WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LES HALL, ***Applicant,*** **vs.** **VALLEY MEDIA and LEGION INSURANCE COMPANY,** ***Defendants.***	**Case No. SAC 309589** **OPINION AND DECISION AFTER RECONSIDERATION AND ORDER DISMISSING PETITION FOR REMOVAL**

On July 19, 2002, the Appeals Board (Board) granted defendant's petition for reconsideration of the Order Approving Compromise and Release (OAC&R) of May 1, 2002 in order to further consider the facts and law of this case, complete its deliberation and prepare an appropriate decision. We have completed our deliberation and the following is our Decision After Reconsideration. We will affirm the OAC&R but will strike the provision in the OAC&R awarding penalties and interest if payment is not made within 25 days of the OAC&R.

Defendant, Legion Insurance, administered by Cunningham & Lindsay, contends that (1) the Workers' Compensation Administrative Law Judge (WCJ) erred in not allowing defendant to withdraw from the compromise and release (C&R), arguing that subsequent to submission of the C&R, defendant was placed in rehabilitation,[1] so that a mutual mistake of fact existed as to defendant's ability to pay the lump sum settlement, and (2) the WCJ, who has awarded penalties and interest to applicant without giving defendant an opportunity to be heard, has denied defendant due process. Defendant alternatively seeks removal. We have received no answer from

[1] On March 28, 2002, the Commonwealth Court of Pennsylvania issued an order placing defendant, Legion Insurance Company, into rehabilitation. This order will be more fully discussed in our Opinion.

applicant, who is unrepresented, in response thereto.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and Recommendation of the WCJ. Based on our review of the record, we agree with the WCJ that defendant has provided no evidence demonstrating why it cannot pay the C&R proceeds. Consequently, we will not set aside the OAC&R and will not allow defendant to withdraw from the C&R.

Furthermore, pursuant to our powers under Labor Code Sections 5906 and 5908(a) and our duty to develop the record (see *Lundberg v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 436 [33 Cal.Comp.Cases 656, 659]; *King v. Workers' Comp. Appeals Bd.* (1991) 231 Cal.App.3d 1640 [56 Cal.Comp.Cases 408, 414]; *Glass v. Workers' Comp. Appeals Bd.* (1980) 105 Cal.App.3d 297 [45 Cal.Comp.Cases 441]; *Raymond Plastering Co. v. Workmen's Comp. Appeals Bd.* (1967) 252 Cal.App.2d 748 [32 Cal.Comp.Cases 287]), we are taking judicial notice of the March 28, 2002 Rehabilitation Order issued by the Commonwealth Court of Pennsylvania, placing defendant Legion Insurance Company into rehabilitation. We are also taking judicial notice of the June 28, 2002 Order by which the Pennsylvania Court extended the Stay Order to September 27, 2002. Although defendant has not raised this issue, we find that the Commonwealth of Pennsylvania has no jurisdiction over litigation pending before the WCAB in the State of California, and that neither the Rehabilitation Order nor the applicable Pennsylvania statutes specify why it is not within the Rehabilitator's discretion to make lump sum payments, such as C&Rs.

Lastly, we find that the provision in the OAC&R awarding penalties and interest if payment is not made within 25 days of the OAC&R, is prejudicial to defendant because, under Labor Code Section 5814, defendant has a right to a hearing on the reasonableness of any delay. We further find that this provision improperly attempts to re-write the C&R, as drafted by the parties. Accordingly, we will strike that portion of the OAC&R.

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BACKGROUND

Applicant sustained an industrial injury to his back on May 8, 2000. He agreed to settle his case by way of a C&R for $35,000 and signed the settlement papers on November 13, 2001. Defendant filed the settlement papers on February 5, 2002. Paragraph 10 of the C&R provided that the "settlement includes interest as provided by law for a period of (25) days from the date of service by the Workers' Compensation Appeals Board of the Order Approving Compromise and Release."

