&O issued granting defendant a third-party credit in the amount of $184,547.28. (F&O, Findings of Fact, Nos. 2-3; Order.) Applicant seeks reconsideration of this determination.

[6] As stated, *supra*, it is our decision after reconsideration to amend the WCJ's decision to reflect this determination.

We agree with applicant that the record, when considered in its entirety, contains substantial evidence that the settlement in the civil action was "demonstrably reduced" to exclude any recovery for collateral source benefits. (See *Graham, supra,* 210 Cal.App.3d at p. 508 citing to *Barme v. Wood* (1984) 37 Cal.3d 174 [1984 Cal. LEXIS 120].) Here, the WCJ identified three basis for the award of third-party credit in this case:

> The statement of accounting fails to list a breakdown between the economic and non-economic damages in the civil settlement. This document states that there was a collateral source of money paid in the form of workers' compensation liens for $204,294.00 and that there was no deduction from the settlement for these monies.
>
> Mr. Phillips did not testify about the breakdown between the economic and non-economic damages in the civil settlement or whether the settlement was reduced to reflect collateral source monies.
>
> The evidence indicates that the applicant settled her case for $100,000.00 above the maximum amount a jury could have awarded her in this case. Therefore, applicant failed to establish that the settlement of the civil settlement was demonstrably reduced to reflect collateral source contributions. (Report, p. 6; see also, F&O, Opinion on Decision, pp. 10-11.)

However, the case law indicates that given the public policy behind MICRA, there is no proverbial high bar to establish that a MICRA settlement has been "demonstrably reduced" because of the ability of the civil defendant to present evidence of collateral source payments to a jury.[7] Contrary to the WCJ's conclusion, we find no case precedent requiring that in order for section 3333.1 to bar subrogation, the MICRA settlement agreement must break down how much of the settlement was for general damages, and how much for special damages.

The Supreme Court found in *Barme* that MICRA provisions precluded subrogation by the workers' compensation carrier based "merely" on a document filed by defendant indicating their intention to introduce collateral source evidence in the malpractice action. (*Graham, supra,* 210 Cal.App.3d at p. 508; see *Barme, supra*, 37 Cal.3d 174, 178, fn. 3.) In *Graham*, a declaration from applicant's civil attorney stated that he "indicated to the court at the settlement conference that

[7] "Under the traditional collateral source rule, a jury, in calculating a plaintiff's damages in a tort action, does not take into consideration benefits -- such as medical insurance or disability payments -- which the plaintiff has received from sources other than the defendant -- i.e., 'collateral sources' -- to cover losses resulting from the injury. (See, e.g., *Helfend v. Southern Cal. Rapid Transit Dist*. (1970) 2 Cal.3d 1 [84 Cal.Rptr. 173, 465 P.2d 61, 77 A.L.R.3d 398].) Section 3333.1 alters this rule in medical malpractice cases." (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 164 [1985 Cal. LEXIS 254].)

Graham's medical expenses and disability would not be considered in the settlement because the defense would introduce evidence that workers' compensation benefits would pay those damages." (*Graham, supra,* 210 Cal.App.3d at p. 502.) The transcript of the trial court settlement proceedings confirming the statement was submitted. (*Id*., p. 502, fn. 1.) This was an "an adequate factual record that Graham's settlement was reduced to exclude any recovery for collateral source benefits." (*Id.*, p. 508.)

It appears that the case in *Graham* was settled at a mandatory settlement conference in civil court, with a court reporter. In this case, the settlement occurred at a private mediation, where there would be no court reporter, and thus, no record made. However, applicant submitted a sworn declaration from Mr. Phillips stating that he agreed to the reduced settlement amount (from $2,500,000 to $350,000) because of his belief and fear that applicant's civil action would be subject to MICRA, which would include a general damages cap, and a reduction of special damages (medicals, wage loss) due to MICRA's exception to the prohibition against introducing evidence of collateral source payments. Mr. Phillips then testified under the penalty of perjury consistently with that declaration. Applicant also produced correspondence contemporaneous with the civil action settlement, which confirms Mr. Phillip's sworn declaration and testimony that he believed the civil action would be subject to MICRA. (App. Exh. 6, May 28, 2015 Letter.)

Finally, applicant produced contemporaneous correspondence clarifying that the carrier chose not to assert its lien at the time of the civil action settlement, which explains why there was no deduction for the lien from the civil action settlement amount. (App. Exh. 5, June 10, 2015 e-mail.)

In contrast, defendant introduced no rebuttal evidence, no witnesses of its own, and did not impeach the attorney's testimony or declaration. Instead, and contrary to its position in the civil action, defendant contended that MICRA does not apply in this case, and thus it is entitled to credit. (See App. Exh. 8, Defendant's Mediation Brief, May 20, 2015; cf. defendant's Petition for Reconsideration, July 23, 2018.) This strategy tracks with Mr. Phillips' June 10, 2015 e-mail correspondence to the carrier, i.e., that the carrier reserved its right to credit because *Flores* was still pending and, based on the result in *Flores*, it may ultimately have the right to seek credit. In other words, the carrier's prior reservation of rights cannot support an inference that collateral source evidence was *not* considered in the settlement negotiations and/or the amount of settlement.

