WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA ANDRADE (Deceased), ***Applicant***

vs.

DELTA AIRLINES;
ACE AMERICAN INSURANCE COMPANY,
administered by SEDGWICK CMS, ***Defendants***

Adjudication Number: ADJ11377591
Oakland 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 reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 10, 2023

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

MARIA ANDRADE
MANGOSING LAW GROUP
BLACK & ROSE
OFFICE OF THE DIRECTOR-LEGAL UNIT (OAKLAND)

PAG/abs

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 REMOVAL

I. INTRODUCTION

1.	Applicant's Occupation:	Flight Attendant
	Age:	55
	Parts of Body Injured:	Shoulder and ankle
2.	Identity of Petitioner:	Applicant's attorney
	Timeliness:	The Petition was timely filed
	Verified:	The Petition was verified.
3.	Dates of Minutes of Hearing:	December 5, 2022

4. The Petitioner contends:

A. That this WCJ erred in their Findings and Order and that the applicant has been aggrieved by such Order.
B. That this WCJ acted without or in excess of her powers:
C. That the evidence does not justify the Findings of Fact:
D. And that the Findings of Fact do not support the Order

II. SUMMARY OF FACTS

The parties agree on the basic underlying facts, which have been laid out succinctly in both the Petition for Reconsideration and in the Response to the Petition for Reconsideration and will be kept accordingly concise here.

The applicant sustained injuries to her right foot/ankle and right shoulder on November 30, 2014. The claim resolved via Stipulations for 69% permanent disability. The parties agree that this award has been paid out. Post-Stipulation the parties engaged in settlement discussions, obtained an MSA and CMS approval of the same.

On February 16, 2022, the defense attorney transmitted settlement documents to applicant's counsel. They forwarded to the applicant, who signed it on February 18, 2022. Counsel for the applicant signed and returned to defense counsel on February 19, 2022. On February 23, 2022, defense counsel submitted the Compromise and Release agreement with the Board, electronically.

The afternoon on February 23, 2022, all parties were made aware that the applicant had passed away on February 21, 2022. The parties contacted the Board and advised two WCJ's of what happened and asked for no action to be taken on the settlement. An Order Suspending Action was issued, and the matter proceeded to hearing and Trial on the issues.

The matter was submitted on the record on September 26, 2022. The Findings and Order issued on December 5, 2022, which found that the applicant was to take nothing.

A Petition for Consideration was filed on December 30, 2022, and a Response to the Petition for Consideration was filed on January 4, 2022.

III.
DISCUSSION

The issues presented for Trial were (1) whether the Compromise and Release should be enforced; (2) attorney's fees; (3) Whether any accrued benefits exist; and (4) whether the applicant's estate has any entitlement to the MSA funds. The issues addressed in the Finding and Order were whether the compromise and release ("C&R") should be enforced, attorneys' fees and whether any accrued benefits exist. Since the undersigned found no entitlement to the overall C&R, the issue regarding the MSA funds was moot. The Petition for Reconsideration solely disputes the issue of whether the C&R is enforceable. We will address that question now.

In the Petition for Reconsideration, applicant contends that the controlling case is *Light v. Summit Drilling* (1979) *(en banc*) 44 CCC 1083. (Petition for Consideration ("PC", page 3, lines 10 -11). In *Light*, as indicated in applicant's Petition for Consideration, it was determined that the approval or disapproval of a Compromise and Release is at the Board's discretion. (PC, page 3, lines 14-15). Applicant continues, noting "The Board ruled on two important aspects that are material to the case here. First, the Board stated that the execution of the compromise and release agreement creates a "legally binding agreement which is effective from the time of execution upon approval by the Board." Second, the Board ruled that the language of Labor Code Section 5001 which states, in part, "No release of liability or compromise agreement is valid unless it is approved by the appeals board or referee" is a condition subsequent to the execution of the C&R and not a condition precedent to the approval. This means that the only way that the "legally binding agreement" of the parties can be disturbed is if the Board disapproves the settlement." (PC, page 3, lines 16-24).

The Board, in *Light*, spend a considerable amount of time in their analysis discussing that approval or disapproval of a C&R is within the Board's discretion. This is based on Labor Code §5001, the relevant portion of which is noted above. No agreement is effective until it is approved by the Board. *Light* continues, noting that this finding is supported in 3 different treatises, in addition to the holding in *Chavez v. I.A.C.* (1958), 49 C. 2d 701, 321 P.2d 449, 23 Cal. Comp. Cases 38. "In *Chavez*, The supreme court stated (in a four-to-three decision) that the adequacy of consideration is not controlling, but did not disturb the ruling of the Board, basing its decision on the premise that a compromise is *ineffective unless it has been approved by the Board.* (Emphasis added).

"Hanna, Law of Employee Injuries, Vol. 1, Section 8.04 (2)(g) cites Chavez in part for the following:

"The Appeals Board may disapprove a settlement when it learns of the employee's death from nonindustrial causes prior to approval. (*Light*; Supra)"

Light, and *Chavez* are not inconsistent in that they both stand for the proposition that the approval of a settlement is at the discretion of the Board.