On February 25, 2002, the WCJ wrote defendant informing it that the C&R "will not be approved until you provide a copy of the benefit notice letter required by Reg. 9812(g)(2) advising the injured worker of the Qualified Medical Evaluation." Having received no response from defendant, the Board issued a notice of hearing on April 9, 2002, indicating that this matter was scheduled for a May 1, 2002 Conference.[2]

On March 28, 2002, the Commonwealth Court of Pennsylvania issued an order placing defendant, Legion Insurance Company, into rehabilitation, appointing the Insurance Commissioner of Pennsylvania as the Rehabilitator and directing her to take possession of the "assets, contracts and rights of action of Legion, of whatever nature and wherever located…." Paragraph 24(b) of the Rehabilitation Order indicated that "[a]ll court actions, arbitrations and mediations currently or hereafter pending against an insured of Legion in the Commonwealth of Pennsylvania or elsewhere are stayed for ninety (90) days from the effective date of this Order or such additional time as the Rehabilitator may request."

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[2] According to the WCJ's Report and Recommendation on Petition for Reconsideration, she set the matter for adequacy because defendant did not include a benefit notice to applicant, consistent with Cal.CodeRegs., tit. 8, section 9812(g)(2) (Adm. Dir. Rules), when it filed the fully executed C&R on February 5, 2002. Therefore, on February 25, 2002, the WCJ advised defendant she would not approve the C&R without a copy of the benefit notice sent to applicant. During the May 1, 2002 Pretrial Conference (Conference), defendant provided the WCJ with a copy of an April 26, 2002 benefit notice it sent to applicant. The WCJ notes that, when applicant signed the C&R on November 13, 2001, he was unaware of his right to request a panel qualified medical examiner (QME). Although the WCJ explained the panel QME process to applicant during the Conference, he opted to proceed with the C&R.

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Paragraph 17 of the Order specified that "[e]xcept for polices or contracts of insurance, the Rehabilitator, in her discretion, may affirm or disavow any executory contracts to which Legion is a party. The entry of this Order of Rehabilitation shall not constitute an anticipatory breach of any such contracts."

Furthermore, Paragraph 20 provided as follows:

> "The Rehabilitator may, in her discretion, pay claims for losses, in whole or in part, under policies and contracts of insurance and loss adjustment expenses as identified in Section 544(b) of the Insurance Department Act, *supra,* 40 Section 221.44(b), provided, however, that the Rehabilitator shall not have the discretion to pay, and may not pay, bad faith claims or claims for extra-contractual charges or damages."

During the May 1, 2002 Conference, defense counsel provided the WCJ with an April 26, 2002 notice to applicant, in conformity with the requirements of Rule 9812(g)(2). The WCJ asked applicant if he wished to be examined by a panel qualified medical examiner (QME). Applicant replied that he preferred to go forward with the settlement as drafted. However, defendant requested to withdraw from the C&R because it was in court-ordered rehabilitation and moved to have the matter taken off calendar. The WCJ approved the C&R, denying defendant's motion. She issued an OAC&R which also specified that "[p]ayment [is] to be made within 25 days, if later penalties and interest to be added."

Defendant then filed its petition for reconsideration. In her Report and Recommendation on Defendant's Petition for Reconsideration (Report), the WCJ noted that, by memorandum of May 21, 2002, the Chairman of the WCAB advised that "the restraining order on the business of Legion Insurance Co. does not apply to workers' compensation cases." She further indicated that a C&R is a binding contractual agreement from which, absent a showing of good cause, a party may not unilaterally withdraw. She stated that defendant has submitted no evidence demonstrating its inability to pay the settlement. Since the only prior impediment to approval of the C&R was defendant's failure to provide applicant notice of his right to an evaluation by a panel QME if he

disagreed with its assessment of permanent disability (see footnote 2), and since defendant did not provide that notice until April 26, 2002 (two months after the WCJ requested it to do so), to allow defendant to withdraw from the C&R would also allow it to profit from its own failure to diligently satisfy the requirements of the workers' compensation laws.

Finally, the WCJ interpreted the C&R as implicitly providing for payment to be made within 25 days of the OAC&R, and stated that defendant "cited no case law showing a delay in payment based on financial difficulty is a valid justification of delay." She recommended that reconsideration be denied.

DISCUSSION

Defendant has asked us to rescind the OAC&R and allow it to withdraw from the C&R based upon the existence of a mutual mistake of fact. As the Court observed in *Johnson v. Workmen's Comp. Appeals Bd.* (1970) 2 Cal.3d 964 [35 Cal.Comp.Cases 362, 368]: "[A] workmen's compensation release [rests] 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.' *(Raischell & Cottrell, Inc. v. Workmen's Comp. Appeals Bd.* (1967) 249 Cal.App.2d 991, 997 [32 Cal.Comp.Cases 135, 58 Cal. Rptr. 159].)"[3]

Like the WCJ, we reject defendant's argument that a mutual mistake of fact exists which would justify setting aside the OAC&R. Presumably, the mistake of fact alleged by defendant is the ability of the Rehabilitator to pay this settlement. However, defendant has not shown any

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[3] We note that a request to set aside an OAC&R after it has become final will not be granted, absent a showing of good cause. This would require a showing of fraud, mutual mistake of fact, duress or undue influence. (See *Smith v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 1160 [50 Cal.Comp.Cases 311]; *Carmichael v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 311 [30 Cal.Comp.Cases 169]; *Silva v. Industrial Acc. Com.* (1924) 68 Cal. App. 510 [11 IAC 266]. See also *City of Beverly Hills v. Workers' Comp. Appeals Bd.* (Dowdle) (1997) 62 Cal.Comp.Cases 1691 (writ denied); *Bullocks, Inc. v. Industrial Acc. Com.* (1951) 16 Cal.Comp.Cases 253 (writ denied); *Pac. Indem. Co. v. Industrial Acc. Com.* (Forrest) (1946) 11 Cal.Comp.Cases 117 (writ denied).)

In contrast, where an OAC&R comes before the Board on a timely petition for reconsideration, then under Labor Code Sections 5906, 5907 and 5908, the Board's powers are broader. Although the Board can set the OAC&R aside on the grounds set forth above, it is not limited to them. (See *Redner v. Workmen's Comp. Appeals Bd.* (1971) 5 Cal.3d 83 [36 Cal.Comp.Cases 371].) Good cause to set aside an OAC&R need not be shown. (See *Argonaut Ins. Exch. v. Industrial Acc. Com.* (Bellinger) (1958) 49 Cal.2d 706 [23 Cal.Comp.Cases 34].)

basis or made any offer of proof, as to why the Rehabilitator cannot make this particular lump sum payment pursuant to the OAC&R. Furthermore, it has not demonstrated that such payment would irreparably harm the defendant's rehabilitation proceedings or jeopardize its assets. The payment of this claim is discretionary with the Rehabilitator and it is within her power to pay it.

Although defendant's petition avers that it cannot make lump sum payments, the Rehabilitation Order contains no language specifying that the Rehabilitator cannot make such payments, nor has defendant offered any documentary evidence in this record to support such contention. Such evidence may include a written policy statement from the Pennsylvania Rehabilitator setting forth justification for not paying lump sum settlements.

We observe that, while this matter was pending, we received a copy of a memorandum from the Pennsylvania Rehabilitator, which offers clarification of her procedures for handling workers' compensation claims under the Rehabilitation Order. [4] While the memorandum

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[4] For the edification of the community, we quote the July 26, 2002 letter sent to the Administrative Director of the California Division of Workers' Compensation from the Office of Liquidations and Rehabilitations of the Pennsylvania Insurance Department:

