

*Re Boyer*

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

Case No. ADJ4118969 (SJO 0267767)

**ALBERT CARRABELLO,**

*Applicant,*

**vs.**

**RGW CONSTRUCTION; OLD REPUBLIC  
INSURANCE CORPORATION,**

*Defendants.*

**OPINION AND DECISION AFTER  
RECONSIDERATION**

In order to further study the factual and legal issues in this case, on April 25, 2011, we granted defendant's Petition for Reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of February 2, 2011, wherein it was found that "The Workers' Compensation Appeals Board lacks jurisdiction to adjudicate the disbursement and distribution of the settlement proceeds received as a result of the settlement of the third party personal injury lawsuit filed in San Joaquin County, and purportedly settled." In the instant workers' compensation proceedings, applicant contends that, while employed as a labor foreman on September 25, 2007, he sustained industrial injury to his left hip and lumbar spine, as a result of an automobile accident.

Defendant contends that the WCJ erred in finding no jurisdiction to adjudicate the issue of how to disburse the settlement funds. We have received an answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

As explained below, the WCJ erred in finding that the WCAB did not have jurisdiction to adjudicate the issue of disbursement of the third-party settlement funds. We will therefore rescind the Findings and Order of February 2, 2011, and return this matter to the WCAB trial level to determine the issue of disbursement of the third-party settlement funds.

Applicant filed an application for adjudication of claim in the instant WCAB proceedings on March 10, 2008. Applicant also filed a complaint in the San Joaquin County Superior Court against

1 third-party defendant Beverly Casby. On or about May 13, 2009, Old Republic Insurance Company, the  
2 defendant in the instant compensation proceedings, filed a complaint-in-intervention against Casby  
3 pursuant to Labor Code section 3853. In the civil proceedings, Casby raised the comparative negligence  
4 of the employer as a defense to both applicant's and employer's civil actions, pursuant to the rule set  
5 forth in *Witt v. Jackson* (1961) 57 Cal.2d 57, 72-73 [26 Cal.Comp.Cases 252] as modified in *Associated*  
6 *Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (Cole)* (1978) 22 Cal.3d 829 [43  
7 Cal.Comp.Cases 1333]), that a third-party tortfeasor's liability is reduced in proportion to an employer's  
8 comparative negligence, up to the amount that an employer has expended in workers' compensation  
9 benefits.

10 Eventually, the third-party defendant's insurance carrier tendered a \$100,000 policy limit offer to  
11 resolve the claims of both applicant/plaintiff and employer/intervenor, and a partial settlement was  
12 reached in which the third-party defendant issued a \$100,000 check payable to both applicant/ plaintiff  
13 and compensation defendant/intervenor. In exchange, applicant/plaintiff and compensation  
14 defendant/intervenor each executed separate releases of the third-party defendant, and each filed  
15 dismissals of their respective civil complaints against the third-party defendant. Concurrently with the  
16 dismissal of its complaint-in-intervention, defendant/intervenor filed a notice of lien in the superior court  
17 seeking to recoup from the settlement the benefits that it had expended. The applicant/plaintiff and the  
18 compensation defendant/intervenor also entered into a stipulation which read as follows:

19 "IT IS HEREBY STIPULATED AND AGREED by and between the  
20 parties to the above-entitled actions, by their respective counsel, that the  
21 \$100,000.00 settlement money received from the settlement with [third-  
22 party defendant] will be deposited into an interest bearing account.  
Signatures of both parties will be required to withdraw any money."

23 Thus, the applicant and defendant herein agreed to settle against the third-party defendant for a  
24 global amount of \$100,000, but left the issue of how to apportion the proceeds between themselves  
25 unresolved. The settlement was in effect an interpleader, in which the third-party defendant was  
26 discharged from additional liability, and the parties herein were left to litigate how to apportion the  
27 \$100,000 settlement amount. Although the record is incomplete, it appears that the parties attempted to

1 litigate the matter in the superior court, but the superior court refused jurisdiction on the grounds that the  
2 applicant/plaintiff and defendant/intervenor had dismissed their complaints in the Superior Court,  
3 divesting the court of jurisdiction.

4 It appears that despite the stipulation, applicant's counsel has disbursed funds to himself and to  
5 applicant, with no payment to defendant/intervenor.

