WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIBEL GARIBAY, ***Applicant***

vs.

NATIONS SURGERY CENTER II LP dba FOUR SEASONS SURGERY, UNITED FIRE INSURANCE COMPANY; administered by CRUM & FORSTER, ***Defendants***

Adjudication Number: ADJ7361252
Anaheim 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.[1]

The WCAB is vested with "continuing jurisdictional over all of its orders, decisions and awards." (Lab. Code, § 5803.) The Appeals Board has the authority to enforce against an employer or insurer "the recovery of compensation, or concerning any right or liability arising out of or incidental thereto," and for the enforcement of "any liability for compensation imposed upon the employer by this division in favor of the injured employee, his or her dependents, or any third person." (Lab. Code, § 5300(a) and (b).)

While the WCAB's power to alter prior decisions is limited to five years from the date of injury under sections 5410 and 5804, its authority to enforce its awards and to conduct related ancillary proceedings is not time-barred. (*Barnes v. Workers' Comp. Appeals Bd*. (2000) 23 Cal.4th 679 [65 Cal.Comp.Cases 780]; *Nickelsberg v. Workers' Comp. Appeals Bd*. (1991) 54 Cal.3d 288, 297 [56 Cal.Comp.Cases 476].)

[1] We make note of the WCJ's continued patience throughout the pendency of this dispute. We strongly urge the parties to resolve issues informally without involvement of the WCAB given its limited resources and the constitutional mandate that workers' compensation proceedings be expeditious.

Lastly, Appeals Board Rule 10955 provides that in seeking removal a petitioner must "demonstrate that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award." (Cal. Code Regs., tit. 8, former § 10843(a), now § 10955(a) (eff. Jan. 1, 2020).) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656].) Here, the WCJ's decision makes a finding at he has jurisdiction to enforce payment of the award at the indemnity rate of $264.50. This finding determines a substantive right or liability of the parties and is, therefore, final. Accordingly, reconsideration rather than removal is the appropriate remedy.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 9, 2021

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

MARIBEL GARIBAY
REAL & HERNANDEZ
CRUM & FORSTER

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I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT & RECOMMENDATION ON PETITION FOR RECONSIDERATION/ REMOVAL

I
INTRODUCTION

The applicant, Maribel Garibay, born 9/26/1969, while employed on 1/28/2010, as an operating technician, by MRI International/ Nations Surgery Centers III dba Four Seasons Surgery, was stipulated on 6/20/2016 to have sustained injury arising out of and in the course of her employment resulting in 75% permanent disability. The insurance carrier for the employer was United States Fire Insurance Company administered by Crum & Forster.

The parties wrote up the stipulations providing that payment was to be made at the rate of $264.50 per week pursuant to Labor Code §4658(d). The parties left the total value of the settlement, pre life pension, as $138,577.50, and the amount for payment at $264.00 per week. Defendant paid the Award at the weekly rate of $264.50 but stopped paying when the total paid hit $138,577.50 and not $159,016.98.

Defendant later started to pay some of the difference based on the representation of defense counsel on 4/20/2020 that it should be paid. That additional payment stopped shortly thereafter.

Trial was then held as to whether the court had jurisdiction to remedy an alleged clerical drafting error on page three of the 6/20/2016 stipulations. Defendant argues that the court lacks jurisdiction to rescind, alter, or amend an award, more than 5 years from the date of injury. The court found that it had jurisdiction to enforce payment at the stipulated rate of $264.50. Defendant also alleges there was no drafting error.

Defendant filed a timely verified Petition for Reconsideration/ Removal on 2/12/2021.

Defendant argues that its agreement on 4/20/2020 to restart the additional payments was not a waiver of its prior, and current position that no addition money is owed except as to life pension money and that the court lacks jurisdiction to make any corrections.

II.
FACTS

This case had been set for trial on 6/20/2016 on issues that included applicant claiming she was 100% permanently disabled and entitled to the statutory increase in payment value pursuant to Labor Code §4658(d). The parties compromised and entered into stipulations that the applicant was 75% permanently disabled.

The parties wrote up the settlement using figures that did not provide for the 15% increase that they agreed upon. In paragraph three, they then crossed out the weekly rate of $230.00 per week and handwrote $264.50 as the weekly permanent disability rate to be paid. They did not change the $138,577.50 to a $159,016.68 figure. Defendant stopped paying when a total of $138,577.50, absent life pension, was paid.

Applicant later sought the remaining value between $159,016.68 and $138,577.50. Defendant argued that it did not owe the difference in those figures and that the court lacked jurisdiction to correct for any error which defendant actually argues in the petition does not exist.

III.
DISCUSSION

Initially when drafting the settlement papers were being written up, one of the attorneys pulled out the revised stipulation form dated 4/2014, when the increase was no longer applicable to injuries occurring on or after 1/1/2013. Petitioner argues there was no clerical error but that was simply not the case. Applicant's counsel scratched out the weekly payment of $230.00 and changed it to $264.50. Due to the newer form being used, there was no additional line in the form. There was never an attempt to reduce the applicant's 75% permanent disability settlement which they stipulated to be paid at $264.50. They made the mistake of not scratching out $138,577.50 and entering $159,016.68. A life pension was also awarded. Jerry Hernandez was the attorney appearing for applicant and I was the judge. The defense firm, Manning & Kass, has long since been substituted out of the case with the defense now being handled in house at Crum & Forster.

In the interim, there was a trial on applicant's petition for commutation of permanent disability which issued 5/19/2017.

The applicant's request to obtain the full $159,016.68 she argues she was entitled to has been much more recent.

Defendant retained Schlossberg & Umholtz when this issue arose. Applicant's counsel filed a DOR claiming a need for an Expedited trial on the issue of temporary disability when there was no such temporary disability issue outstanding. Although the court was displeased at the content and type of DOR that was filed when clearly the issue related to permanent disability, Mr. Hernandez and James Umholtz appeared and the true nature of the dispute was discussed.

Mr. Umholtz said he would get the payments restarted and he did. He spoke to his adjuster, Carroll Shapiro. Per Mr. Umholtz, the adjuster agreed to restart the payments at the $264.50 weekly rate. His representation was at the

hearing on the telephone (there was no in person appearance due to Covid restrictions). Pursuant to that agreement, a 4/22/2020 Notice Regarding Indemnity Benefits Payment Resume was served representing that payments would be sent to applicant for 77 weeks until $159,016.98 has been paid. This notice was marked and admitted as applicant's Exhibit 18 at the recent trial. Payments then stopped as of 5/7/2020.

When this issue was then set for trial, applicant argued that defendant had now waived any claim of completing payment of the full award for 75% permanent disability at the $264.50 figure. Defendant claimed the restarting of those payments was an error and that nothing was waived.

Applicant's counsel had argued that the court retains jurisdiction to correct an Award when a settlement is ambiguous. Also argued is that counsel had no reason to expect payments to stop until they stopped. The Award is ambiguous.

As argued by defendant, the Labor Code §5803 provides for continuing jurisdiction of the appeals Board over its orders, decisions, and Awards, but per Labor Code §5804, they may not be rescinded, altered, or amended more than 5 years after the date of injury. The parties stipulated to the payment at the legal rate of $264.50. Although the drafting is internally contradictory, the agreement of payment at the legal rate is enforceable.

IV.
RECOMMENDATION

It is recommended that the Petition for Reconsideration and Removal be denied.

DATE: 2/24/2021
Nancy M. Gordon
WORKERS' COMPENSATION JUDGE