

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ANA ROMERO, *Applicant*

vs.

**BERBERIAN ENTERPRISES, INC. dba JON'S MARKETPLACE, and AMERICAN
ZURICH INSURANCE COMPANY, administered by ZURICH NORTH AMERICA,
*Defendants***

**Adjudication Number: ADJ10439566
Van Nuys District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petitions for Reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

In this matter applicant has filed two Petitions for Reconsideration. By the April 3, 2020 Petition, applicant seeks reconsideration of the Supplemental Findings of Fact, Orders and Notice of Intention to Impose Sanctions, (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 12, 2020, wherein the WCJ found in pertinent part that applicant's claim of injury to her low back was barred by the April 9, 2018 Compromise and Release (C&R). The Notice of Intention stated that absent a showing of good cause, applicant's counsel would be sanctioned in an amount up to \$2,500.00.

Applicant contends that her low back injury claim was not included in the C&R and that the medical reports submitted as exhibits at the trial are evidence that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her low back.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

By the April 27, 2020 Petition, applicant seeks reconsideration of the April 8, 2020 Order Imposing Sanctions and Reasonable Attorney's Fee (Order) wherein the WCJ determined that applicant's Objection did not show good cause contrary to the Notice of Intention and the WCJ ordered applicant's counsel to pay sanctions in the of \$2,250.00, and pay attorney fees to defense

counsel in the amount of \$3,744.00. The Petition includes the arguments made in the April 3, 2020 Petition, and in addition, applicant contends that since her low back injury claim was not included in the C&R, counsel's pursuit of benefits for the low back injury does not constitute egregious or bad faith conduct warranting the imposition of sanctions and/or the order to pay attorney fees.

We received an Amended Report from the WCJ recommending the Petition be denied and we received a Second Amended Report from the WCJ recommending the Petition be denied. We did not receive an Answer from defendant.

We have considered the allegations in the Petitions and the Answer, and the contents of the Report and Amended Reports. Based on our review of the record, and for the reasons discussed below, we will rescind F&O and the Order, and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

The facts of this matter, which are relevant to the issues raised in applicant's Petitions, are summarized as follows:

Applicant claimed injury to her neck, bi-lateral upper extremities, bi-lateral shoulders, and bi-lateral lower extremities, while employed by defendant as a cashier during the period from January 9, 2009, through May 30, 2015. The injury claim was settled by C&R and the WCJ issued the Order Approving Compromise and Release (OAC&R) on April 9, 2018. Applicant filed a petition to set-aside the OAC&R. The WCJ issued an order suspending the OAC&R but subsequently denied the petition.

By the October 24, 2019 Declaration of Readiness to Proceed, applicant claimed she was entitled to benefits for her back as a result of the injury in case number ADJ10439566. On March 11, 2020, the parties proceeded to trial regarding the issues raised by applicant's back injury claim. (Minutes of Hearing and Summary of Evidence (MOH/SOE), March 11, 2020, p. 2.) The WCJ issued the F&O; in response, applicant filed an Objection to Notice of Intent, and she filed the April 3, 2020 Petition. On April 8, 2020, the WCJ issued the Order and on April 24, 2020, the WCJ submitted his Report. Applicant filed the second Petition on April 27, 2020. The WCJ subsequently submitted the Amended Report and the Second Amended Report.

DISCUSSION

To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a “final” decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1), former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020).) A petition for reconsideration of a final decision by a workers’ compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, former § 10840(a), now § 10940(a) (eff. Jan. 1, 2020).)

The Division of Workers’ Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19). In light of the district offices’ closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (In re: COVID-19 State of Emergency En Banc (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020. Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices’ closure was tolled until April 13, 2020.

We first note that the WCJ issued the Order after applicant filed the initial Petition, but within the 15 day “window” provided in WCAB Rule 10961. (Cal. Code Regs., tit. 8, § 10961.) While we conclude that the WCJ still had jurisdiction over the matter at that time, we nonetheless rescind the Order for the reasons discussed below.

In each of the Reports, the WCJ stated:

In this case, both Dr. Haronian and Dr. Kayvanfar acknowledged, at the time they evaluated the Applicant, that she did sustain an industrial injury to her lumbar spine. As such, the Applicant was aware of this disputed body part when entering into her settlement with the Defendant and was also aware that injury AOE/COE was a threshold issue that was denied.

(Reports, pp. 5 – 6.)

Our review of the reports from Dr. Haronian and Dr. Kayvanfar indicate that the WCJ is correct that the doctors identified an injury to applicant’s low back. (see e.g. Joint Exh. C, Dr.

Haronian, October 5, 2016, p. 10; Joint Exh. E, Dr. Haronian, May 17, 2017, p. 2; Joint Exh. A, Dr. Kayvanfar, April 10, 2017, p. 20; Joint Exh. B, Dr. Kayvanfar, June 04, 2017, p. 4.)

