

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **Case No. SAC 309589**

5 **LES HALL,**

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7
8 *Applicant,*

9 **vs.**

10 **VALLEY MEDIA and LEGION INSURANCE**
11 **COMPANY,**

12 *Defendants.*

**OPINION AND DECISION AFTER
RECONSIDERATION AND ORDER
DISMISSING PETITION FOR
REMOVAL**

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

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

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

1 applicant, who is unrepresented, in response thereto.

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

7 Furthermore, pursuant to our powers under Labor Code Sections 5906 and 5908(a) and
8 our duty to develop the record (see *Lundberg v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d
9 436 [33 Cal.Comp.Cases 656, 659]; *King v. Workers' Comp. Appeals Bd.* (1991) 231 Cal.App.3d
10 1640 [56 Cal.Comp.Cases 408, 414]; *Glass v. Workers' Comp. Appeals Bd.* (1980) 105
11 Cal.App.3d 297 [45 Cal.Comp.Cases 441]; *Raymond Plastering Co. v. Workmen's Comp.*
12 *Appeals Bd.* (1967) 252 Cal.App.2d 748 [32 Cal.Comp.Cases 287]), we are taking judicial notice
13 of the March 28, 2002 Rehabilitation Order issued by the Commonwealth Court of Pennsylvania,
14 placing defendant Legion Insurance Company into rehabilitation. We are also taking judicial
15 notice of the June 28, 2002 Order by which the Pennsylvania Court extended the Stay Order to
16 September 27, 2002. Although defendant has not raised this issue, we find that the
17 Commonwealth of Pennsylvania has no jurisdiction over litigation pending before the WCAB in
18 the State of California, and that neither the Rehabilitation Order nor the applicable Pennsylvania
19 statutes specify why it is not within the Rehabilitator's discretion to make lump sum payments,
20 such as C&Rs.

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

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2 **BACKGROUND**

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

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

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

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23 ² According to the WCJ’s Report and Recommendation on Petition for Reconsideration, she set
24 the matter for adequacy because defendant did not include a benefit notice to applicant,
25 consistent with Cal.CodeRegs., tit. 8, section 9812(g)(2) (Adm. Dir. Rules), when it filed the fully
26 executed C&R on February 5, 2002. Therefore, on February 25, 2002, the WCJ advised
27 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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2 Paragraph 17 of the Order specified that “[e]xcept for policies or contracts of insurance,
3 the Rehabilitator, in her discretion, may affirm or disavow any executory contracts to which
4 Legion is a party. The entry of this Order of Rehabilitation shall not constitute an anticipatory
5 breach of any such contracts.”

6 Furthermore, Paragraph 20 provided as follows:

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

14 During the May 1, 2002 Conference, defense counsel provided the WCJ with an April 26,
15 2002 notice to applicant, in conformity with the requirements of Rule 9812(g)(2). The WCJ asked
16 applicant if he wished to be examined by a panel qualified medical examiner (QME). Applicant
17 replied that he preferred to go forward with the settlement as drafted. However, defendant
18 requested to withdraw from the C&R because it was in court-ordered rehabilitation and moved to
19 have the matter taken off calendar. The WCJ approved the C&R, denying defendant's motion. She
20 issued an OAC&R which also specified that “[p]ayment [is] to be made within 25 days, if later
21 penalties and interest to be added.”

22 Defendant then filed its petition for reconsideration. In her Report and Recommendation
23 on Defendant's Petition for Reconsideration (Report), the WCJ noted that, by memorandum of
24 May 21, 2002, the Chairman of the WCAB advised that “the restraining order on the business of
25 Legion Insurance Co. does not apply to workers’ compensation cases.” She further indicated that a
26 C&R is a binding contractual agreement from which, absent a showing of good cause, a party may
27 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

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

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

9 DISCUSSION

10 Defendant has asked us to rescind the OAC&R and allow it to withdraw from the C&R
11 based upon the existence of a mutual mistake of fact. As the Court observed in *Johnson v.*
12 *Workmen's Comp. Appeals Bd.* (1970) 2 Cal.3d 964 [35 Cal.Comp.Cases 362, 368]: “[A]
13 workmen’s compensation release [rests] upon a higher plane than a private contractual release; it
14 is a judgment, with ‘the same force and effect as an award made after a full hearing.’ (*Raischell*
15 *& Cottrell, Inc. v. Workmen's Comp. Appeals Bd.* (1967) 249 Cal.App.2d 991, 997 [32
16 Cal.Comp.Cases 135, 58 Cal. Rptr. 159].)”³

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

20 ³ We note that a request to set aside an OAC&R after it has become final will not be granted,
21 absent a showing of good cause. This would require a showing of fraud, mutual mistake of fact,
22 duress or undue influence. (See *Smith v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d
23 1160 [50 Cal.Comp.Cases 311]; *Carmichael v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 311
24 [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).)