6 On September 27, 2010, the defendant herein filed a Petition for Disbursement of Settlement  
7 Proceeds Held in Trust by the Boccardo Law Firm. The matter proceeded to trial on January 31, 2011,  
8 on the issue of "Whether the WCAB has jurisdiction over a dispute pertaining to distribution of the  
9 settlement proceeds in this case (under Labor Code Section 3852, 3860, or otherwise)...." As noted  
10 above, the WCJ found that the WCAB had no jurisdiction over the issue.

11 Labor Code section 5300, which sets forth the jurisdiction of the Workers' Compensation  
12 Appeals Board, states:

13 "All the following proceedings shall be instituted before the appeals  
14 board and not elsewhere, except as otherwise provided in Division 4:

15 (a) For the recovery of compensation, or concerning any right or liability  
arising out of or incidental thereto.

16 (b) For the enforcement against the employer or an insurer of any  
17 liability for compensation imposed upon the employer by this division in  
favor of the injured employee, his or her dependents, or any third person.

18 (c) For the determination of any question as to the distribution of  
19 compensation among dependents or other persons.

20 (d) For the determination of any question as to who are dependents of  
any deceased employee, or what persons are entitled to any benefit under  
the compensation provisions of this division.

21 (e) For obtaining any order which by Division 4 the appeals board is  
22 authorized to make.

23 (f) For the determination of any other matter, jurisdiction over which is  
24 vested by Division 4 in the Division of Workers' Compensation,  
including the administrative director and the appeals board."

25 Thus, "except as otherwise provided in Division 4" of the Labor Code (Lab. Code §§, 3200-  
26 6002), the WCAB has exclusive jurisdiction over "any right or liability arising out of or incidental" to the  
27 recovery of compensation. Division 4 of the Labor Code "otherwise provide[s]" in sections 3850 et seq.,

1 and establishes superior court jurisdiction over a workers' compensation carrier's reimbursement claims  
2 against third party tortfeasors in certain circumstances. The Court of Appeal has succinctly summarized  
3 an employer's or carrier's reimbursement rights vis-à-vis third party civil claims as follows:

4 "It is clear under these Labor Code provisions that a worker injured  
5 [arising out of and in the course] of his employment by the negligence of  
6 a third party may seek benefits under his employer's workers'  
7 compensation insurance and, at the same time, pursue a negligence claim  
8 against a third party who caused or contributed to the injury. Double  
9 recovery is disfavored, however, and various provisions of the Labor  
10 Code seek to ensure that the employer (defined to include the insurance  
11 carrier under Lab. Code, § 3850) will be reimbursed for amounts paid to  
12 the injured employee which the employee has also recovered from a third  
13 party tortfeasor. 'An employer who has paid workers' compensation  
14 benefits to an injured employee has the right to be reimbursed for the  
15 sums paid and for certain other expenditures, except to the extent that  
16 fault attributable to the employer caused the worker's civil damages.  
17 (Lab. Code, § 3852.)' [Citation.] Reimbursement can be obtained in  
18 three ways: '(1) by an independent lawsuit against the third party; (2) by  
19 intervention in the injured worker's lawsuit against the third party; or (3)  
20 by asserting a lien against the worker's recovery from the third party.  
21 (Lab. Code, § 3852, 3853, 3856, subd. (b).)' [Citations.]" (*Bailey v.*  
22 *Reliance Ins. Co.* (2000) 79 Cal.App.4th 449, 454 [65 Cal.Comp.Cases  
23 375].))

24 An employer or carrier's reimbursement rights are further qualified by the principles set forth in  
25 *Witt v. Jackson* (1961) 57 Cal.2d 57, 72-73 [26 Cal.Comp.Cases 252] as modified in *Associated*  
26 *Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (Cole)* (1978) 22 Cal.3d 829 [43  
27 Cal.Comp.Cases 1333]), that an employer's or carrier's reimbursement is reduced to the extent that the  
benefits paid were caused by the employer's own fault.

Although Labor Code sections 3850 et seq. contain an exception to the default rule of exclusive  
WCAB jurisdiction over any issue "arising out of or incidental" to the recovery of compensation, we find  
no authority to support the principle that the WCAB does not have jurisdiction to determine the proper  
distribution of settlement proceeds in the instant matter. At worst, the WCAB has at least concurrent  
jurisdiction. "Unlike the situation where the employee is claiming compensation benefits from his  
employer and exclusive jurisdiction is vested in the appeals board (Lab. Code, §§ 3601, 5300), where the

1 employer is seeking indemnification from a third party for benefits paid to the employee, the board and  
2 the superior court have concurrent jurisdiction over the question of the employer's fault." (*Levels v.*  
3 *Growers Ammonia Supply Co.* (1975) 48 Cal.App.3d 443, 449 [40 Cal.Comp.Cases 393].)

4 In *Hughes v. Argonaut Ins. Co.* (2001) 88 Cal.App.4th 517, 529-530 [66 Cal.Comp.Cases 454],  
5 cited by the defendant in its Petition, the Court of Appeal held that a dispute between an injured worker  
6 and a workers' compensation carrier regarding reimbursement from a third-party settlement concerns  
7 rights and liabilities arising out of or incidental to the payment of compensation for the purposes of Labor  
8 Code section 5300(a). Thus, in the absence of any statutory authority in Division 4 of the Labor Code to  
9 the contrary, the *Hughes* court found that the WCAB had exclusive jurisdiction over how to apportion the  
10 contested amount of a third-party settlement.

11 The WCJ in his Report and the applicant in his Answer focus on the fact that, in *Hughes*, the  
12 dispute between the injured worker and the carrier centered upon the amount of expenses and attorney  
13 fees that were to be deducted from the carrier's portion of the settlement. The WCJ's Report and  
14 applicant's Answer note that Labor Code section 3860(f) creates an exception to the WCAB's exclusive  
15 jurisdiction over matters arising out of or incidental to the payment of compensation (Lab. Code, § 5300,  
16 subd. (a)), and grants the superior court jurisdiction over the issue of attorney fees and expenses incurred  
17 in a third-party civil suit.<sup>1</sup> The WCJ's Report and the applicant's Answer reason that the *Hughes* court  
18 was simply applying Labor Code section 3860(f), and that WCAB jurisdiction existed in *Hughes*  
19 because, unlike in the instant case, the injured worker in *Hughes* settled her third-party case without  
20 formally filing a superior court suit. Thus, both the WCJ and the applicant find *Hughes* crucially  
21 distinguishable from the instant case because here a lawsuit was filed in the superior court, whereas in  
22 *Hughes* the third party settlement was effected without filing suit. However, although the *Hughes* court  
23 did apply section 3860 to find WCAB jurisdiction because suit was never filed (*Hughes*, 88 Cal.App.4th  
24

25 <sup>1</sup> Section 3860 provides that, prior to allowing reimbursement of the employer or carrier, reasonable attorney fees and  
26 expenses are to be deducted from any settlement. Section 3860(f) states that, "The amount of expenses and attorneys' fees  
27 referred to in this section shall, on settlement of suit, or on any settlement requiring court approval, be set by the court. In all  
other cases these amounts shall be set by the appeals board. Where the employer and the employee are represented by  
separate attorneys they may propose to the court or the appeals board, for consideration and determination, the amount and  
division of such expenses and fees."

1 WCJ and the applicant appear to ignore the long discussion in *Hughes* regarding how "[i]rrespective of  
2 section 3860" section 5300 vested jurisdiction over the dispute in the WCAB. (*Hughes*, 88 Cal.App.4th  
3 at pp. 527-531.)

4 Section 3860(f) is inapplicable to the instant dispute because the dispute herein centers mainly on  
5 how to apportion the settlement proceeds in light of the applicant's assertion of employer fault (the so-  
6 called *Witt v. Jackson* issue), and not on the amount of expenses and attorney's fees to deduct from the  
7 settlement. In any case, however, we note that even when suit has been filed, section 3860(f) does not  
8 vest exclusive jurisdiction in the superior court to set attorneys' fees. In both *Griffith v. Workers' Comp.*  
9 *Appeals Bd.* (1989) 209 Cal.App.3d 1260 [54 Cal.Comp.Cases 145] and *Serna v. Workers' Comp.*  
10 *Appeals Bd.* (2001) 66 Cal.Comp.Cases 1428 (writ denied), it was held that, even when a suit has been  
11 filed, the WCAB has jurisdiction to set the amount of attorney's fees and expenses when the issue has not  
12 been adjudicated by the court. Thus, we find the WCJ's reliance on section 3860 in finding exclusive  
13 superior court jurisdiction to be inapposite.

14 In his Answer, the applicant argues that the superior court has exclusive jurisdiction to determine  
15 the *Witt v. Jackson* issue when it is asserted as a defense to an employer's reimbursement claim (as  
16 opposed to as a credit for future compensation liability). The applicant cites *Levels v. Growers Ammonia*  
17 *Supply Co.* (1975) 48 Cal.App.3d 443, 449 [40 Cal.Comp.Cases 393], which we cited *ante*, and *Ellis v.*  
18 *Wells Manufacturing* (1989) 216 Cal.App.3d 312 [54 Cal.Comp.Cases 503], in support of exclusive  
19 superior court jurisdiction over the *Witt v. Jackson* issue. In both *Levels* and *Ellis*, the injured worker  
20 filed a third-party civil suit in which the compensation carrier intervened. In each case, the injured  
21 worker then settled its suit with the third-party tortfeasor. The settlements in each case contained hold  
22 harmless clauses, in which the injured worker agreed to indemnify the third-party defendant from the  
23 intervention suits brought by the compensation carriers. Thus, the *Levels* and *Ellis* cases held that the  
24 superior court had jurisdiction to determine the employer fault issue between the compensation carrier  
25 and the employee with the compensation carrier continuing to prosecute its complaint-in-intervention,  
26 and the employee stepping into the shoes of the third-party defendant to defend the claim. However,  
27 nowhere do *Levels* or *Ellis* state that this is the exclusive means to determine employer fault as between

1 the employee and the carrier as it relates to a carrier's claim for reimbursement. To the contrary, as we  
2 stated *ante*, the *Levels* court stated that "the board and the superior court have concurrent jurisdiction  
3 over the question of the employer's fault." (*Levels*, 48 Cal.App.3d at p. 449.)

4 We find *Hone v. Climatrol Industries, Inc.* (1976) 59 Cal.App.3d 513 [41 Cal.Comp.Cases 404]  
5 more applicable to the facts of the instant case. In *Hone*, the employee filed a third-party civil suit and  
6 the workers' compensation carrier intervened. Prior to trial, the compensation carrier reached a  
7 settlement with the third-party defendant whereby the compensation carrier dismissed its complaint-in-  
8 intervention and filed a notice of lien. The *Hone* court distinguished *Levels, supra*, on the grounds that  
9 "in *Levels* there was an active complaint-in-intervention subjecting the carrier to the jurisdiction of the  
10 [superior] court." The *Hone* court held that, save the exception carved out in *Levels*, "The jurisdiction of  
11 the WCAB to determine the validity of the employer's lien, where it is not the third party tortfeasor but  
12 the injured employee who seeks to prove employer negligence is exclusive." (*Hone v. Climatrol*  
13 *Industries, Inc.* (1976) 59 Cal.App.3d 513, 527 [41 Cal.Comp.Cases 404] [citing to *Gilford v. State*  
14 *Comp. Ins. Fund.* (1974) 41 Cal.App.3d 828 [39 Cal.Comp.Cases 1020].)

15 In this case, the defendant/intervenor dismissed the complaint-in-intervention and thus, like in  
16 *Hone*, there is no longer an active complaint-in-intervention.<sup>2</sup> Also like in *Hone*, in this case the  
17 employer substituted a lien for the complaint-in-intervention. Although we need not decide whether  
18 WCAB jurisdiction is exclusive given the facts of this instant case, the superior court has essentially  
19 made that decision for us, as it has declined to exercise jurisdiction over the issue. The Supreme Court  
20 has recognized the "appeals board as a forum for adjudicating the employer's untried claim for  
21 reimbursement or credit." (*Roe v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 884, 892 [39  
22 Cal.Comp.Cases 791]). "[B]oth trial court and workmen's compensation agency are bound to accept the  
23

24 <sup>2</sup> In his Answer, the applicant appears to argue that, by dismissing its complaint-in-intervention before the adjudication of the  
25 employer fault issue, the carrier has waived its right to reimbursement. (see generally *Van Nuis v. Los Angeles Soap Co.*  
26 (1973) 36 Cal.App.3d 222 [39 Cal.Comp.Cases 88].) We note that there is also competing authority standing for the  
27 proposition that an employee cannot defeat a carrier's lien when it settles a case without obtaining findings on the question of  
employer fault. (*Correll v. Clark Equipment* (1978) 76 Cal.App.3d 548, 555 [43 Cal.Comp.Cases 1432].) We don't find  
either line of authority persuasive in a case such as this one, where a global settlement was effected with the third-party  
defendant which contemplated that the issue of reimbursement would be settled in future proceedings. In such a case, it  
cannot be fairly said that either side waived any issues relating to the issue of apportioning the settlement proceeds.

1 other's prior adjudication of employer negligence but free to adjudicate the issue if it is yet unsettled."

2 (*Ibid.*)

3 "We resolve all reasonable doubts about WCAB jurisdiction in favor of jurisdiction." (*Hughes*,  
4 *supra*, 88 Cal.App.4th at p. 531.) Contrary to the WCJ's decision, the WCAB has jurisdiction to decide  
5 the issue of how to apportion the settlement proceeds, including any issues of employer fault, and  
6 attorney's fees and expenses. We therefore rescind the Findings and Order of February 2, 2011 and  
7 return this matter to the trial level for all appropriate proceedings. We note that the WCJ has found that  
8 notwithstanding a stipulation to hold the settlement monies in trust, the applicant's counsel distributed  
9 the settlement monies to his firm and to the applicant. We take no position on what remedies are  
10 available to the defendant. The parties may litigate this issue at the WCAB trial level.

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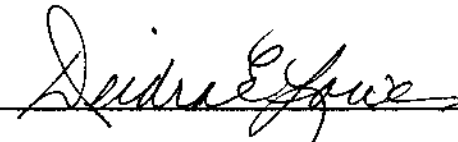
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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals  
3 Board that the Findings and Order of February 2, 2011 is hereby **RESCINDED** and that this matter is  
4 **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

5 **WORKERS' COMPENSATION APPEALS BOARD**

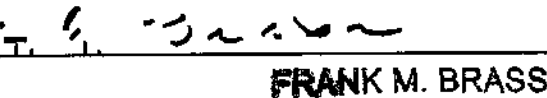
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9 I CONCUR,

DEIDRA E. LOWE

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13 ALFONSO J. MORESI



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16 FRANK M. BRASS

17 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

18 SEP 12 2013

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

21 ALBERT CARRABELLO  
22 THE BOCCARDO LAW FIRM  
23 MORSE, GIESLER, CALLISTER & KARLIN

24 DW/ebc

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1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **Case No. ADJ4118969 (SJO 0267767)**

5 **ALBERT CARRABELLO,**

6 *Applicant,*

7 **vs.**

8 **RGW CONSTRUCTION and OLD**  
9 **REPUBLIC GENERAL INSURANCE**  
10 **CORPORTION, Administered By**  
11 **GALLAGHER BASSETT SERVICES,**

12 *Defendant(s).*

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION**

13 Reconsideration has been sought by defendant with regard to a decision filed on  
14 February 2, 2011.

15 Taking into account the statutory time constraints for acting on the petition, and based  
16 upon our initial review of the record, we believe reconsideration must be granted in order to  
17 allow sufficient opportunity to further study the factual and legal issues in this case. We believe  
18 that this action is necessary to give us a complete understanding of the record and to enable us to  
19 issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such  
20 further proceedings as we may hereinafter determine to be appropriate.

21 For the foregoing reasons,

22 **IT IS ORDERED** that the Petition for Reconsideration be, and it hereby is, **GRANTED.**

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

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Albert Carrabello

Applicant,

**Case No. ADJ 4118969  
SJO-0267767**

**REPORT OF WORKERS'  
COMPENSATION JUDGE  
ON RECONSIDERATION**

RGW Construction, Inc., insured by Old Republic  
Insurance Corp., administered by Gallagher Bassett  
Services, Inc.,

Defendants.

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The above-entitled matters were submitted for decision following the hearing held in this matter on January 31, 2011, after which Findings and Order issued on February 2, 2011, together with an Opinion on Decision provided in explanation of the Findings and Order, which found that the WCAB is without jurisdiction to order the distribution or allocation of the proceeds of the third party settlement proceeds in this case.

Defendant timely filed a Petition for Reconsideration on or about February 23, 2011, and this report is provided in response.

## **I. INTRODUCTION and FACTUAL SUMMARY**

The facts in this case are based upon the stipulations of the parties, as set forth in the Minutes of the Hearing held on January 31, 2011, together with the documentary evidence admitted at the hearing, as identified in the Minutes of Hearing. I will briefly summarize those facts as herein pertinent, as the summary provided by defendant in its Petition differs slightly from the facts of record.