The C&R form instructs the parties to “State with specificity the date(s) of injury(ies) and what part(s) of body, conditions or systems are being settled.” (DWC-CA form 10214 (c) [C&R] p. 3.) The body parts identified in the C&R were neck, upper extremity, shoulder, lower extremity, bilateral wrists, bilateral shoulders, psych, stress, bilateral feet/ankles. (C&R, p. 3.) In the Addendum A, the body parts identified were neck, upper extremities, bilateral shoulders, lower extremities, bilateral hands, psych, stress, bilateral feet/ankles. (C&R, p. 10.)

We note that counsel did strike “PSYCH” and “STRESS,” (C&R p. 3 ¶ 1) and “PSYCH; STRESS; BILATERAL FEET/ANKLES” (C&R p. 10 [Addendum “A”] ¶ 13), which, as noted above, were initially included in the C&R. Counsel indicated that they were not claimed body parts (“not pled by A/A”). The parties also struck language which would have “discharged” defendant from liability for any claims “whether now known or ascertained or which may hereafter arise” as a result of applicant’s employment with defendant. (C&R p. 10, ¶ 13.) Based thereon, it appears that the parties did not intend to settle those issues. Also, the C&R states, “This agreement is limited to settlement of the body parts, conditions, or systems and for the dates of injury set forth...” (C&R p. 5, ¶ 3.)¹

The C&R does not identify the low back as an injured or claimed body part. As noted by the WCJ, the parties were aware of the disputed body part (low back) when entering into the settlement, but the C&R did not include and/or mention the low back. In that the parties “edited” the C&R by striking parts of its original language, and they did not include and/or strike the low back as an injured body part, there is no basis for assuming the parties intended to include the low back in the settlement of the injury claim.

¹ Although the second line of paragraph was stricken, the first line as quoted above was not and therefore is applicable. (*Johns Mansville v. Workers' Comp. Appeals Bd. (Cooper)* (2016 W/D) 81 Cal.Comp.Cases 216; *Orellana v. United Care Services, Inc.*, 2015 Cal.Wrk.Comp. P.D. LEXIS 761; *Rodriguez v. Air Serv. Corporation*, 2015 Cal.Wrk.Comp. P.D. LEXIS 728.) We note that Appeals Board decisions (other than *en banc* decisions) do not have precedential value, however they are significant in that they reveal the Appeals Board's contemporaneous interpretation and application of the workers' compensation laws. (*Smith v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 530, 537, fn. 2 [65 Cal.Comp.Cases 277].)

Although we are not addressing the merits of applicant's low back injury claim, applicant's claim is not barred by the C&R and based thereon applicant does have a viable claim. Additional issues raised by the parties at trial were not addressed in the F&O and are not addressed herein.

Regarding the April 8, 2020 Order, sanctions may be imposed if counsel's conduct constitutes bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. (Lab. Code, § 5813; see also Cal. Code Regs., tit. 8, § 10421.) In the Order the WCJ stated:

Having considered Mr. Nolan's objection, the undersigned WCJ does not accept as credible his claim that his omission of the lumbar spine from his settlement of the Applicant's claim by compromise and release enabled him to further litigate it given that injury AOE/COE had been released in the settlement.
(Order, April 8, 2020.)

As discussed above, applicant's low back injury claim is not barred by the C&R. Therefore, counsel's litigation of the injury claim does not constitute frivolous and/or bad-faith conduct and it is not a basis for imposing sanctions.

Finally, the Petition states that, "[A]pplicant feels that the matter should be transferred to another WCJ for any further matters..." (Petition p. 20.)

Any party to the proceeding may object to the reference of the proceeding to a particular workers' compensation judge upon any one or more of the grounds specified in Section 641 of the Code of Civil Procedure and the objection shall be heard and disposed of by the appeals board.

(Lab. Code, § 5311.)

Pursuant to WCAB Rule 10960:

Proceedings to disqualify a workers' compensation judge under Labor Code section 5311 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 specified in section 641 of the Code of Civil Procedure.

(Cal. Code Regs., tit. 8, § 10960.)

Here, applicant's Petition does not comply with the requirements of Rule 10960. Thus, to the extent it seeks disqualification of the WCJ, that request will not be addressed. However, the Workers' Compensation Act was designed to "accomplish substantial justice . . . expeditiously, inexpensively, and without incumbrance of any character...." (Cal. Const., art. XIV, §4.) Clearly,

our system is intended to facilitate the parties' timely and efficient resolution of their disputes. Under these circumstances we must encourage the parties to work together with the WCJ in a spirit of cooperation and collaboration, in order to conclude the litigation of this matter in a prompt, expedient, and appropriate manner.

Accordingly, we rescind F&O and the Order, and return the matter to the WCJ for further proceedings consistent with this opinion, and a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Supplemental Findings of Fact, Orders and Notice of Intention to Impose Sanctions, issued by the WCJ on March 12, 2020, and the April 8, 2020 Order Imposing Sanctions and Reasonable Attorney's Fee are **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 3, 2021

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

**ANA ROMERO
LAW OFFICES OF RONALD J. NOLAN
FLOYD, SKEREN, MANUKIAN & LANGEVIN**

TLH/*pc*

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