There are a number of cases interpreting this precise issue, and the results vary from case to case. *Stock v. WCAB* (1971) 36 [Cal.Comp.Cases] 404; 1971 Cal Wrk. Comp. Lexis 181 (write denied) held that a compromise and release agreement is not binding on the parties to a workmen's Compensation Proceeding until it has been signed by both parties, the employee and the insurance carrier for the employer, and approved by the Appeals Board. In that case, the carrier negotiated a settlement agreement with the applicant, and sent the applicant 3 copies of a C&R agreement. The day that the applicant signed the documents in his attorney's office, they received a phone call from the carrier indicating that the offer had been made without authority, and that the carrier would not consummate the C&R agreement. After hearing evidence, the referee in the matter issued a take nothing against Stock. The Appeals Board held up the take nothing finding, due to the reasoning noted above.

In *Casavant v. Sierra Mkt*., 2015 Cal. Wrk. Comp. P.D. Lexis 681, while not binding, but still instructive, the Board upheld an Order of the WCJ Dismissing the Case with Prejudice. The WCJ in that matter questioned the adequacy of the C&R and after attempting to develop the medical record and contact heirs, dismissed the case with prejudice. His ruling was upheld by the Board.

In the Noteworthy Panel Decision *Ramirez v. Plugin Digital Printing*, 2019 Cal. Wrk. Comp. P.D. LEXIS 516, only the applicant signed off on the compromise and release before his death. The document was forwarded to defense counsel, who executed the document, without being told that the applicant had died. The WCAB explained:

"What is important in this case is there was a change in circumstance prior to the document being fully executed, the applicant died. Defendant was not aware the applicant had passed when they executed the compromise and release. Defendant should not be penalized for lack of knowledge of a pivotal fact. *When the Applicant passed away prior to the execution of the compromise and release, defendant's obligation for future medical care ceased to exist at which point defendant's liability changed.* Defendant would have had the right had they known all the facts to not sign the settlement documents." (emphasis added).

"If we were to allow a settlement to be enforceable despite a material change in circumstances prior to final execution, it would encourage parties to purposely conceal facts which render a settlement void had they been brought to light."

However, in *CNA ins. Cos. V. WCAB* (1997) 62 Cal.Comp.Cases 1143; 1997 Cal.Wrk. Comp. LEXIS 4776, the Board upheld the finding of the WCJ who posthumously approved a C&R agreement. In that case defendants and a pro per applicant submitted a C&R for approval, with defendants transmitting the settlement agreement with a signed letter, and which resolved all issues including PPD, FM, and Life Pension. The C&R was suspended pending information regarding PDA's. The applicant died thereafter. Defendants had also prepared a second C&R, but the applicant did not sign it before he died and it was not approved by the WCAB. Through an internal audit, the WCAB discovered that the C&R had never been approved, and the WCJ approved it. This decision was upheld upon Reconsideration.

In *Les Arkenberg v. Indus. Accident Comm 'n* of Cal., 28 Cal. Comp. Cases 119; 1963 Cal. Wrk. Comp. LEXIS 142, a C&R had been negotiated and submitted to the Board for approval. On

the same day the Order Approving the C&R issued, the applicant passed away. Defendants filed a Petition to Reopen, and there was a hearing on that issue. The widow in that matter testified that she did not know her husband had cancer that he did not know he was going to die. The referee in that matter issued a finding of 22 ½% permanent disability. He subsequently issued an Order granting the Petition to reopen and setting aside the C&R, giving the widow only the accrued but unpaid portion of the permanent disability. The widow filed a Petition for Reconsideration, which was granted. An Order rescinding the Order setting aside the C&R. There was very specific language included in the C&R that was submitted, including that there existed a bona fide dispute as to the nature and extent of permanent disability, and that there was a very complex medical picture, that Defendants agreed to the compromise only because of potential liability.

These cases are mostly consistent in granting the WCJ wide discretion in determining under the specific facts to that case of whether the C&R should be approved. The facts in this matter, the undersigned believes, indicate that the C&R should not be approved, and it is not enforceable or "valid". This is a matter where the permanent disability had been paid out. The settlement is primarily for future medical care and the MSA that was obtained and approved by CMS is subsumed into that amount. The facts in this matter are distinguishable from *Les Arkenberg*. In that case great weight was given to the fact that written into the C&R, which resolved all issues, including permanent disability, which was in dispute. The agreement was truly a compromise on the issues and the defendant was quite specific in including language that they only agreed to this compromise because of potential liability. In that case it appears that the parties had a bona fide dispute which was being resolved, and they were clear with their intentions with the language that was included. That is not the case in this matter. Here the C&R is essentially settling out future medical care. The amount remaining after the permanent disability is deducted is $66,900 (after attorneys fees) out of which $41,450, as indicated in paragraph 9 of the C&R (Defendant's Exhibit C) is to fund the CMS approved MSA. This amount alone is to fund treatment the applicant will never have.

The holding in *CNA Insurance v. WCAB* appears to be similarly fact driven. The parties there made multiple attempts to get a C&R approved, even after the applicant's death. Once again the C&R was resolving all issues, and not just future medical, as is the case here. In fact, as noted, the parties stipulated to all the PD being paid out (Minutes of Hearing and Summary of Evidence, page 3, lines 10-13). The undersigned still finds the reasoning in *Ramirez* (supra) to be persuasive. The defendants in the instant case were also unaware of applicant's death prior to signing the C&R. This is a material change of circumstances. Further, as noted in *Ramirez*, the liability for future medical treatment expires with the death of the applicant.

IV.
RECOMMENDATION

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

Dated: 13 January 2023

Joanna Stevenson
Workers' Compensation Judge