

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

JESUS LIZARDO, *Applicant*

vs.

**HOME CARE ASSISTANCE, LLC;
administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants***

**Adjudication Number: ADJ11129122
Salinas District Office**

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to study the factual and legal issues in this case.¹ This is our Opinion and Decision After Reconsideration.

Applicant, in pro per, seeks reconsideration of the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on July 11, 2019. The WCJ found in relevant part that applicant is not entitled to temporary disability indemnity from June 12, 2017 and continuing. The WCJ also found that EDD is not entitled to reimbursement for unemployment benefits paid to applicant. Applicant contends that the WCJ erred in finding that he was not entitled to temporary disability indemnity. Applicant also appears to be seeking reconsideration of the Stipulations with Request for Award (Award) issued by the WCJ on September 22, 2020. By the Award, the WCJ approved stipulations between the parties that applicant's injury caused no temporary disability and caused 16% permanent disability with an award for future medical treatment.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our decision after reconsideration, we will vacate our order granting reconsideration and dismiss applicant's Petition. Upon return, the WCJ may consider the Petition as one to set aside.

¹ Commissioners Sweeney and Lowe, who were on the panel that issued the order granting reconsideration, no longer serve on the Appeals Board. Other panelists were appointed in their place.

FACTUAL BACKGROUND

Applicant claims injury to his low back on June 3, 2017, while employed as a caretaker by Homecare Assistance, LLC.

The matter initially went to trial on May 13, 2019, at which time applicant was represented by an attorney. The Minutes of Hearing and Summary of Evidence state that the disputed issues included temporary disability, with applicant claiming indemnity from June 12, 2017 to the present and continuing, and the lien of EDD for unemployment benefits. (Minutes of Hearing; Summary of Evidence, May 13, 2019, p. 2.) Multiple exhibits were offered into evidence and two witnesses testified at trial, including applicant. (*Id.* at pp. 2-12.)

The WCJ issued the resulting Findings on July 11, 2019, wherein it was found that applicant was not entitled to temporary disability indemnity from June 12, 2017 and continuing, and EDD was not entitled to reimbursement for unemployment benefits. The decision indicates that it was served on the parties on the official address record.

Defendant filed a declaration of readiness to proceed (DOR) on June 17, 2020. The disputed issue was stated as:

APPLICANT HAS BEEN UNRESPONSIVE TO ATTORNEY REGARDING SETTLEMENT. WCAB INTERVENTION NECESSARY TO HELP BRING CLAIM TO RESOLUTION.

(Defendant's DOR, June 17, 2020, p. 2.)

Defendant filed the December 26, 2019 report of the qualified medical evaluator (QME), Ali Soozani, D.O., in support of its DOR.

The matter proceeded to a hearing on September 9, 2020. The Minutes reflect that applicant was represented by a hearing representative, but was not present at the hearing. The Minutes indicate settlement pending and state: "Settlement to be e-filed." (Minutes of Hearing, September 9, 2020.) The matter was taken off calendar.

On the same date as the hearing, defendant submitted Stipulations with Request for Award to the WCJ for approval. The WCJ issued the Award approving the stipulations between the parties on September 22, 2020 and designated defendant's attorney to serve the Award.

On February 18, 2021, applicant's attorney filed a Petition to be Relieved as Counsel requesting an order relieving him as counsel. Applicant also separately filed a Notice of Dismissal of Attorney, which was date stamped as received by the district office on February 24, 2021.

DISCUSSION

Applicant's Petition is not a model of clarity. However, he states as relevant herein that: "my lawyer I think did not file an appeal for my loss [*sic*] wages or temporary disability."

With respect to a challenge of the July 11, 2019 Findings, there are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903;² Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, § 10940(a); § 10615(b).)

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].)

Applicant's Petition is date stamped as filed with the district office on February 24, 2021. This was more than 25 days after the service of the WCJ's July 11, 2019 decision and beyond whatever extension of time, if any, applicant might have been entitled to under WCAB Rule 10600.

Therefore, to the extent that applicant's Petition seeks reconsideration of the July 11, 2019 Findings, the Petition was subject to dismissal with regard to that decision.

As discussed above, a petition for reconsideration must be filed within 25 days of service of the decision. Where an order can be shown to have been defectively served, the time limit begins to run as of the date of receipt of the order. (*Hartford Accident & Indemnity Co. v. Workers' Comp. Appeals Bd. (Phillips)* (1978) 86 Cal.App.3d 1 [43 Cal.Comp.Cases 1193].)

² All further statutory references are to the Labor Code unless otherwise stated.

Defendant was designated to serve the September 22, 2020 Award. Applicant's Petition and supplemental correspondence were filed on February 24, 2021. However, there is no proof of service in evidence reflecting when defendant's attorney served the Award on applicant. Accordingly, to the extent that the Petition challenges the Award, it could be considered to be timely filed.

The parties stipulated that applicant's injury did not cause temporary disability. As noted above, applicant disputes that he was not entitled to temporary disability indemnity. He further appears to dispute the circumstances regarding executing the signatures on the Stipulation, and the lack of an opportunity to appear before the WCJ when the Stipulations were approved.

"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.)