(See *St. Jude Hospital, et al. v. Workers' Comp. Appeals Bd. (Ballard)* (1995) 61 Cal.Comp.Cases 75 [1995 Cal.Wrk.Comp. LEXIS 3443], writ den.)

Our determination that there is substantial evidence to support a finding that applicant's civil action settlement was "demonstrably reduced" by the consideration of collateral source payments, is consistent with prior panel decisions. In *Kaiser Found. Hosps. v. Workers' Compensation Appeals Bd. (Needels)* (2006) 71 Cal.Comp.Cases 850, 854, [2006 Cal. Wrk. Comp. LEXIS 178], the Board panel determined that a settlement was reduced pursuant to *Graham* based on inferences from the record including testimony from the plaintiff's attorney that "from the inception of the case he anticipated a substantial MICRA reduction, and that his evaluation took this factor into account..." (*Id*., at pp. 853-854.) In *Ballard, supra,* the Board concluded that even if settlement papers do not expressly recite that a reduction was being contemplated in consideration of collateral source benefits, a WCJ may reasonably infer such reduction, if the operative facts lead to such an inference.[8]

The WCJ's final support for finding no demonstrable reduction was that applicant received $100,000 "above the maximum amount a jury could have awarded her in this case," and therefore, that "applicant failed to establish that the settlement of the civil settlement was demonstrably reduced to reflect collateral source contributions." (Report, p. 6.) It is true that MICRA caps *non-economic* damages at $250,000.00. (Civ. Code, § 3333.2.) However, MICRA does not cap special damages, although the introduction of collateral source payments are presumed to result in a reduction of special damages. For example, applicant claimed a wage loss claim in the civil action of more than $3,375,000.00. (App. Exh. 9, Plaintiff's Mediation Brief.) Applicant's wage loss claim would have most likely exceeded any reduction by the jury for any workers' compensation lien in this case, which is a more logical explanation than the WCJ's for why the settlement included $100,000.00 above the general damages cap.

Accordingly, as there is substantial evidence to support a finding that applicant's civil action settlement was "demonstrably reduced" by the consideration of collateral source payments,

[8] We note that an applicant's lay testimony regarding the monetary value of his civil malpractice claim may not be substantial evidence of demonstrable reduction, and that "expert testimony" from a civil attorney may be necessary to establish demonstrable reduction. (See *Bernstein v. Workers Compensation Appeals Bd.* (1996) 61 Cal. Comp. Cases 484, 487 [1996 Cal. Wrk. Comp. LEXIS 3132]; see also, *Brady v. County of Kern*, 2015 Cal. Wrk. Comp. P.D. LEXIS 739, *12-13 ["Rather than having workers' compensation practitioners flail away as they try to comprehend what happened in personal injury litigation involving medical malpractice and what it all meant, consultation with the civil attorneys is an appropriate and accepted practice..."].)

it is our decision after reconsideration to rescind the WCJ's decision that defendant is not barred from obtaining third-party credit pursuant to Civil Code section 3333.1 (F&O, Findings of Fact, Nos. 2-3, and Order). It is also our decision after reconsideration to amend the WCJ's decision to include his determination that "the description of the causes of action in the [civil] complaint and the facts set forth in Plaintiff's [applicant's] mediation brief, do establish facts that are sufficient to state a cause of action for professional negligence" pursuant to section 3333.1 and *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal. 4th 75 [2016 Cal. LEXIS 2561] (*Flores*)

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on June 29, 2018 by a workers' compensation administrative law judge is **AFFIRMED,** except that it is **AMENDED** as follows:

FINDINGS OF FACT

...

2. Applicant's civil lawsuit filed on July 30, 2012 against third party Mission Hospital Regional Medical Hospital, states a cause of action for professional negligence pursuant to Civil Code section 3333.1 and *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal. 4th 75 [2016 Cal. LEXIS 2561].

3. The settlement of applicant's civil lawsuit filed on July 30, 2012 against third party Mission Hospital Regional Medical Hospital was demonstrably reduced by the consideration of collateral source payments.

4. Defendant is barred from obtaining third party credit pursuant to Civil Code section 3333.1 and *Graham v. Workers' Comp. Appeals Bd.* (1989) 210 Cal.App.3d 499 [54 Cal.Comp.Cases 160].

ORDER

IT IS HEREBY ORDERED that defendant is barred from obtaining a third party credit pursuant to Civil Code section 3333.1 and *Graham v. Workers' Comp. Appeals Bd.* (1989) 210 Cal.App.3d 499 [54 Cal.Comp.Cases 160], for any workers' compensation benefits paid or due to be paid as a result of the above captioned matter.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 12, 2021

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

AMANDA QUINTANILLA
BAZIAK & STEEVENS
TOBIN LUCKS

AJF/abs

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