

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

ERNESTO MAGANA, *Applicant*

vs.

**TRINET GROUP INCORPORATED; ACE AMERICAN INSURANCE COMPANY,
administered by CANNON COCHRAN MANAGEMENT SERVICES INCORPORATED,
*Defendants***

**Adjudication Number: ADJ15811594
San Bernardino District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the April 18, 2023 Findings and Award (F&A), in which the workers' compensation administrative law judge (WCJ) found that: defendant/defense counsel was aware that the Labor Code section 132(a)¹ claim was not included in the settlement on or before July 12, 2022; defendant/defense counsel was aware that "Hanna Brophy" may not represent the employer for the section 132(a) claim on or before July 14, 2022; defendant's action of filing the Compromise and Release (C&R) on July 12, 2022 constitutes a unilateral mistake; and, defendant's action of not issuing payment for the Order Approving Compromise and Release (OACR) dated July 20, 2022 until November 28, 2022, constitutes bad-faith actions or tactics that were frivolous or solely intended to cause unnecessary delay, therefore penalties pursuant to section 5814 are warranted. She further found that applicant is entitled to a 25% penalty pursuant to section 5814, interest pursuant to section 5800, and attorney's fees pursuant to section 5814.5.

Defendant contends that its petition to set aside the C&R was never adjudicated, in violation of defendant's right to due process.

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

We received a Report and Recommendation (Report) from the WCJ, wherein she recommends that the Petition for Reconsideration be denied.

We received an Answer from applicant.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the Report. Based on our review of the record and for the reasons discussed below, we will rescind the F&A and return this matter to the trial level for further proceedings consistent with this decision.

BACKGROUND

Applicant, defendant's employer, and defendant's insurance company, Ace American Insurance Company, entered into a C&R to resolve applicant's claim of injury while employed on July 19, 2021 as a rim repairer for defendant. As relevant herein, Addendum A states that the section 132a claim is "expressly excluded" from the settlement. The C&R was signed by applicant on June 15, 2022, applicant's attorney on June 24, 2022, and defendant's attorney on July 12, 2022. Defendants submitted the C&R to the WCAB on July 12, 2022 for approval.

In a chain of emails between applicant's attorney and defendant's attorney on July 14, 2022, defendant's attorney affirmatively states that: "The 132a is settled separately, is it not?" (Exhibit 2.)

On July 20, 2022, the WCJ issued an OACR, approving an agreement that defendant would pay applicant \$30,000 for his claimed injuries.

On August 9, 2022, defendant filed a petition to set aside the C&R citing mutual mistake because the C&R did not include settlement of applicant's section 132a claim.

On August 11, 2022, applicant filed a response to the petition to set aside. Applicant alleged that defendant's attorneys did not represent the employer on the section 132a claim; that the employer was represented by separate counsel for the section 132a claim; and that applicant was in the process of resolving that case separately.

On September 21, 2022, the parties appeared at a status conference. According to the Minutes:

Def counsel for 132a has a tentative settlement agreement for the 132a claim with aa.

Joint request to move case to msc; issues for msc relate to the oacr on the wc claim, and whether there is basis to set aside the same. (All caps omitted.)

Subsequently, applicant and defendant employer entered into a separate C&R agreement to resolve the section 132a claim, and it was signed by applicant on September 22, 2022, by applicant's attorney on September 27, 2022, and by defendant's attorney on September 29, 2022. A WCJ issued an OACR for that C&R on October 19, 2022.

On October 25, 2022, defendant filed a Declaration of Readiness (DOR) on its petition to set aside.

On November 23, 2022, the parties appeared at a mandatory settlement conference (MSC). At the joint request of the parties, the matter was taken off calendar. According to the Minutes:

Def no longer pursuing its petition to vacate oacr dated 7/20/2022 in light recent resolution 132a claim. Def represents that it will now pay in accordance with oacr dated 7/20/2022. matter off calendar.

AA's petition for 5814 filed on 11/22/2022 reserved.

EDD lien remains outstanding and defense to resolve. (All caps omitted.)

On December 1, 2022, applicant filed a DOR on the issues of non-payment of settlement proceeds, penalties, interest and attorney fees.

On December 29, 2022, the parties appeared at an MSC. According to the Minutes:

Parties jointly request trial on request for penalties and interest related to settlement payments. PTCS may be emailed to the WCJ by 4:00 on 12/29/2022 or must be filed no later than 12/30/22. (All caps omitted.)