In *Camacho v. Target Corp.* (2018) 24 Cal.App.5th 291, 301-302 [83 Cal.Comp.Cases 1014], the Court observed that:

Given the more informal nature of workers' compensation proceedings, there are certain safeguards in place to protect workers from unknowingly releasing their rights. For example, "[t]o safeguard the injured worker from entering into unfortunate or improvident releases as a result of, for instance, economic pressure or bad advice, the worker's knowledge of and intent to release particular benefits must be established separately from the standard release language of the form. [Citation.]" (*Ibid.*) Further, "[e]ven with respect to claims within the workers' compensation system, execution of the form does not release certain claims unless specific findings are made. [Citations.]" (*Ibid.*)

The board or referee must inquire into the fairness and adequacy of a settlement and may set the matter for hearing to take evidence when necessary to determine whether to approve the settlement. (*Id.* at p. 181; Cal. Code Regs., tit. 8, §§ 10870, 10882³.) "These safeguards against improvident releases place a workmen's compensation release 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.' [Citation.]" (*Johnson v. Workmen's Comp. App. Bd.* (1970) 2 Cal.3d 964, 973 [88 Cal.Rptr. 202, 471 P.2d 1002]; see also *Steller*, at p. 181.) (*Camacho, supra*, at pp. 301-302.)

³ Effective January 1, 2020, WCAB Rules 10870 and 10882 are now WCAB Rule 10700.

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. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].) 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 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." (*Weatherall, supra*, 77 Cal.App.4th at p. 1119.)

As stated in *Camacho, supra*:

We interpret a release or settlement agreement under the same rules of construction that apply to contracts generally. (Civ. Code, § 1635; *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524 [117 Cal. Rptr. 2d 220, 41 P.3d 46].) We interpret a contract to give effect to the mutual intention of the parties at the time they formed the contract. (Civ. Code, § 1636; *Hess*, at p. 524.) We discern the parties' intention based on the written contract alone, if possible, but may also consider the circumstances under which the contract was made and its subject matter. (Civ. Code, §§ 1639, 1647; *Hess*, at p. 524.) We consider the contract as a whole, and interpret contested provisions in their context, not in isolation, with the aim of giving effect to all provisions, if doing so is reasonably possible. (Civ. Code, § 1641; *People v. Doolin* (2009) 45 Cal.4th 390, 413, fn. 17 [87 Cal. Rptr. 3d 209, 198 P.3d 11]; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473 [80 Cal. Rptr. 2d 329] ["Courts must interpret contractual language in a manner which gives force and effect to every provision, and not in a way [that] renders some clauses nugatory, inoperative or meaningless".]) (*Camacho, supra*, at p. 306.)

“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. (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] (writ den.)) To determine whether there is good cause to rescind the Award, the circumstances surrounding its execution and approval must be assessed. (*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].)

All parties to a workers’ compensation proceeding retain the 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].) A fair hearing is “. . . one of ‘the rudiments of fair play’ assured to every litigant . . .” (*Id.* at p. 158.) As stated by the California Supreme Court in *Carstens v. Pillsbury* (1916) 172 Cal. 572, “the commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law.” (*Id.* at p. 577.) 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. (See *Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker, supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com. (Baskin)* (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 [57 Cal.Comp.Cases 230].) Furthermore, the “administration of justice is founded on the principle that every litigant shall have a fair opportunity to present to the court material evidence in support of his valid claim.” (*Walker Mining Co. v. Industrial Acci. Com. (Galeazzi)* (1939) 35 Cal.App.2d 257, 262.)

Applicant contends that he was “not presented by the court to choose stipulation and award as [he] wanted.” The record shows that applicant was not present at the September 9, 2020 hearing.

There is also no record that the WCJ inquired as to the adequacy of the Award before approving it. When presented with stipulations with request for award, the WCJ “shall inquire into the adequacy of all...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...” (Cal. Code Regs., tit. 8, § 10700(b).)

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].) It is premature for the Appeals Board to address the merits of applicant’s Petition in the absence of an evidentiary record regarding his contentions. (See *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [decisions of the Appeals Board must be based on admitted evidence in the record].) There has been no evidence or testimony under oath admitted into the record regarding the allegations in his Petition, i.e., there is no evidence upon which we could base a decision. When the matter is returned to the trial level, the WCJ should conduct an evidentiary hearing to permit applicant to provide evidence in support of his arguments and create a record upon which a decision can be made. Either party may then timely seek reconsideration of that decision and the Appeals Board can then address the issues with the benefit of an evidentiary record.

Thus, we treat applicant’s pleadings as a petition to set aside the September 22, 2020 Award, vacate our grant of reconsideration and dismiss the Petition for Reconsideration as premature. Upon return, the Petition should be treated as a petition to set aside, and applicant should be provided with an opportunity to present evidence regarding the conditions surrounding the execution of the Stipulations and whether there is good cause to set aside the Award.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Opinion and Order Granting Petition for Reconsideration issued by the Workers' Compensation Appeals Board on April 26, 2021 is **VACATED**.

IT IS FURTHER ORDERED as that applicant's Petition for Reconsideration is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 13, 2024

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

**JESUS LIZARDO, IN PRO PER
RTGR LAW LLP**

AS/mc

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