WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOSHUA CRUMP, *Applicant*

vs.

O'REILLY AUTO PARTS;
SAFETY NATIONAL INSURANCE COMPANY
administered by CORVEL, *Defendants*

Adjudication Number: ADJ12206396
Santa Ana 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 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 the Opinion on Decision, both of 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 findings regarding final or threshold issues including employment and injury arising out of and occurring in the course of employment (AOE/COE). Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains findings that are final, the defendant is only challenging an interlocutory finding/order in the decision, namely, the issue of good cause to set aside the August 7, 2019 Order Approving Compromise and Release (OACR). 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 and Opinion on Decision, 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.

The Appeals Board has continuing jurisdiction to "rescind, alter, or amend any order, decision, or award," if a petition is filed within five years of the date of injury and "good cause" to reopen is alleged and shown. (Lab. Code, §§ 5803, 5804.) Moreover, the decisions of the Appeals Board 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].) An order approving compromise and release is an order that may be reopened for "good cause" under section 5803.

WCAB Rule 10700 provides:

> When filing a Compromise and Release or a Stipulations with Request for Award, ***the filing party shall file*** all agreed medical evaluator reports, qualified medical evaluator reports, treating physician reports, and any other that are relevant to a determination of the adequacy of the Compromise and Release or Stipulations with Request for Award that have not been filed previously.
> (Cal. Code Regs., tit. 8, § 10770(a).)

When presented with a compromise and release agreement, the WCJ "shall inquire into the adequacy of all compromise and release agreements . . . and may set the matter for hearing to take evidence when necessary to determine whether the agreement should be approved or disapproved." (Cal. Code Regs., tit. 8, former § 10882, now § 10700(b) (eff. Jan. 1, 2020); see also Lab. Code, § 5001.)

In this case, relevant medical evidence in existence at the time of the settlement was not submitted with the Compromise and Release as required by WCAB Rule 10700 depriving applicant of a full inquiry into the adequacy of the agreement. Given the facts of this case, we agree with the WCJ that the procedural defects and the inadequacy of the settlement constitute good cause. (See *Aliano v. Workers' Comp. Appeals Bd*., (1979) 100 Cal.App.3d 341, 366 [44 Cal.Comp.Cases 1156] [Good cause to reopen existed where defendant failed to fulfill its duty to adequately and fairly investigate the injured worker's claim and to present the full medical picture to the Appeals Board resulting in an inequitable decision based upon medical reports that did not constitute substantial evidence]); see also *Fidelity & Cas. Co. of New York v. Workers' Comp. Appeals Bd*. (1980) 103 Cal.App.3d 1001, 1010 [45 Cal. Comp. Cases 381].)

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 19, 2021

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

JOSHUA CRUMP
GHITTERMAN, GHITTERMAN & FELD
SAMUELSEN, GONZALEZ, VALENZUELA & BROWN

PAG/abs

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

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION:

O'Reilly Auto Parts, LLC c/o CorVel ("Petitioner") filed a timely, verified Petition for Reconsideration. Petitioner seeks Reconsideration contending it is prejudiced by this Judge's decision of June 3, 2021, finding there was good cause to set aside the August 7, 2019, Order Approving Compromise and Release because the settlement was inadequate.

II.
STATEMENT OF FACTS:

Joshua Crump, while employed on March 29, 2018, as a delivery driver, at Visalia, California, by O'Reilly Auto Parts, sustained injury arising out of and in the course of employment to his head.

At the time of injury, the employer's Workers' Compensation carrier was Safety National Insurance Company. The employer furnished some medical treatment.

The parties entered into a signed Compromise and Release on July 23, 2019, (EAMS DOC. ID 70837521) and the settlement was approved on August 7, 2019, by Workers' Compensation Judge Mendivel (EAMS DOC. ID 70837520).

On May 11, 2020, applicant dismissed his attorney, Law Office of Cyrus Chen, and substituted in Ghitterman, Ghitterman & Feld as his counsel. (EAMS DOC. ID 32400783; 32400803). Applicant filed a Petition to Reopen on June 9, 2020, (EAMS DOC. ID 32694623) and ultimately had the matter placed on the Court's active Mandatory Settlement Conference Calendar.

This matter proceeded to trial on January 7, 2021 and March 11, 2021. The sole issue for trial was as follows:

1. Has the applicant established good cause to set aside the August 7, 2019, Order Approving Compromise and Release?

Applicant filed a Trial Brief on October 12, 2020, and a supplement to the Brief via correspondence to the Court on November 25, 2020. Defendant responded to applicant's letter on December 30, 2020. Defendant submitted their brief on March 19, 2021. This matter was submitted as of March 20, 2021. Defendant filed a timely verified Petition for Reconsideration dated June 21, 2021.

III.
DISCUSSION:

Petitioner contends that the Judge that approved the Compromise and Release should not have been the Trial Judge to decide whether the Order Approving should be set aside. Petitioner failed to file for Automatic Reassignment of Trial to another Workers' Compensation Judge. Pursuant to California Code of Regulations §10788(c), "if the parties are first notified of the identity of the workers' compensation judge assigned for trial or expedited hearing by a notice of trial served by mail, to exercise the right to automatic reassignment **a party must file a petition requesting reassignment not more than 5 days after receipt of the notice of trial or expedited hearing**." (emphasis added) As such, the time to object to the Trial Judge has long passed.

Petitioner mistakenly argues that there was a lack of new evidence to constitute good cause that was not previously known to the Appeals Board. As stated in this Workers' Compensation Judge's Opinion on Decision, there were no medical reports provided during the walk through of the settlement as required by California Code of Regulations §10700(a).

Per California Code of Regulations §10700(a), when filing a Compromise and Release (C&R), the filing party **shall file** all AME, QME and treating physician reports and any other medical and other records that haven't been filed and are relevant to a determination of the adequacy of the C&R. (emphasis added) There were no medical reports filed in conjunction with the Compromise and Release at the time of the Walk - Through. This is evident by review of FileNet in EAMS. Yet, there were medical reports in existence at the time of the walk through, none of which were brought to this Court's attention until the filing of the Petition to Set Aside. Namely, Exhibit E, the Doctor's First Report from Dr. Russom dated April 6, 2018, states as follows: "Pt. states: I was walking to the back and a box of brake shoes (10 lbs.) fell on my head…" The diagnoses listed were "unspecified injury of the head, initial encounter; Other cause of strike by thrown, projected or falling object, initial encounter…"

A head trauma is a serious injury that could have potentially deadly complications especially in light of the fact that the Doctor's First Report (Exhibit E) indicates that the after the hit to his head, the applicant was nauseous and vomited. The applicant was also taken off work. Additionally, there were other records in existence at the time of the walk through, specifically Exhibit I, the discharge records from Kawaeh Delta dated March 29, 2018, where the applicant reported nausea and vomiting. Neither of these medicals were filed with the Court for review to appropriately address adequacy. Thus, the medical reports submitted at trial were in fact new evidence that was not previously known to the Court. Therefore, using Petitioner's own argument, there was new evidence and it was the medical reports showing an industrial head trauma.

Petitioner misapplies the doctrine of *res judicata*. Specifically, Petitioner contends that "conclusive orders and awards of the WCAB are final for the purposes of the doctrine of *res judicata* unless a Petition for Reconsideration is filed." The doctrine of *res judicata*, or claim preclusion, prevents re-litigation of the same cause of action in a second suit between the same parties. (*Ly v. County of Fresno (2017) 82 CCC 1138, 1142*) Accordingly, for *res judicata* to apply there must be first a litigation (there was no litigation but a settlement) and then a second litigation for the same cause of action. This present litigation regarding the Order Approving being set aside

is in fact the FIRST litigation not the second litigation. Therefore, the doctrine of *res judicata* is inapplicable in this case.

Moreover, in *Smith v. WCAB (1985) 50 CCC 311, 318*, the Court held that an Order Approving Compromise and Release could not be rescinded if the Petition to Set Aside was filed over five years from the date of injury. In this case, the date of injury is March 29, 2018. Therefore, the parties have until March 29, 2023, to file a Petition to Set Aside the Order Approving. After five years, the Court no longer has jurisdiction to rescind, alter, or amend any order, decision or award. Accordingly, Petitioner is incorrect that there is a 20- day time limit to file a Petition to Set the Order Approving.

The Petition for Reconsideration filed fails to address the most important issue at hand. As stated in the Decision on Opinion, the Workers' Compensation Judge has the duty to review settlement documents to determine whether the settlement is adequate. After review of the evidence in this matter, both documentary and testimonial, a settlement in the amount of $4,500, is inadequate for an admitted head injury. It is noted that the AOE/COE box was checked off on the Order Approving, the settlement amount was low, there were no medical reports and the Walk-Through Appearance Sheet noted that the "case settled at the depo based on agreement of the parties." Although this Workers' Compensation Judge does not have independent recollection of this walk through, it is likely that the undersigned mistakenly believed that this case was denied. All settlements must be appropriately assessed for adequacy by the Court. However, admitted cases require additional care review, especially in light of the fact that this injury involved a head injury.