The matter proceeded to trial on February 7, 2023. The issues listed were: 1. Timeliness of petition to set aside; and 2. Penalties, interest, attorney fees and the petition for penalties for unreasonable delay with respect to the July 20, 2022 OACR.

The Minutes of Hearing state that:

LET THE MINUTES REFLECT that with respect to the exhibits, the Court is taking judicial notice of the Order Approving Compromise and Release on July 20, 2022, the Petition to Set Aside dated August 9, 2022, the Response to the Petition to Set Aside dated August 11, 2022, and the Petition for Penalties dated November 22, 2022.

The only evidence submitted was by applicant as follows: Exhibit 1, letter to defendants dated August 11, 2022; Exhibit 2, e-mails to and from defendant dated July 14, 2022; Exhibit 3, e-mails to and from defendant dated August 3, 2022; Exhibit 4, calculation of penalties and interest on late payment. According to Exhibit 4, which is a document prepared by applicant's attorney, defendant

did not make payment until November 28, 2022. *Defendant submitted no evidence, and neither party presented any witness testimony.*

DISCUSSION

I.

Defendant contends in its verified Petition for Reconsideration that:

On 06/16/2022 Defense counsel received a partially executed Compromise and Release from Applicant's counsel *in the mail*. This document was mailed by Applicant's counsel to Defense counsel with Applicant's signature and Applicant counsel's signature. *Defense counsel erred and forwarded the document to Defense counsel's staff for e-filing*. The version of the Compromise and Release erroneously e-filed was a version of the documents Defendant had already rejected. This version did not represent a meeting of the minds of the parties as it did not include the Petition for 132(a) benefits.

On 08/09/2022 Defense counsel filed a Petition to Set Aside the Order Approving C&R dated 07/20/2022 on the basis of mutual mistake of fact. The ground for mutual mistake of fact being that the Petition for 132(a) Benefits was not included in the submitted C&R document and there was no meeting of the minds on the underlying C&R *as the filed version of the C&R had been rejected by Defense counsel prior to receipt of the signed version by Applicant's counsel*.

The parties appeared to [sic] a Mandatory Settlement Conference on 11/23/2022. Since the Petition for 132(a) was now resolved via separate C&R, Defense counsel agreed to proceed with payment of the Order Approving C&R dated 07/20/2022. *At no time did Defense counsel withdraw their Petition to Set Aside*. The validity of the Petition to Set Aside has not been adjudicated. Defense counsel issued payment under the Order Approving C&R dated 07/20/2022 on 11/28/2022.

In our present case, there was no meeting of the minds on the Compromise and Release dated 06/16/2022. Defense counsel was very clear in both the Petition to Set Aside dated 08/09/2022 and in the Trial Brief dated 02/17/2023 that the negotiations over the Compromise and Release had been defunct at the time Defense counsel received a partially signed version of the Compromise and Release in her scanned mail. *An administrative mistake was made by Defense Counsel* and the Compromise and Release was e-filed for an Order Approving. Defense counsel notified both the WCAB via timely Petition to Set Aside and Applicant's counsel that a mistake was made and there was never a meeting of the minds on the terms of the Compromise and Release.

Due process allows all parties to be heard properly on an issue. In this matter, WCJ Hirsch *proceeded forward on the substance of Defendant's Petition to Set Aside* without it actually being set for trial. This is a direct violation of Defendant's due process and Defense's ability to submit proper evidence and

argument to the WCAB. *Further, WCJ Hirsch issued an opinion on penalties associated with the Petition to Set Aside when the underlying Petition was not adjudicated.* This was not addressed in WCJ Hirsch's Opinion and violated Defendant's due process completely. Therefore, Defendant requests reconsideration and review of whether Defendant's due process was violated by WCJ Hirsch issuing a Findings and Award on a Petition to Set Aside not set for trial.

Secondly, WCJ Hirsch uses Minutes of Hearing as evidence for her Opinion on Decision that were not listed on the exhibit listing or presented by either party. Please note the Minutes of Hearing and Summary of Evidence dated 02/08/2023 which notes: "LET THE MINUTES REFLECT that with respect to the exhibits, the Court is taking judicial notice of the Order Approving Compromise and Release on 07/20/2022, the Petition to Set Aside dated 08/09/2022, the Response to the Petition to Set Aside dated 08/11/2022 and the Petition for Penalties dated 11/22/2022." There is no mention of the Minutes of Hearing dated 09/21/2022 and 11/22/2022; however, the Opinion on Decision relies on them to find penalties against Defendant. This is a second violation of Defendant's right to due process. *WCJ Hirsch has taken evidence into her own hands and sought to justify her position by adding evidence to the record which was not presented by either party.* This is a violation of Defendant's due process. Defendant requests reconsideration and review of the evidence record and the Opinion on Decision in relation to Defendant's due process and request the matter be remanded for proper review.

(Petition for Reconsideration, p. 3, lines 10-16, lines 23-28; p. 4, lines 6-11; p. 4, line 28 – p. 5, line 8; p. 6, lines 4-26. [Italics added.])

We begin by pointing out that there are several inconsistencies in defendant's Petition for Reconsideration. Defendant's attorney alleges that she received the C&R from applicant's attorney on June 16, 2022 in the *regular mail*, with applicant's and applicant's attorney's signatures, but the C&R shows that applicant signed the C&R on June 15, 2022, and applicant's attorney signed the C&R on June 24, 2022. At no time does defendant's attorney admit that she signed the C&R on July 12, 2022; instead, she attempts to point the finger at applicant's attorney and her administrative staff. We note that the MSC on November 23, 2022 was in response to defendant's DOR, and defendant's attorney appeared and represented to the WCJ that the petition to set aside had been withdrawn. At trial on February 23, 2022, a different attorney for defendant appeared, and despite the opportunity to raise the issues now raised in defendant's Petition for Reconsideration, defendant raised no issues, submitted no evidence and offered no testimony.

It is unclear here if defendant's attorney has deliberately made misrepresentations or is simply inexperienced. However, we caution defendant's attorney that WCAB Rule 10421(b)(5)

and (6), provides that sanctions may be appropriate when a party submits a verified document that either intentionally or carelessly makes misrepresentations of fact or when a party advances a meritless or frivolous legal argument. (See Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421.)

As explained below, we are rescinding the WCJ's decision because of the lack of a record. When the petition to set aside is set for trial and defendant produces evidence in support of its petition to set aside, we recommend that it may be prudent to elicit testimony by defendant's attorney as to the factual circumstances giving rise to defendant's claim that the C&R should be set aside.

II.

The WCJ's decision must be "based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc); Lab. Code, § 5313.) "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* 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* at p. 476 (citation omitted).)

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. (Rucker)* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) As stated by the Supreme Court of California in *Carstens v. Pillsbury* (1916) 172 Cal. 572, 577:

[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.

Due process guarantees all parties the right to notice of hearing and a fair hearing. (*Rucker, supra*, 82 Cal.App.4th at pp. 157-158.) 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. (Gangwish)* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker* at pp. 157-158, citing *Kaiser Co. v. Industrial Acci. Com.* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd. (Katzin)* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

Here, we are unable to provide meaningful review due to the state of the record. At issue is the status of defendant's petition to set aside. Neither the merits of that petition, nor the question of whether that petition had been abandoned, were listed as issues at the February 7, 2023 trial. Instead, the list of trial issues included only "timeliness of motion to set aside." While the petition to set aside, the response to the petition to set aside, and the petition for penalties are properly filed to invoke the jurisdiction of the WCAB, they are part of the record of proceedings. But, *they are not evidence*, and there is no summary judgement in workers' compensation cases. (Cal. Code Regs., tit. 8, § 10515.) In contrast, when a hearing is held or a settlement document is approved, an action has been taken by the WCAB, and judicial notice is proper.

Therefore, we are returning the matter to the trial court to create a record, in order to consider the petition to set aside and whether defendant had any valid basis for withholding payment to applicant while the petition to set aside was pending. We recommend that all parties be given an opportunity to submit evidence, that the issues be clearly identified, and that the evidence be properly admitted. (See Cal. Code Regs., tit. 8, § 10515.) Any issue of sanctions is deferred to the WCJ in the first instance.

Accordingly, we rescind the April 18, 2023 Findings and Award and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 18, 2023 Findings and Award is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 3, 2025

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

**ERNESTO MAGANA
CERVANTES HODGES
HANNA, BROPHY, MacLEAN, McALEER & JENSEN**

MB/cs

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