25 In contrast, where an OAC&R comes before the Board on a timely petition for
26 reconsideration, then under Labor Code Sections 5906, 5907 and 5908, the Board's powers are
27 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].)

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

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

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

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

15 "Allow me first to extend the appreciation of the Rehabilitator of Legion
16 and Villanova for your cooperation and assistance while the
17 Rehabilitation Team completes its financial analysis of the companies.
18 Because the issues are complex, this analysis is ongoing. For this
19 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.

20 "Legion and Villanova are paying undisputed worker's compensation
21 claims. This means that we continue to pay temporary total, temporary
22 partial, permanent total, permanent partial and scheduled loss of use
23 ratings benefits as well as expenses for medical treatment and vocational
24 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.

25 "All denied or disputed claims that go to mediation hearings will be
26 handled as usual; we will direct defense counsel to attend mediation
27 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

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

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

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

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

22 bring the employee to a current status. If a compromise agreement
23 cannot be reached, we will request a 90-day stay on future hearings.

24 "Finally, although we are deferring payment of third party administrators'
25 and other vendors' fees (e.g., attorneys' fees) which were incurred but not
26 paid prior to April 1, 2002, we are paying these expenses for services
27 provided after April 1 in accordance with the Order of Rehabilitation.

"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."

1 to pay this settlement in accordance with the OAC&R, we further note that a party cannot
2 unilaterally withdraw from a fully executed C&R agreement. (See *Starner v. Industrial Acc.*
3 *Com.* (1953) 18 Cal.Comp.Cases 300 (writ denied).) It has been specifically held that the
4 approval of a C&R should be treated as a condition subsequent, rather than a condition
5 precedent. Consequently, once the parties submit a duly executed C&R, it is a valid and binding
6 agreement upon the parties, and it is within the WCJ's discretion to approve or disapprove it.
7 (See *Light v. Summit Drilling and Production Co.* (1979) 44 Cal.Comp.Cases 1083 (WCAB en
8 banc).) It is not error for a WCJ to approve a previously submitted C&R, despite a defendant's
9 request to withdraw from the agreement based upon evidence obtained after the document's
10 submission. (*Portola Motors v. Workers' Comp. Appeals Bd. (Garcia)* (1992) 57 Cal.Comp.Cases
11 115 (writ denied).)

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

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

8 Turning now to the language in the OAC&R specifying that penalties and interest will be
9 added if the award is not paid within 25 days, we are persuaded that this provision violates
10 defendant's due process rights. It does not afford defendant an opportunity to be heard as to the
11 reasonableness of the delay. Labor Code Section 5814 entitles defendant to a hearing and allows
12 it to present evidence on the issue of reasonableness. (See *State Compensation. Ins. Fund v.*
13 *Workers' Comp. Appeals Bd.* (Stuart) (1998) 18 Cal.4th 1209 [63 Cal.Comp.Cases 916]; *County*
14 *of Sacramento v. Workers' Comp. Appeals Bd.* (Souza) (1999) 69 Cal.App.4th 726 [64
15 Cal.Comp.Cases 30]; *Kampner v. Workers' Comp. Appeals Bd.* (1978) 86 Cal.App.3d 376 [43
16 Cal.Comp.Cases 1198].) Moreover, a WCJ may not rewrite a C&R entered into by the parties but
17 is limited to either approving the settlement as drafted by the parties or disapproving the
18 settlement. (*Burbank Studios v. Workers' Comp. Appeals Bd.* (Yount) (1982) 134 Cal.App.3d 929
19 [47 Cal.Comp.Cases 832].) We shall therefore strike that provision from the OAC&R.

20 Lastly, defendant requests removal, as an alternative to reconsideration. Removal to the
21 Board, rather than reconsideration, is the appropriate remedy under Labor Code Section 5310
22 only for interim, nonfinal orders. These include procedural or discovery orders, which may be
23 issued before a final decision is made on the substantive issues. (*Jablonski v. Workers' Comp.*
24 *Appeals Bd.* (1987) 52 Cal.Comp.Cases 399 (writ denied); *Beck v. Workers' Comp. Appeals Bd.*
25 (1979) 44 Cal.Comp.Cases 190 (writ denied).) Here, however, the OAC&R is dispositive of the
26 final rights and liabilities of the parties. Consequently, removal is not an appropriate remedy and
27 therefore the petition will be dismissed.

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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

I CONCUR.

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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