

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

BEATRIZ ROCHA, *Applicant*

vs.

**DRIFTWOOD HEALTHCARE CENTER;
ZURICH AMERICAN INSURANCE COMPANY, administered by GALLAGHER
BASSETT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ10954167
Salinas 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.

Further, we emphasize that the Appeals Board has continuing jurisdiction over all its orders, decisions, and awards made and entered. (Lab. Code, § 5803.)¹ The Appeals Board may rescind, alter, or amend any order, decision, or award, for good cause. (Lab. Code, § 5803.)

However, section 5804 provides that "No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury." "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 v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 1160, 1169, quoting *Johnson v. Workmen's Comp. Appeals Bd.* (1970) 2 Cal.3d 964, 973.) Consequently, after the five-year period has expired, the Findings and Order constitutes a final judgement with the full effect of res judicata. (*Smith v. Workers' Comp. Appeals Bd., supra*, 168 Cal.App.3d at p. 1169.)

¹ All further statutory references are to the Labor Code unless otherwise stated.

In contrast to the limitations imposed by the statute on the Appeals Board to *set aside* an entire award, the Appeals Board continues to have jurisdiction after five years to *enforce* its awards. (*Barnes v. Workers' Comp. Appeals Bd.* (2000) 23 Cal.4th 679, 687.) Consequently, collateral changes may be made to an award so long as the merits of the basic decision determining the worker's right to benefits are not altered, and the amount of benefits remains unchanged. (*Hodge v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 501, 509.) In the instant case, defendant petitioned to change the amount of benefits after the five-year limitation from the date of injury had passed. Therefore, the award may only be set aside on the showing of fraud or mistake pursuant to section 5804. (*Id.*) Here, defendant did not demonstrate that there was fraud or a mutual mistake.

Accordingly, we deny the petition for reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 22, 2024

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

**BEATRIZ ROCHA
RUCKA, O'BOYLE, LOMBARDO & MCKENNA
LAW FIRM OF FRIEDMAN & BARTOUMIAN**

JMR/ara

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 ON PETITION FOR RECONSIDERATION

I INTRODUCTION

On 11/22/23, Defendant filed a timely, verified Petition for Reconsideration of the undersigned's (Amended) Findings and Order that issued on 11/6/23. (EAMS Doc. ID: 77330145) On 12/1/23, Applicant filed an Answer (incorrectly labeled "Petition for Reconsideration") (EAMS Doc. ID: 49338446)

II FACTS

Beatriz Rocha sustained injury AOE/COE to her back, knee, psyche, and digestive system while employed on 11/9/16 as a caregiver at Santa Cruz, California, by Driftwood Healthcare Center, then insured by Zurich American Insurance Company.

On 2/10/23, an Award issued, based on 10/21/22 Stipulations with Request for Award. On 12/9/22, the undersigned had suspended the Stipulations to obtain more information about the discrepancy between TD and PD rates. Defendant responded on 12/22/22. The parties stipulated to PD of 31%, payable at the rate of \$170.57 per week, totaling \$40,020.00, with an attorney's fee of \$6,003.00.

Defendant then raised the issue of alleged "mutual mistake" in calculating the total PD and attorney's fee amounts. Defendant contended that total PD should have been \$23,538.66 based upon a PD rate of \$170.57. Attorney's fees would then be reduced to \$3,530.00 based on that amount. Applicant did not agree. The parties took the matter to trial over whether the Stipulations and Award could be corrected by the court. Applicant also raised the issue of penalties for Defendant's failure to pay the full amount.

The undersigned found that the court has no jurisdiction to make the changes. The court awarded penalties against Defendant for failure to pay the Award in full. Defendant petitions for reconsideration of these findings.

III DISCUSSION

A WCJ's report "cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313." (*City of San Diego v. Workers' Comp. Appeals Bd (Rutherford)* (1989) 54 Cal. Comp. Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd* (1980) 45 Cal. Comp. Cases 1026 (writ den.) To the extent that the undersigned failed to elaborate on her conclusions, they will be discussed below.

Stipulations with Request for Award were filed on 10/21/22. (EAMS Doc. ID: 43579650) The court issued an Order Suspending Action on Stipulations on 12/9/22. (EAMS Doc. ID: 76217547)

The undersigned questioned the discrepancy between the TD rate of \$207.22 and PD rate of \$170.57 noted in the Stipulations.

Defendant filed two responses to the OSA on 12/2/22—identical in all respects, except for counsel’s signature. (EAMS Doc. IDs: 44399168 and 44399307) Defense counsel wrote, “In the Order, you had a question as to the discrepancy between the TTD rate and the applicant’s PD rate. The applicant’s AWW was \$255.86, the TTD was \$170.57, and the PD was \$170.57. However, it was originally calculated as AWW \$309.22 and her TTD was \$206.22. The TTD was paid based on this original calculation.”

