WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SANDRA GENOVESE, *Applicant*

vs.

DENNY'S INC.; THE HARTFORD INSURANCE COMPANY OF THE MIDWEST, administered by GALLAGHER BASSETT SERVICES, INC., *Defendants*

Adjudication Numbers: ADJ9701120 (MF); ADJ10123214; ADJ10696420
Van Nuys District Office

OPINION AND ORDERS DISMISSING PETITION FOR RECONSIDERATION AND DENYING PETITION FOR DISQUALIFICATION

Applicant, in pro per, has filed a Petition for Reconsideration[1] of the June 22, 2021 Joint Findings of Fact and Orders issued by the workers' compensation administrative law judge (WCJ). Applicant also seeks to disqualify the WCJ. Based on our review of the petition and for the reasons stated in the Report, which we adopt and incorporate herein, we will dismiss reconsideration and deny the request to disqualify the WCJ.

The Labor Code requires that:

> The petition for reconsideration shall set forth specifically and in full detail the grounds upon which the petitioner considers the final order, decision or award made and filed by the appeals board or a workers' compensation judge to be unjust or unlawful, and every issue to be considered by the appeals board. The petition shall be verified upon oath in the manner required for verified pleadings

[1] The Petition for Reconsideration was filed as two separate documents: one consisting of a 63-page handwritten document and the other consisting of a proof of service and 21 pages of attachments. We admonish applicant for attaching 21 pages that are either already part of the record or have not been admitted into evidence in violation of WCAB Rule 10945(c). (Cal. Code Regs., tit. 8, former § 10842(c), now § 10945(c) (eff. Jan. 1, 2020) and for failing to comply with the page-limit requirement of Administrative Director Rule 10205.12(10). Failure to comply with the WCAB's rules in the future may result in the imposition of sanctions.

> in courts of record and shall contain a general statement of any evidence or other matters upon which the applicant relies in support thereof.
> (Lab. Code, § 5902, emphasis added.)

Moreover, the Appeals Board Rules provide in relevant part: (1) that "[e]very petition for reconsideration … shall fairly state all the material evidence relative to the point or points at issue [and] [e]ach contention contained in a petition for reconsideration … shall be separately stated and clearly set forth" (Cal. Code Regs., tit. 8, former § 10842, now § 10945 (eff. Jan. 1, 2020) and (2) that "a petition for reconsideration … may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved" (Cal. Code Regs., tit. 8, former § 10846, now § 10972 (eff. Jan. 1, 2020).

In accordance with section 5902 and WCAB Rules 10945 and 10972, the Appeals Board may dismiss or deny a petition for reconsideration if it is skeletal (e.g*., Cal. Indemnity Ins. Co. v. Workers' Comp. Appeals Bd. (Tardiff)* (2004) 69 Cal.Comp.Cases 104 (writ den.); *Hall v. Workers' Comp. Appeals Bd.* (1984) 49 Cal.Comp.Cases 253 (writ den.); *Green v. Workers' Comp. Appeals Bd*. (1980) 45 Cal.Comp.Cases 564 (writ den.)); if it fails to fairly state all of the material evidence, including that not favorable to it (e.g., *Addecco Employment Services v. Workers' Comp. Appeals Bd. (Rios)* (2005) 70 Cal.Comp.Cases 1331 (writ den.); *City of Torrance v. Workers' Comp. Appeals Bd. (Moore)* (2002) 67 Cal.Comp.Cases 948 (writ den.); or if it fails to specifically discuss the particular portion(s) of the record that support the petitioner's contentions (e.g., *Moore, supra*, 67 Cal.Comp.Cases at p. 948; *Shelton v. Workers' Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 70 (writ den.).) The petition filed herein fails to state grounds upon which reconsideration is sought or to cite with specificity to the record. Therefore it is subject to dismissal.

If we were not dismissing the Petition for Reconsideration for being skeletal, we would have denied it on the merits for the reasons stated in the Report.

To the extent the petition seeks to disqualify the WCJ, we note that Labor Code section 5311 provides that a party may seek to disqualify a WCJ upon any one or more of the grounds specified in Code of Civil Procedure section 641. (Lab. Code, § 5311; see also Code Civ. Proc., § 641.) Among the grounds for disqualification under section 641 are that the WCJ has "formed or expressed an unqualified opinion or belief as to the merits of the action" (Code Civ. Proc., § 641(f)) or that the WCJ has demonstrated "[t]he existence of a state of mind … evincing enmity against or bias toward either party" (Code Civ. Proc., § 641(g)).

Under WCAB Rule 10960, proceedings to disqualify a WCJ "shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under penalty of perjury stating in detail facts establishing one or more of the grounds for disqualification … ." (Cal. Code Regs., tit. 8, former § 10452, now § 10960 (eff. Jan. 1, 2020), italics added.) It has long been recognized that "[t]he allegations in a statement charging bias and prejudice of a judge must set forth specifically the facts on which the charge is predicated," that "[a] statement containing nothing but conclusions and setting forth no facts constituting a ground for disqualification may be ignored," and that "[w]here no facts are set forth in the statement there is no issue of fact to be determined." (*Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 399, italics added.)

Furthermore, even if detailed and verified allegations of fact have been made, it is settled law that a WCJ is not subject to disqualification under section 641(f) if, prior to rendering a decision, the WCJ expresses an opinion regarding a legal or factual issue but the petitioner fails to show that this opinion is a fixed one that could not be changed upon the production of evidence and the presentation of arguments at or after further hearing. *(Taylor v. Industrial Acc. Com. (Thomas)* (1940) 38 Cal.App.2d 75, 79-80 [5 Cal.Comp.Cases 61].) Additionally, even if the WCJ expresses an unqualified opinion on the merits, the WCJ is not subject to disqualification under section 641(f) if that opinion is "based upon the evidence then before [the WCJ] and upon the [WCJ's] conception of the law as applied to such evidence." (*Id.*; cf. *Kreling v. Superior Court* (1944) 25 Cal.2d 305, 312 ["It is [a judge's] duty to consider and pass upon the evidence produced before him, and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing party."].)

Also, it is "well settled … that the expressions of opinion uttered by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice" under section 641(g) (*Kreling, supra*, 25 Cal.2d at pp. 310-311; accord: *Mackie, supra*, 154 Cal.App.2d at p. 400) and that "[e]rroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias or prejudice, especially when they are subject to review" *(McEwen v. Occidental Life Ins. Co*. (1916) 172 Cal. 6, 11; accord: *Mackie, supra*, 154 Cal.App.2d at p. 400.) Similarly, "when the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies" the judge under section 641(g). (*Kreling, supra*, 25 Cal.2d at p. 312; see also *Moulton Niguel Water Dist.*

v. Colombo (2003) 111 Cal.App.4th 1210, 1219 ["When making a ruling, a judge interprets the evidence, weighs credibility, and makes findings. In doing so, the judge necessarily makes and expresses determinations in favor of and against parties. How could it be otherwise? We will not hold that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias."].)

Under no circumstances may a party's unilateral and subjective perception of bias afford a basis for disqualification. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1034; *Robbins v. Sharp Healthcare* (2006) 71 Cal.Comp.Cases 1291, 1310-1311 (Significant Panel Decision).)

Here, the petition for disqualification does not set forth facts, declared under penalty of perjury, that are sufficient to establish disqualification pursuant to Labor Code section 5311, WCAB Rule 10960, and Code of Civil Procedure section 641(f) and/or (g). Accordingly, the petition will be denied.

For the foregoing reasons,

IT IS ORDERED that the Petitions for Reconsideration are **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 2, 2021

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

SANDRA GENOVESE, IN PRO PER
SLADE NEIGHBORS

PAG/abs

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

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Applicant Sandra Genovese, in pro per, has filed a timely, verified Petition for Reconsideration challenging the Joint Findings of Fact and Orders dated June 22, 2021 wherein it was found that applicant had failed to carry her burden of proof and her motions to set aside the Third-Party Compromise and Release dated January 18, 2018 and the Stipulation & Order dated December 17, 2018 were denied.

II

FACTS

The WCAB is aware of the history of this matter as stated in the undersigned's previous Report & Recommendation on Petition For Reconsideration/Removal filed September 20, 2019 (EAMS Doc 10#7123968) and the Board's Opinion on Decision After Reconsideration dated January 16, 2020 (EAMS Doc 10#72026584).

Following the WCAB's decision after reconsideration returning this matter to the trial level, additional exhibits were admitted into evidence and testimony was taken from the applicant and Jon Dodart. Joint Findings of Fact and Orders dated June 22, 2021 issued wherein it was found that applicant had failed to carry her burden of proof and her motions to set aside the Third-Party Compromise and Release dated January 18, 2018 and the Stipulation & Order dated December 17, 2018 were denied, from which applicant now seeks reconsideration.

III

DISCUSSION

Labor Code section 5702 states:

The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.

Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (*County of Sacramento v. WCAB* (*Weatherall*) (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases I].) As defined in *Weatherall*, "A stipulation is 'An agreement between opposing counsel .. . ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,' (Ballentine, Law Diet. (1930) p. 1235, col. 2)and serves 'to obviate need for proof or to narrow range of litigable issues' (Black's Law Diet.(6th ed. 1990) p. 1415, col. 1) in a legal proceeding." (*Weatherall*, *supra*, 77 Cal.App.4th at p. 1119.)

"Good cause" to set aside an order or stipulations depends upon the facts and circumstances of each case. "Good cause" includes mutual mistake of fact, duress, fraud, undue influence, and procedural irregularities. (*Johnson v. Workmen's Comp. Appeals Bd.* (1970) 2 Cal.3d 964, 975 [35 Cal.Comp.Cases 362]; *Santa Maria Bonita School District v. Workers' Comp. Appeals Bd*. (2002) 67 Cal.Comp.Cases 848, 850 (writ den.); *City of Beverly Hills v. Worker's Comp. Appeals Bd.* (*Dawdle*) (1997) 62 Cal.Comp.Cases 1691, 1692 (writ den.); *Smith v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 1160, 1170 [50 Cal.Comp.Cases 311] (writ den.).) To determine whether there is good cause to rescind the Joint Order Approving, the circumstances surrounding its execution and approval must be assessed. (See Lab. Code, § 5702; *Weatherall*, *supra*, 77 Cal.App.4th at pp. 1118-1121; *Robinson v. Workers' Comp. Appeals Bd.* (Robinson} (1987) 199 Cal.App.3d 784, 790-792 [52 Cal.Comp.Cases 419]; *Huston v. Workers' Comp. Appeals Bd. (Huston*) (1979) 95 Cal.App.3d 856, 864-867 [44 Cal.Comp.Cases 798].)

"The legal principles governing compromise and release agreements are the same as those governing other contracts." *(Burbank Studios v. Workers' Comp. Appeals Bd.* (*Yount*) (1982) 134 Cal.App.3d 929, 935 [47 Cal.Comp.Cases 832].) "An approved workers' compensation compromise and release rests upon a higher plane than a private contractual release; it is a judgment, with the same force and effect as an award made after a full hearing." (Smith, supra, at p. 1169, internal citations and quotations omitted.)

Applicant has the burden of proof to show by a preponderance of the evidence that she should be relieved from the settlement agreement she entered into with defendant while represented by an attorney. (See Lab. Code, § 5705 [the burden of proof rests upon the party with the affirmative of the issue]; see also Lab. Code, § 3202.5 ["All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence"], *Marroquin v. WCAB* (2020) 85 CCC 645).

The WCAB has previously addressed the required showing to prove duress in order to set aside a settlement agreement on this basis:

"[W]hen duress is alleged there must be evidence that the aggrieved party was subjected to threats or coercion that would have induced sufficient fear to compel the party to act in a manner in which he or she would not have normally acted. Fear of the legal process or a possible adverse ruling is not sufficient to justify a finding of duress, nor will duress be found when the aggrieved party knowingly and willingly settled his or her case." (*Beverly Hills Center for Arthroscopic and Outpatient Surgery, LLC v. WCAB*. (*Cardozo*) (2013) 78 Cal.Comp.Cases 340, 342 (writ den.).) This indicates a fairly significant required showing to prove duress by a preponderance of the evidence since the moving party must show evidence of: 1) threats or coercion, 2) those threats or coercion induced sufficient fear to compel the party to act in a manner they would not have normally acted. The Cardozo decision also expressly states that duress will not be found when the party knowingly and willingly settled their case.

APPLICANT'S MOTION TO SET ASIDE THE STIPULATION DATED DECEMBER17, 2018

Having had an opportunity to hear testimony from both the applicant and her counsel Jon Dodart, and based upon the credible testimony of Mr. Dodart, it is found that applicant has failed

to carry her burden of proof to show duress, coercion or threats sufficient to set aside the stipulation. Further, neither applicant's testimony nor the exhibits submitted at the initial trial of this matter nor the additional exhibits subsequently offered by the applicant support a finding of such sufficient duress. Applicant knowingly and willingly entered into the stipulation.

APPLICANT'S MOTION TO SET ASIDE THE JOINT THIRD-PARTY COMPROMISE & RELEASE

The statutes and case law cited above likewise apply to applicant's motion to set aside the Third-Party Compromise & Release. Based upon the credible testimony of Mr. Dodart, it is found that applicant has failed to carry her burden of proof to show duress, coercion or threats sufficient to set aside the C&R. Further, neither the exhibits submitted at the initial trial of this matter nor the additional exhibits subsequently offered by the applicant support a finding of such sufficient duress. Applicant knowingly and willingly entered into the settlement. Applicant stated in testimony that she signed the agreement because" ... she had no money, no job, and was desperate" (Minutes of Hearing 1/6/2021, p.7, 1.16). This demonstrates that it was done willingly and knowingly. She considered her situation at the time and elected to proceed with the settlement.

Mr. Dodart credibly testified that: the applicant never instructed him to not settle the case (MOH 3/30/2021, p. 3, I. 3), applicant "was elated and excited and wanted to know when she would get the money" (ibid, line 5), she even offered to send his family a case of wine and a trip to Hawaii (ibid, line 6). When he met with the applicant at the WCAB in October 2017, he reviewed every page of the settlement document and invited any questions she may have had; it was not rushed. He gave her a copy of the C&R (ibid, lines 13 -20). After filing the C&R and before it was approved, she called his office asking when she would get the money. She never said anything about not wanting the C&R (ibid, lines 22 -24). When the Order Approving C&R was received, he called the applicant to let her know, and "she was happy ... " (ibid, p. 4, I. 11). He credibly refuted applicant's testimony that he had told her not to read the C&R. He spoke to her at length eight days prior to the OACR issuing and she never said she didn't read it (ibid, p.5. I. 4).

Applicant signed both the original C&R and as well as the Third Party C&R. Her only question was when she would receive the money (ibid, p. 7, I. 6)

Based thereon, the motion to set aside the Third Party C&R is denied, and the Order Rescinding the Order Approving is vacated. Petitioner has offered no new evidence or facts to support her petition. The documents attached to the Petition are either part of WCAB electronic file or were previously admitted into evidence (See Exhibits 23, 24, 25 and 26).

A party may not set aside a C&R because she changes her mind [*Brightwell v. IAC* (1964) 29 CCC 26). Further, regret with the settlement does not constitute good cause to set aside the award (*Schroedel v. WCAB* (1997) 62 CCC 1173; *Moyles v. WCAB* (1982) 47 CCC 328 (applicant [dissatisfied] with amount of award), *Valentis v. WCAB* (2015) 80 CCC 328). No duress will be found when there is no evidence that applicant's counsel misrepresented the terms of the settlement (*Sutterfield v. WCAB* (1996) 61 CCC 1231).

DISQUALFICATION

If treated as a Petition for Disqualification, the Petition should fail. Per Rule 10960, the only basis of alleged bias stated by Petitioner is the fact that the ruling went against her. Further, the allegations are made more than 10 days after the alleged grounds for disqualification were known.

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

DATED: JULY 22, 2021

David Brotman
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE