WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ABIEL HARRISON, *Applicant*

vs.

CANYON SPRINGS POOLS AND SPAS, INC.;
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ9924960
Van Nuys 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 as quoted below, 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 a finding regarding the threshold issue of employment. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, defendant is only challenging an interlocutory finding/order in the decision, namely, the issue of good cause to set aside the January 8, 2020 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 as quoted below, and for the reasons stated below, 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.

We adopt and incorporate the following quote from the WCJ's report:

> **REPORT AND RECOMMENDATION**
> **ON PETITION FOR RECONSIDERATION**
> **I**
> **INTRODUCTION**
>
> Defendant, State Compensation Insurance Fund, the workers' compensation carrier for employer defendant Canyon Springs Pools and Spas, Inc., has filed a timely, verified petition for reconsideration of the June 8, 2021 Findings and Order that the January 8, 2020 Compromise & Release agreement with applicant Abiel Harrison should be set aside, and the Order Approving rescinded, because its reliance on a zero-dollar Medicare Set-Aside (MSA) was a mutual mistake.

Defendant's petition contends that by this decision and order, the undersigned acted without or in excess of his powers, that the evidence does not justify the findings of fact, and that the findings of fact do not support the order and decision. More specifically, the petition contends that there could not have been any mutual mistake about whether Medicare would accept a zero-dollar Medicare Set-Aside, because the parties had no intention of submitting the MSA for Medicare's approval. The petition also contends that a September 14, 2020 letter from the Center for Medicare Services, or CMS, seeking reimbursement from Mr. Harrison of $883.82 under the Medicare Secondary Payer provisions of the Social Security Act, should not have been admitted into evidence over defendant's objection at trial.

No answer to the petition has been received yet from Mr. Harrison, who is representing himself.

II
FACTS

Based on the agreement of both Abiel Harrison, representing himself, and the attorney for State Compensation Insurance Fund, the June 8, 2020 Findings and Order found that Abiel Harrison, while employed during a period from 2000 through 2013, as a professional plumber, by Canyon Springs Pools and Spas, Inc., at Corona, California, claims to have sustained injury arising out of and in the course of employment, and at the time of injury, the employer's workers' compensation carrier was State Compensation Insurance Fund (Minutes of Hearing and Summary of Evidence dated April 12, 2021, page 2, numbered paragraphs 1 and 2).

At the April 12, 2021 trial, both parties also agreed that they had entered a Compromise & Release dated January 8, 2020 that was approved by an Order Approving (Minutes of Hearing and Summary of Evidence dated April 12, 2021, page 2, numbered paragraph 4).

The medical reports of Agreed Medical Evaluator (AME) Alan Sanders, M.D. (agreed to by Mr. Harrison's former counsel) were admitted into evidence as Defendant's A through F. Dr. Sanders found a compensable orthopedic cumulative trauma injury, but without any permanent impairment, based on the doctor's skepticism about Mr. Harrison exaggerating his symptoms after observing the applicant through a window after an evaluation (Report of Dr. Sanders dated June 27, 2017, Defendant's E, page 17, paragraphs 1-5).

A March 10, 2017 report from Dr. Goubran Galal, Primary Treating Physician (PTP), was admitted without objection at trial as Applicant's 1. This report diagnoses several orthopedic conditions affecting the cervical and lumbar spine, both shoulders, both knees and both feet (Report of Dr. Goubran Galal dated March 10, 2017, Applicant's 1, page 6, paragraph 2). All of applicant's other exhibits were met with objections by defendants: Reports from Dr. Uzma

Nassim (Applicant's 2), Dr. Romero (Applicant's 3), and Dr. Mahdad (Applicant's 4), as well as USPS tracking information and return receipts (Applicant's 4), and a September 14, 2020 letter from the Center for Medicare Services, or CMS, seeking reimbursement from Mr. Harrison of $883.82 under the Medicare Secondary Payer provisions of the Social Security Act (Applicant's 6) (Minutes of Hearing and Summary of Evidence dated April 12, 2021, page 2, line 19 through page 3, line 16). A ruling on these objections was deferred to the opinion on decision, which indicated that of these, Applicant's 6 was admitted into evidence over defendant's objection (Opinion on Decision dated June 8, 2021, page 2, last paragraph).

Based on the contents of the Compromise & Release agreement dated January 8, 2020, and the reports of Dr. Alan Sanders that were admitted into evidence at trial as Defendant's A, B, C, D, E, F, and G, it was found that the January 8, 2020 Compromise & Release should be set aside, and the Order Approving rescinded, because its reliance on a zero-dollar Medicare Set-Aside (MSA) was a mutual mistake.

Defendant, State Compensation Insurance Fund, has appealed the Findings and Order with a timely, verified petition for reconsideration. Defendant contends that there was no mutual mistake about a zero-dollar MSA being acceptable to Medicare, and that Applicant's 6, the claim against applicant by Medicare under the Medicare Secondary Payer Act, should not have been admitted into evidence.

III
DISCUSSION

A Compromise & Release agreement may be set aside based on fraud, duress, undue influence, incompetency, or mutual mistake (*Silva v. Industrial Accident Commission* (1924) 68 Cal.App. 510; *Sun Indemnity Co. v. Industrial Accident Commission (McKinney)* (1948) 85 Cal.App.2d 171, [13 Cal.Comp.Cases 82]). In this case, there is a mutual mistake. Both defense counsel and applicant's former counsel apparently believed that a zero MSA would be accepted by Medicare, and the settlement agreement is based on this assumption. This assumption turned out to be incorrect and a mistake. A September 14, 2020 letter from the Center for Medicare Services (CMS), admitted into evidence at trial as Applicant's 6, shows that CMS does not in fact consider this a zero-MSA case, and is charging applicant with payment for treatment from a non-existent MSA fund, which applicant actually paid back to CMS out-of-pocket in the amount of $909.96. Thus, the parties were both mistaken in relying on a zero-dollar MSA as the basis for their settlement agreement. The petition mistakenly assumes that zero-dollar MSAs are never submitted to CMS for approval (Petition for Reconsideration dated June 29, 2021, page 3, lines 3-5)….

The parties' zero-MSA strategy was also mistaken with respect to its interpretation of Dr. Sanders' statements as meaning that there was no compensable injury, which is understandable given Dr. Sanders' harsh criticisms of Mr. Harrison. However, Dr. Sanders writes in the last two lines of page 15 of his report dated May 24, 2017 (admitted into evidence over Mr. Harrison's objection as Defendant's E, with some pages missing): "I have no doubt this patient suffered a continual [sic] trauma." The same statement is on the last two lines of page 15 of the report dated June 27, 2017 (admitted as Defendant's F), which may in fact be the same report, followed by Sanders' reasoning for finding injury: "He did a job for ten or more years involving bending, stooping, lifting, pushing and pulling. One would reasonably expect anyone who would suffer continual [sic] trauma to allow for that concept to be accepted." (*Id*., page 16, lines 1-4.)

Dr. Sanders also notes prior claims, and thinks applicant is exaggerating or malingering (*Id*., page 16, paragraphs 2-7), but treatment cannot be apportioned, so Dr. Sanders' opinion about credibility would not support a zero MSA as long as he finds a treatable injury, which he does. Dr. Sanders himself explains that his finding of "malingering" does not negate his finding of injury: "The diagnosis of malingering does not indicate a patient does not have an injury or injurious exposure… That does not rule out an actual injury." (*Id*., page 16, last paragraph.) The Compromise & Release's reliance on the reports of Dr. Sanders as supporting a zero MSA constitutes yet another mutual mistake. Reliance on Dr. Sanders with respect to impairment would also constitute mutual mistake, as Dr. Sanders does not substantially explain how and why concerns about credibility prevent him from even attempting to use the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition to assess impairment percentages as required under California Labor Code section 4660.1.