During trial, this Workers' Compensation Judge had the opportunity to witness the applicant's demeanor and mannerisms to determine credibility. The applicant was found to be credible. The applicant testified that he continued working at O'Reilly Auto Parts for several months after the accident. He stopped working because he was having neurological complications. Specifically, he was having twitching and spasms. (MOH/SOE 01/07/2021, page 5, lines 19-21). Currently, the applicant still has complaints that are attributed to his industrial injury of March 29, 2018. He complained of crippling insomnia. In addition, the applicant's spasms have gotten worse from 2018, and after the time he resigned. He has continued to have more and more spasms. He had a seizure-type episode in his sleep and suffered fractures to his vertebrae. (MOH/SOE 01/07/2021, page 6, lines 3-7).

Whether these continuing problems the applicant is having is due to his industrial injury is not an issue at this time. However, it is most certainly a medical issue, not a factual or legal issue that can be resolved at this time nor could have been resolved at the time of the walk through of the settlement. What is clear is that $4,500, to resolve an admitted head injury is inadequate.

RECOMMENDATION

For the reasons stated above it is respectfully recommended that the Petition for Reconsideration be **DENIED.**

Date: June 30, 2021

Laura Mendivel
WORKERS' COMPENSATION JUDGE

OPINION ON DECISION

FACTUAL BACKGROUND

Joshua Crump, while employed on March 29, 2018, as a delivery driver, at Visalia, California, by O'Reilly Auto Parts, sustained injury arising out of and in the course of employment to his head.

At the time of injury, the employer's Workers' Compensation carrier was Safety National Insurance Company. The employer furnished some medical treatment.

The parties entered into a signed Compromise and Release on July 23, 2019 (EAMS DOC. ID 70837521) and the settlement was approved on August 7, 2019 by WCJ Mendivel (EAMS DOC. ID 70837520).

On May 11, 2020, applicant dismissed his attorney, Law Office of Cyrus Chen, and substituted in Ghitterman, Ghitterman & Feld as his counsel. (EAMS DOC. ID 32400783; 32400803). Applicant filed a Petition to Reopen on June 9, 2020 (EAMS DOC. ID 32694623) and ultimately had the matter placed on the Court's active Mandatory Settlement Conference Calendar.

This matter proceeded to trial on January 7, 2021 and March 11, 2021. The sole issue for trial was as follows:

1. Has the applicant established good cause to set aside the August 7, 2019 Order Approving Compromise and Release?

Applicant filed a Trial Brief on October 12, 2020 and a supplement to the Brief via correspondence to the Court on November 25, 2020. Defendant responded to applicant's letter on December 30, 2020. Defendant submitted their brief on March 19, 2021. This matter was submitted as of March 20, 2021.

APPLICANT HAS ESTABLISHED GOOD CAUSE TO SET ASIDE THE AUGUST 7, 2019 ORDER APPROVING COMPROMISE AND RELEASE

Labor Code § 5803 reads in pertinent part as follows:

> "The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division and the decisions and orders of the rehabilitation unit established under §139.5. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order decision or award, good cause appearing therefor…"

It is clear in the Labor Code that the Court has the authority to "rescind, alter, or amend any order decision or award, good cause appearing" after the parties in interest are given an opportunity to be heard. Here, the parties provided testimonial and documentary evidence and, in addition, eloquently outlined their respective legal positions in their Trial Briefs. All of which were carefully considered in rendering this decision.

The Court agrees with Defendant, there is no evidence of misrepresentation, fraud in the inducement of the settlement or that applicant was represented by incompetent counsel. Further, there is no evidence that there was a misrepresentation by Ms. Nisha Sharma, Hearing Representative from the Law Offices of Samuelson Gonzalez, attorneys representing the Defendant, to the Court at the time of the walk-through of the settlement. Ms. Sharma has appeared before the undersigned on other occasions and there is no reason to question her integrity. Additionally, after carefully observing her during trial, the Court finds that Ms. Sharma credibly testified. She provided a reasonable explanation as to why the box on the Order Approving relating to a "good faith dispute" was checked off.

Specifically, Ms. Sharma testified that she knew the head in this claim was an admitted body part and there were some body parts that were denied. She read the portion of the Order Approving regarding disputed injury as stating it was either a disputed injury or disputed body parts. Ms. Sharma never said at any time during the walk-through that the case was denied (MOH/SOE, 03/11/2021, page 5, lines 12-16). Had Ms. Sharma stated that the case was denied, this WCJ would have written on the Walk Through Appearance Sheet that the case was denied as this is the standard practice during walk-throughs by the undersigned. However, the Walk Through Appearance Sheet makes no reference that the case was denied. Ms. Sharma presented herself in a truthful manner and there is no reason to question the veracity of her testimony. As such, there is no misrepresentation or fraud in the case.