On 2/10/23, the undersigned issued the Award. (EAMS Doc. ID: 76419980) Defendant had 30 days (20 plus 10 for mailing) to file for reconsideration. Defense counsel, who is located in California, was served via email on 2/10/23—the twenty-day deadline to file for reconsideration would be extended by five days; another five days would then be added, as Gallagher Bassett’s mailing address is in Iowa. (Lab. Code § 5903; 8 CCR § 10605) Therefore, Defendant had until 3/12/23 to file a petition for reconsideration.

Prior to filing for reconsideration, Defendant could have filed a petition to ask the court to “correct the decision for clerical, mathematical or procedural error or amend the decision for good cause under the authority and subject to the limitations set out in sections 5803 and 5804 of the Labor Code.” (8 CCR § 10966) Instead of filing a petition for relief, Defendant sent a letter with proposed Amended Stipulations to Applicant’s attorney on 2/20/23 explaining that it had come to her attention that the Stipulations contained errors in the total PD amount and attorney’s fees. (Def’t Exhibits D-1 and D-2)

On 3/1/23, Applicant filed a DOR indicating that the parties could not resolve issues of PD, future medical treatment, and the SJDB voucher. (EAMS Doc. ID: 45287511) On 3/23/23, defense counsel filed a letter to the undersigned objecting to the DOR. (EAMS Doc. ID: 45613674) (Lab. Code §§ 5900, 5903) By then, the time for Defendant to petition for reconsideration had passed.

When Defendant failed to petition for reconsideration, the Award became a final judgment. “[T]here exists an important public policy that there be an end to litigation. “[H]ence it is the long established policy of the law to, so far as possible, prohibit the further contest of an issue once judicially decided...” (Citations) This policy underlies the well-established doctrine of finality of judgments (Citations)” (*Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd.* (2010) 181 Cal. App. 4th 752, 771)

Five years have passed from the date of Applicant’s injury on 11/9/16. Pursuant to Labor Code sections 5803 and 5804, the court has jurisdiction to rescind, alter, or amend an award of compensation *within five years of the date of injury*. “This continuing jurisdiction of the Board to ‘review . . . or terminate’ its awards is expressly subject, however, to being exercised ‘within the limits prescribed by this division.’ (§ 5803.) The five-year limitation period set forth by section 5804 is in the same division as section 5803. Section 5803’s continuing jurisdiction, then, is subject to section 5804’s limitation period.” [*Barnes v. Workers' Comp. Appeals Bd.* (2000) 23 Cal. 4th 679, 688-689]

Once the five years have passed, an award may only be set aside upon a showing of extrinsic fraud or mistake.

And when the Board's jurisdiction to rescind, alter or amend has terminated, an order approving a compromise and release, like other awards of the Board, constitutes a final judgment entitled to full res judicata effect. [Citations omitted] As with other final judgments, after the Board's jurisdiction to rescind, alter or amend has expired, an award may be set aside only upon a showing of fraud or mistake of the kind generally referred to as "extrinsic" fraud or mistake. [Citations omitted] [*Smith v. Workers' Comp. Appeals Bd.* (1985) 168 Cal. App. 3d 1160, 1169-1170; 50 Cal. Comp. Cases 311]

In this case, there is no showing, or even allegation, of extrinsic fraud or mistake. Extrinsic fraud occurs when “circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits.”

In contrast with extrinsic fraud, extrinsic mistake exists when the ground of relief is not so much the fraud or other misconduct of one of the parties as it is the excusable neglect of the defaulting party to appear and present his claim or defense. If that neglect results in an unjust judgment, without a fair adversary hearing, the basis for equitable relief on the ground of extrinsic mistake is present. (Citation) Relief will be denied, however, if the complaining party's negligence permitted the fraud to be practiced or the mistake to occur. (Citation) [*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 47]

A unilateral mistake is “not the type of mistake that would constitute a sufficient ground upon which to set aside a final judgment.” (*Smith v. W.C.A.B., supra*, at 1171) “Fraud is intrinsic and not a valid ground for setting aside a judgment when the party has been given notice of the action and has had an opportunity to present his case and to protect himself from any mistake or fraud of his adversary, but has unreasonably neglected to do so.” (Citation)” [*Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750] Defendant has not been prevented from participating in any of the proceedings. Defendant was involved in the drafting of the Stipulations with Request for Award. If any mistake occurred, it was a unilateral mistake on Defendant’s part, which is not a valid basis to set aside a final judgment.

The court does have continuing jurisdiction to enforce its awards, however. (Lab. Code § 5901) The Defendant did not petition for reconsideration, so the Award should have been paid in full but was not. Wherefore, pursuant to Labor Code sections 5800 and 5814, Defendant should pay interest and 25% penalties on any unpaid amounts.

**IV
RECOMMENDATION**

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

ROISILIN RILEY
Workers' Compensation Judge

Served 12/11/2023 on the following: