

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

**JACOB PENNER (Deceased), *Applicant***

**vs.**

**MARQUEE FIRE PROTECTION, LLC; BERKSHIRE HATHAWAY HOMESTATE  
INS. CO. DBA BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ18235480  
Oakland District Office**

**OPINION AND ORDER  
DISMISSING PETITION FOR  
RECONSIDERATION**

Dependent Nancy Arreguin, in her individual capacity and in her capacity as guardian ad litem and trustee for Dependent Asher Penner, a minor child (Dependent) seeks reconsideration of the Order Approving Compromise and Release and Order Taking Matter Off Calendar (OACR and OTOC) issued by the workers compensation administrative law judge (WCJ) on October 9, 2023.

Dependent contends that the OACR and OTOC should be vacated or set aside.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that: “. . . the parties meet and confer to discuss whether they can stipulate to set aside the Order Approving, or that the Appeals Board treat the Petition for Reconsideration as a Petition to Set Aside the Compromise and Release and that the matter be remanded for consideration of that issue.”

We have considered the allegations of the Petition for Reconsideration (Petition), the Answer, and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report as well as the reasons provided below, we will dismiss the petition as one for reconsideration, so that the WCJ can consider the Petition to set aside the Order Approving Compromise and Release in the first instance.

## **BACKGROUND**

Dependent Nancy Viridiana Arreguin in her individual capacity and in her capacity as guardian ad litem and trustee for Dependent Asher Penner, a minor child (Dependent) claim that Jacob Penner while employed at Sacramento on December 22, 2022, by defendant allegedly sustained injury arising out of and in the course of such employment as follows: “Mr. Penner was driving his personal vehicle on the way to work, when he was involved in an auto accident and lost his life.”

On September 19, 2023, defendant submitted a letter with the fully executed C&R and multiple enclosures to the WCJ requesting that it be reviewed and approved. Both the C&R and dependency claim were signed by defendant and the alleged dependent Nancy Arreguin, who was the live-in girlfriend and mother of Asher Penner, the minor child of decedent. When the C&R and dependency claim were executed, neither the alleged dependent nor the minor child were represented by an attorney.

On September 20, 2023, the WCJ issued an Order Appointing Nancy Viridiana Arreguin as guardian ad litem and trustee for Asher L. Penner, a minor/incompetent.

On September 20, 2023, the WCJ issued an Order Suspending Action on Compromise and Release (Order). The Order states:

The above document is on file herein. Approval thereof will be stayed and will be considered again only after the additional information requested below has been filed or the required action taken. Additionally, this matter will be:

Taken off calendar without further Order of this District Office

Set for conference

Action has been suspended for the following reason (s):

1. Further information is required before the settlement can be approved. First, the parties did not present any evidence of the alleged intoxication. Next, it is well established that the going and coming rule is riddled with numerous exceptions and it is unclear whether this claim falls into one of those exceptions. Finally, I am concerned about the adequacy of the settlement in light of the benefits described in section 4703.5. I would encourage Ms. Viridiana Arreguin to consult with an attorney. This case is being set to discuss these issues.

On September 29, 2023, defendant filed a letter with attachments addressed to the WCJ dated September 7, 2023. Despite the letter being dated September 7, 2023, it states: “The parties are in receipt of your Order Suspending Action (OSA) dated 9/19/23. Defendant had submitted

the C&R settlement packet for approval that same day. We wanted to address the concerns laid out in your OSA.”

On October 9, 2023, the WCJ issued an Order Approving Compromise and Release and Order Taking Matter Off Calendar (OACR and OTOC). The Order states:

The parties to the above-entitled action have filed the Compromise and Release and have waived the provisions of Labor Code 5313. Based upon a review of the medical file, discussion with the parties, and the reasons for settlement set forth in the agreement, the Compromise and Release is deemed adequate. In determining the adequacy of the Agreement, the following has also been considered:

[X]The court has considered the applicant’s dependent’s rights to death benefits in determining the adequacy of the Compromise and Release. *Summer v. WCAB*, 48 CCC 369

[X] The Compromise and Release lists good faith issues of law and/or fact that if resolved against the applicant would defeat the applicant’s right to compensation in whole or in part. *Thomas v. Sports Chalet, Inc.* 42 CCC 625 / *Beltran v. Structural Steel Fabricators* 81 CCC 1224

[X] This matter is taken off calendar

IT IS ORDERED that said Compromise and Release is approved. Award is made in favor of Applicant and against Berkshire Hathaway Homestate Ins. Co. payable as follows:

Total Settlement Amount	\$350,000.00
Less reasonable attorney fees in the amount of	\$ n/a
payable to Nancy Veridiana Arreguin (on Jacob Penner/Asher Penner behalf)_	
Balance to be paid to Nancy Arreguin_(for herself and Jacob/Asher Penner).	\$350,000.00

On October 9, 2023, a Notice of Representation and Request for Notice and Service was filed by Elaine Deane, of the Law Offices of Grundman and Deane for Nancy Arreguin, in her individual capacity and her capacity as guardian ad litem and trustee for dependent Asher Penner, a minor child and incompetent.

On October 23, 2023, dependent Nancy Arreguin, in her individual capacity and in her capacity as guardian ad litem and trustee (Dependent) for Dependent Asher Penner, a minor child filed a Petition for Reconsideration of the Order Approving Compromise and Release and Order Taking the Matter Off Calendar.

## DISCUSSION

“The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of [Division 4]. . . At any time, upon notice and after the opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.” (Lab. Code, § 5803. <sup>1</sup>)

We observe that contract principles apply to settlements of workers’ compensation disputes. The legal principles governing compromise and release agreements are the same as those governing other contracts. (*Burbank Studios v. Workers’ Co. Appeals Bd.* (1982) 134 Cal.App.3d 929, 935.) There can be no contract unless there is a meeting of the minds and the parties mutually agree. (Civ. Code, §§ 1550, 1565; *Sackett v. Starr* (1949) 95 Cal.App.2d 128; *Sieck v. Hall* (1934) 139 Cal.App.279, 291.) Moreover, there is no contract unless the parties agree upon the same thing in the same sense. (Civ. Code, § 1580; *American Can Co. v. Agricultural Ins. Co.* (1909) 12 Cal.App. 133, 137.) For a compromise and release agreement to be effective, the necessary elements of a contract must exist, including an offer of settlement of a disputed claim by one of the parties and an acceptance by the other. (*Burbank Studios, supra*, at p. 935.) A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. (Civ. Code, § 1636; *County of San Joaquin v. Workers’ Compensation Appeals Bd. (Sepulveda)* (2004) 117 Cal.App.4th 1180, 1184 [69 Cal.Comp.Cases 193].) The plain language of a contract is the first step in determining the intent of the parties. (Civ. Code, §§ 1638, 1639.)

“The Workers’ Compensation Appeals Board shall inquire into the adequacy of all Compromise and Release agreements and Stipulations with Request for Award, and may set the matter for hearing to take evidence when necessary to determine whether the agreement should be approved or disapproved, or issue findings and awards.” (Cal. Code Regs., tit. 8, § 10700(b).)

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 Dict. (1930) p. 1235, col. 2) and serves ‘to obviate need for proof or to narrow range of litigable issues’ (Black’s Law Dict. (6th ed. 1990) p. 1415, col. 1) in a legal proceeding.” (*County of Sacramento v. Workers’ Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1118 [65 Cal.Comp.Cases 1].) Stipulations are binding on the parties. (*Id.*, at p. 1121.) However, if there is a showing of good cause,

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise stated.

the parties may be permitted to withdraw from their stipulations. (*Id.*) Whether “good cause” exists to set aside a settlement 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. (Recinos)* (2002) 67 Cal.Comp.Cases 848, 850 (writ den.); *City of Beverly Hills v. Workers’ Comp. Appeals Bd. (Dowdle)* (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].) To determine whether there is good cause to rescind the awards and stipulations, the circumstances surrounding their execution and approval must be assessed. (See Labor Code § 5702; *Weatherall, supra*, at pp. 1118-1121; *Robinson v. Workers’ Comp. Appeals Bd. (Robinson)* (1987) 194 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].)

Here, dependent Nancy Arreguin in her own individual capacity and her capacity as guardian ad litem and trustee for dependent Asher Penner, a minor child alleges among other issues: “. . . 3. That the petitioner has discovered new evidence material to her which she could not with reasonable diligence have discovered and produced at the hearing (since there was no hearing); and 4. That the findings of fact do not support the order, decision or award.”

Decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Furthermore, 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]; *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ’s decision and the WCJ shall “. . . make and file findings upon all facts involved in the controversy[.]” (Lab. Code, § 5313; *Hamilton, supra*, at p. 476; *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-622.) “It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence.” (*Hamilton, supra*, at p. 475.) The WCJ’s decision must “set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on,” so that “the parties,

and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record.” (*Hamilton, supra*, at p. 476 (citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).) The parties must have an opportunity to be heard and the WCJ must create a complete record.

The Appeals Board’s record of proceedings is maintained in the adjudication file and consists of: the pleadings, minutes of hearing and summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits marked but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards, and the arbitrator’s file, if any. . . Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings. (Cal. Code Regs., tit 8, §10803.)

Additionally, there must be a complete record in order to review the case. “[A] proper record enables any reviewing tribunal, be it the Board on reconsideration or a court on further appeal, to understand the basis for the decision (*Hamilton v. Lockheed Corporation* (2001) 66 Cal. Comp. Cases 473, 475 [2001 Cal. Wrk. Comp. LEXIS 4947 (Appeals Bd. en banc).)

Here, the WCJ did not hold a hearing on the C&R and did not have the opportunity to assess whether the parties understood the meaning of the terms in the C&R. Further, it appears that applicant retained an attorney on September 29, 2023, which was after the C&R was executed and an order suspending action issued by the WCJ, but it appears that applicant’s attorney was not included in the proceedings or legal process thereafter and prior to the Order approving such Compromise and Release on October 9, 2023. Therefore, all the parties must have an opportunity to be heard and the WCJ must create a complete record.

A WCJ’s decision must be based on admitted evidence and must be supported by substantial evidence (Lab. Code, §§ 5903, 5952(d); *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc) (*Hamilton*); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd.* (*Garza*) (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16]). “It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence.” (*Hamilton, supra*, at p. 475.)

The WCJ is “charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton*, supra, at pp. 475-476; see Lab. Code, § 5313 and *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-22.) Pursuant to section 5313: The appeals board or the workers’ compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made. (Lab. Code, § 5313.)

All parties in workers’ compensation proceedings retain their fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805] (*Rucker*).) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (*Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker*, supra, 82 Cal.App.4th at pp. 157-158, citing *Kaiser Co. v. Industrial Acc. Com.* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710-712 [57 Cal.Comp.Cases 230].)

Here, applicant contends in her Petition that the C&R should be set aside because her due process rights were denied when the WCJ took the status conference off calendar, approved the Compromise and Release, and issued the Order Approving same on October 9, 2023, without holding a hearing. Since the WCJ did not hold a hearing prior to approving the C&R, the WCJ did not have the opportunity to assess the basis of the parties’ understanding of the C&R and to review the evidence submitted by defendant. Further, dependent was not represented by an attorney when she entered into the C&R nor did she have the opportunity to submit and/or rebut evidence.

Accordingly, we dismiss dependent’s Petition as premature, and return the matter to the WCJ for further proceedings consistent with this decision. Upon return of this matter to the trial level, we recommend that the WCJ treat dependent’s Petition as a Petition to set aside including setting a hearing so dependent can provide evidence in support of her arguments and create a record upon which a decision can be made by the WCJ. After the WCJ issues a decision, any aggrieved person may then seek reconsideration of that decision.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration, filed October 23, 2023, is **DISMISSED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**December 20, 2023**

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

**ASHER PENNER  
BERKSHIRE HATHAWAY  
LAW OFFICES OF GUNDMAN AND DEANE  
JACOB PENNER  
LAW OFFICES OF KAPLAN & BOLDY  
MARQUEE FIRE PROTECTION  
NANCY ARREGUIN**

**DLM/oo**

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