> "Allow me first to extend the appreciation of the Rehabilitator of Legion and Villanova for your cooperation and assistance while the Rehabilitation Team completes its financial analysis of the companies. Because the issues are complex, this analysis is ongoing. For this reason, the Rehabilitator sought from the Commonwealth Court of Pennsylvania and was granted an extension of the stay on litigation for an additional 90 days until September 27, 2002. The purpose of this letter is to provide clarification of our procedures of handling workers' compensation claims under Rehabilitation Order.
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> "Legion and Villanova are paying undisputed worker's compensation claims. This means that we continue to pay temporary total, temporary partial, permanent total, permanent partial and scheduled loss of use ratings benefits as well as expenses for medical treatment and vocational rehabilitation services. We will also pay prescription costs and mileage or other transportation costs to and from doctors' appointments if required. We are deferring payment of lump sum awards at this time. If the lump sum award has been granted, or is granted in the future, however, we will pay these benefits in weekly installments at the employee's weekly compensation rate.
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> "All denied or disputed claims that go to mediation hearings will be handled as usual; we will direct defense counsel to attend mediation hearings in an attempt to reach a compromise settlement. If such a settlement is reached, we will pay 'on forms' or per the compromise agreement in weekly payments. If back weekly payments become due as a result of such compromise agreements, we will pay such benefits to

indicates that the Rehabilitator will continue to pay undisputed claims, including disability indemnity and treatment charges, she advises that she is currently deferring payment of lump sum awards, such as OAC&Rs, which she will instead pay in weekly installments at the injured worker's benefit rate. If a lump sum settlement is reached or an award is made in a denied or disputed claim, these, too, will be paid in weekly installments. She also advises that, where no settlement is reached in a litigated claim, she will request a 90-day stay on future hearings.

Initially, the Rehabilitator has offered no basis, rationale or justification for the payment of lump sum awards of undisputed claims by weekly installments. If a C&R has been agreed upon and approved, either prior to or subsequent to the Rehabilitation Order, absent a showing of good cause as to why the lump sum payment may not be made in a particular case, payment of a lump sum would be expected and required. A similar analysis may be followed in disputed claims where a lump sum settlement has been agreed to and approved. If the parties, however, agree that the lump sum settlement is to be paid in installments, and the settlement has been approved on that basis, then, of course, installments would be acceptable.

With respect to the Rehabilitator's request for an automatic stay on future hearings if a settlement is not reached in denied or disputed cases, such a request standing alone does not illustrate good cause for the stay. Some further explanation or justification must be presented to the WCJ in a particular case to demonstrate the necessity for that request. Examples of such explanation or justification would include a showing of how such a delay will preserve assets or how the 90 days will enable defendant to stabilize its assets.

Having concluded that defendant has offered no evidence that the Rehabilitator is unable

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> bring the employee to a current status. If a compromise agreement cannot be reached, we will request a 90-day stay on future hearings.
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> "Finally, although we are deferring payment of third party administrators' and other vendors' fees (e.g., attorneys' fees) which were incurred but not paid prior to April 1, 2002, we are paying these expenses for services provided after April 1 in accordance with the Order of Rehabilitation.
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> "If I may be of assistance to you in further clarifying this information, please don't hesitate to call on Nancy Henrich at the Legion/Villanova offices at (215) 979-7835."

to pay this settlement in accordance with the OAC&R, we further note that a party cannot unilaterally withdraw from a fully executed C&R agreement. (See *Starner v. Industrial Acc. Com.* (1953) 18 Cal.Comp.Cases 300 (writ denied).) It has been specifically held that the approval of a C&R should be treated as a condition subsequent, rather than a condition precedent. Consequently, once the parties submit a duly executed C&R, it is a valid and binding agreement upon the parties, and it is within the WCJ's discretion to approve or disapprove it. (See *Light v. Summit Drilling and Production Co.* (1979) 44 Cal.Comp.Cases 1083 (WCAB en banc).) It is not error for a WCJ to approve a previously submitted C&R, despite a defendant's request to withdraw from the agreement based upon evidence obtained after the document's submission. *(Portola Motor*s *v. Workers' Comp. Appeals Bd.* (Garcia) (1992) 57 Cal.Comp.Cases 115 (writ denied).)

Although not raised by defendant, we observe that if defendant needs injunctive relief in California to preserve its assets, 40 Pennsylvania Statutes Section 221.5 (which authorizes the Pennsylvania Court to issue the Stay Order) allows the Pennsylvania Rehabilitator to apply to California's courts, thereby invoking California jurisdiction. This statute provides an efficient procedure for the Pennsylvania Court to invoke California jurisdiction. Per Section 221.5(b), the Pennsylvania Rehabilitator must first apply directly with "any court outside of the Commonwealth [of Pennsylvania] for the relief described in subsection (a)." In California, Labor Code Section 5955 provides that "no court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties but a writ of mandate shall lie from the Supreme Court or a court of appeal in all proper cases." (Cf. *Loustalot v. Superior Court of Kern County* (1947) 30 Cal.2d 905 [12 Cal.Comp.Cases 277]; *Patterson v. Sharp* (1970) 10 Cal.App.3d 990 [35 Cal.Comp.Cases 761]; *Pizarro v. Superior Court of Santa Clara County* (1967) 254 Cal.App.2d 416 [32 Cal.Comp.Cases 379].) Notwithstanding the Pennsylvania Rehabilitator's July 26, 2002 letter

(see footnote 4), there has been no showing by defendant that either the Pennsylvania Rehabilitator, or any other concerned party, has applied to the California Supreme Court or the appropriate California Court of Appeal, for a stay of execution of the OAC&R. Without such an application, the Pennsylvania Court cannot invoke jurisdiction to enforce its Stay Order. Furthermore, as noted previously, an unsupported request for a 90-day stay on future hearings, in cases where a settlement has not been reached, will not be a basis standing alone for good cause to grant the stay, absent further reasons or justification.

Turning now to the language in the OAC&R specifying that penalties and interest will be added if the award is not paid within 25 days, we are persuaded that this provision violates defendant's due process rights. It does not afford defendant an opportunity to be heard as to the reasonableness of the delay. Labor Code Section 5814 entitles defendant to a hearing and allows it to present evidence on the issue of reasonableness. (See *State Compensation. Ins. Fund v. Workers' Comp. Appeals Bd.* (Stuart) (1998) 18 Cal.4th 1209 [63 Cal.Comp.Cases 916]; *County of Sacramento v. Workers' Comp. Appeals Bd.* (Souza) (1999) 69 Cal.App.4th 726 [64 Cal.Comp.Cases 30]; *Kampner v. Workers' Comp. Appeals Bd.* (1978) 86 Cal.App.3d 376 [43 Cal.Comp.Cases 1198].) Moreover, a WCJ may not rewrite a C&R entered into by the parties but is limited to either approving the settlement as drafted by the parties or disapproving the settlement. *(Burbank Studios v. Workers' Comp. Appeals Bd.* (Yount) (1982) 134 Cal.App.3d 929 [47 Cal.Comp.Cases 832].) We shall therefore strike that provision from the OAC&R.

Lastly, defendant requests removal, as an alternative to reconsideration. Removal to the Board, rather than reconsideration, is the appropriate remedy under Labor Code Section 5310 only for interim, nonfinal orders. These include procedural or discovery orders, which may be issued before a final decision is made on the substantive issues. (*Jablonski v. Workers' Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 399 (writ denied); *Beck v. Workers' Comp. Appeals Bd.* (1979) 44 Cal.Comp.Cases 190 (writ denied).) Here, however, the OAC&R is dispositive of the final rights and liabilities of the parties. Consequently, removal is not an appropriate remedy and therefore the petition will be dismissed.

For the foregoing reasons,

IT IS ORDERED that, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the May 1, 2002 Order Approving Compromise and Release be, and the same hereby is, **AFFIRMED,** except that the provision which reads that "Payment to be made within 25 days, if later penalties and interest to be added" shall be, and the same hereby is, **DELETED** from the Order Approving Compromise and Release.

IT IS FURTHER ORDERED that removal of the May 1, 2002 Order Approving Compromise and Release be, and the same hereby is, **DISMISSED.**

WORKERS' COMPENSATION APPEALS BOARD

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I CONCUR.

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DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SERVICE BY MAIL ON ALL PARTIES EXCEPT LIEN CLAIMANTS AS SHOWN ON THE OFFICIAL ADDRESS RECORD EFFECTED ON ABOVE DATE

Reserved with page 2 Sept. 12, 2002

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