It could not possibly have been the parties' intent to subject applicant to unlimited bills from Medicare, potentially up to the entire amount of the settlement. If the undersigned had understood that to be the intent of the parties, the settlement would never have been approved. The undersigned was also complicit in the parties' mutual mistake, by mistakenly believing that Dr. Sanders had found no compensable injury, which was apparently the premise of the entire settlement.

One shortcoming of the opinion is that it does not fully address defendant's objections to Applicant's 2 through 6, and merely indicates that Applicant's 6 was admitted into evidence. That lack of explanation is remedied here, by explaining the basis for admitting that document into evidence and not the others. Applicant's 2, 3, and 4 were not admitted into evidence because they pertain to medical treatment after the date of the compromise and release, so defendants' objection was sustained. Applicant's 6 was admitted into evidence, because defendants' only stated grounds for objection at trial was that the exhibit was "incomplete," and the documents in Exhibit 6 are sufficiently

complete to demonstrate by a preponderance of the evidence that Medicare demanded repayment of $883.82, citing the Medicare Secondary Payer Act, following applicant's settlement, and applicant did apparently pay Medicare $909.96, including interest. The fact that the letter from CMS references a date within the cumulative trauma period instead of the entire cumulative trauma period does not invite the conclusion suggested by defendants, that there must have been another injury of December 20, 2012 with a monetary recovery by applicant. Nothing in EAMS or the extensive medical records reviewed by Dr. Sanders supports such an inference. Although the parties' misinterpretation of Dr. Sanders' reports is a sufficient mutual mistake in itself to set aside the compromise and release, the letter from CMS in Applicant's 6 clearly shows that, contrary to the parties' apparent expectations, applicant is in danger of losing the entire benefit of the bargain contemplated in his settlement, because CMS may in fact demand that the entire settlement—in fact, more than the entire settlement, if interest is added—be turned over to reimburse Medicare.

Accordingly, the Compromise & Release agreement was ordered to be set aside based on a mutual mistake, and the Order Approving Compromise & Release is rescinded. The order expressly states that defendants may assert credit for all sums paid, including payment under the Compromise & Release. The opinion also suggests that Mr. Harrison and State Compensation Insurance Fund obtain substantial evidence in support of an amended settlement agreement, and either obtain advance approval by CMS of an MSA or use a guaranteed MSA that holds applicant harmless from rejection or modification of the MSA by CMS. If this is done, an amended settlement should be possible.

IV
RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be denied.

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. "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.).)

Moreover, 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.)

A mutual mistake of fact occurs when:

> '[An agreement] was made under a mutual mistake of both parties, each believing there was an agreement when there was none.'… [] Consent is not mutual, unless the parties all agree upon the same thing in the same sense.' (Civ. Code, § 1580.) 'If both parties are mistaken, and neither is at fault or both are equally to blame, the mistake may prevent formation of the contract.' [] '[I]n certain cases where there is a mutual misunderstanding regarding the identity of the subject matter of the contract, and either both parties are at fault in creating the mistake, or neither of the parties is at fault, there is no meeting of the minds as to a material matter, and no contract is formed.'
> (*Balistreri v. Nev. Livestock Prod. Credit Ass'n* (1989) 214 Cal.App.3d 635, 641–642 [262 Cal.Rptr. 862].)\

Defendant's argument that the parties did not intend the settlement to be reviewed by CMS (Petition for Reconsideration, at p. 3:35) supports the WCJ's finding of mutual mistake. Given the facts of this case, we agree with the WCJ that there is good cause to set aside the OACR due to mutual mistake.

Therefore, we will deny the Petition as one seeking reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 30, 2021

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

ABIEL HARRISON
STATE COMPENSATION INSURANCE FUND

PAG/abs

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