Per California Code of Regulations §10700(a), when filing a compromise and release (C&R), the filing party **shall file** all AME, QME and treating physician reports and any other medical and other records that haven't been filed and are relevant to a determination of the adequacy of the C&R. (emphasis added) There were no medical reports filed in conjunction with the Compromise and Release at the time of the Walk Through. This is evident by review of FileNet in EAMS. Yet, there were medical reports in existence at the time of the walk through, none of which were brought to this Court's attention until the filing of the Petition to Set Aside. Namely, Exhibit E, the Doctor's First Report from Dr. Russom dated April 6, 2018, states as follows: "Pt. states: I was walking to the back and a box of brake shoes (10 lbs.) fell on my head…" The diagnoses listed were "unspecified injury of the head, initial encounter; Other cause of strike by thrown, projected or falling object, initial encounter; Activity other specified; Other trade areas as the place of occurrence of the external cause." A head trauma is a serious injury that could have potentially deadly complications Especially in light of the fact that the Doctor's First Report (Exhibit E) indicates that the after the hit to his head, the applicant was nauseous and vomited. The applicant was also taken off work. Additionally, there were other records in existence at the time of the walk through, specifically Exhibit I, the discharge records from Kawaeh Delta dated March 29, 2018 where the applicant reported nausea and vomiting. Neither of these medicals were filed with the Court for review to appropriately address adequacy.

Defendant argues that it was their intention to file a Declaration of Readiness to Proceed to an AOE/COE Priority Conference to address the AOE/COE issues regarding applicant's injury given the applicant's pre-existing conditions. Pursuant to the Stipulation by the parties, this case is admitted, an AOE/COE Priority Conference is inappropriate. Such a conference would have been taken off calendar by the Court. The issue in this case is not AOE/COE, but rather a nature and extent issue. The head injury was admitted, it then becomes a medical issue as to whether any residuals from this admitted head trauma is industrial or not. Had these two medical reports, the Doctor's First Report and the March 29, 2018 report from Kawaeh Delta been provided to the Court, an Order Suspending Action would have issued and this matter would have be set for a Status Conference.

Moreover, after review of the evidence in this matter, a settlement in the amount of $4,500 appears inadequate for an admitted head injury. Although the California Code of Regulations §10700(a) requires that filing party "must include all AME, QME and treating physician reports and any other medical and other records that haven't been filed and are relevant to a determination of the adequacy," this WCJ bears some responsibility here. It is noted that the AOE/COE box was checked off on the Order Approving, the settlement amount was low, there were no medical reports and the Walk Through Appearance Sheet noted that the "case settled at the depo based on agreement of the parties." Although this WCJ does not have independent recollection of this walk through, it is likely that the undersigned mistakenly believed that this case was denied. All settlements must be appropriately assessed for adequacy by the Court. However, admitted cases require additional care review, especially in light of the fact that this injury involved a head injury.

During trial, the Judge had the opportunity to witness the applicant's demeanor and mannerisms to determine credibility. The applicant was found to be credible.

The applicant testified that he continued working at O'Reilly Auto Parts for several months after the accident. He stopped working because he was having neurological complications. Specifically, he was having twitching and spasms. (MOH/SOE 01/07/2021, page 5, lines 19-21). Currently, the applicant still has complaints that are attributed to his industrial injury of March 29, 2018. He complained of crippling insomnia. In addition, the applicant's spams have gotten worse from 2018 and after the time he resigned. He has continued to have more and more spasms. He had a seizure-type episode in his sleep and suffered fractures to his vertebrae. (MOH/SOE 01/07/2021, page 6, lines 3-7).

Whether these continuing problems the applicant is having is due to his industrial injury is not an issue at this time. However, it is most certainly a medical issue, not a factual or legal issue that can be resolved at this time nor could have been resolved at the time of the walk through of the settlement.

Based on the medical evidence and the testimony of the applicant, the Court finds that the applicant has shown that there is cause to set aside the Order Approving due to the inadequacy of the settlement.

CONCLUSION

Let it be clear, that the sole reason the Court in granting the applicant's request to set aside the Order Approving is based on the fact that there is a serious issue of adequacy of the settlement. The Court finds no misrepresentation, fraud, duress or incompetency of the applicant's prior counsel.

Given that the Court finds that the applicant has shown good cause to set aside the August 7, 2019 Order Approving Compromise and Release; therefore, said Order Approving is hereby **RESCINDED.**

Date: June 3, 2021

Laura Mendivel
WORKERS' COMPENSATION JUDGE