Albert Carrabello, born August 18, 1965, while employed on or about September 25, 2007 as a laborer at Manteca, California, by RGW Construction, insured for workers' compensation purposes by Old Republic General Insurance Corporation, administered by Gallagher Bassett Services, sustained injury arising out of and in the course of employment to his left hip and spine. He was, at that time and place, apparently at a work site for his employer, RGW Construction, when he was struck by a motor vehicle driven by a third party driver. As a result, he initiated both a workers' compensation claim against his employer, and a third party lawsuit against the third party driver. He has at all times been represented in both cases by the Boccardo Law Firm.

He received medical treatment and various disability benefits as a result of his workers' compensation claim. As stipulated, as of 9/10/2010, defendant had paid total temporary disability in the sum of approximately \$ 77,079.00, permanent disability advances of approximately \$ 7,161.00, and medical treatment bills of approximately \$ 42,899.00

Because the injury herein of 9/25/2007 was the alleged result of the negligence of others, including the driver of the third party vehicle which struck applicant at his work site, it resulted in the filing by Mr. Carrabello (and also his wife, based on review of the releases in evidence) of

a third party personal injury civil lawsuit in the Superior Court in Stockton, California (San Joaquin County) on or about 3/10/2009. Defendant Old Republic filed a Complaint in Intervention in said action on or about 5/13/2009. Answers to the Complaint and Complaint in Intervention were filed in the civil action by the civil defendants, raising the issue of employer Fault (Witt v. Jackson defense).

On 8/19/2009, the insurance carrier for the third party defendant tendered a policy limit offer of \$ 100,000.00 to resolve the complaints of both plaintiff and intervenor. On 12/8/2009 plaintiff and intervenor agreed to sign the \$ 100,000.00 settlement check, and to place the settlement funds in the trust account of plaintiff's counsel (Boccardo Law Firm), and a stipulation memorializing this was signed by plaintiff and intervenor (defense exhibit F).

On 12/7/2009 plaintiff signed a settlement release memorializing its agreement regarding the \$ 100,000.00 settlement (defense exhibit D), and on 12/15/2009 intervenor signed a settlement release regarding the same \$ 100,000.00 settlement figure (defense exhibit C). Plaintiff, on or about 12/7/2009, and intervenor, on or about 2/18/2010, dismissed their respective complaint and complaint in intervention in the civil case theretofore filed in San Joaquin County.

Based on review of the documentary evidence, the plaintiff and intervenor were never in agreement regarding the precise amount each were to receive from the \$ 100,000.00 global civil settlement recovery. Some limited efforts with the Superior Court judge to resolve that disagreement were unsuccessful.

Defendant's Petition for Reconsideration states on page 2, lines 12-13 that the settlement proceeds are being held in trust by plaintiff's counsel, the Boccardo Law Firm. That statement is incorrect. As set forth in the Minutes of Hearing, and in the Findings of Fact of my decision,

#13, the settlement funds in the sum of \$ 100,000.00 were in fact already disbursed to applicant and his counsel, by his counsel, with no payment to intervenor. Thus, there are in fact no funds currently being held in trust as implied or stated by Petitioner.

The plaintiff's counsel, following dismissal of the Complaint and Complaint in Intervention, sought an order from the Superior Court regarding the disbursement of funds (arguably, in view of the subsequent course of action, such attempt to seek an order should have been undertaken prior to dismissal with prejudice of the complaint and complaint in intervention), but the Superior Court judge apparently took the position that because both plaintiff and intervenor had dismissed their complaint and complaint in intervention, he could not further act on the matter. As set forth in # 14 of the Findings, and in my Opinion on Decision on page 3, on 7/20/2010 Superior Court Judge Garrigan issued an Order denying plaintiff's application for an ex parte order shortening time regarding a Motion to enforce the settlement and to allow disbursement of funds, noting that "...the case has been dismissed in its entirety", and the court "...has no further jurisdiction." (defense exhibit E). I make no comment regarding the correctness of that determination, and note that there is nothing in the record to indicate that either party appealed that denial.

Based on comments of counsel during the course of the proceedings, it is my understanding that defendant may have some separate subsequently filed litigation filed in the Superior Court (San Joaquin County) pertaining to the settlement terms and conditions, but there was no formal record or documents filed in the proceedings before me regarding such ongoing or pending civil litigation.

The record establishes in the present proceeding that there remains disagreement between the

plaintiff and intervenor regarding disbursement or reimbursement with respect to the settlement proceeds received from the third party defendant, and already disbursed, as set forth above. That disagreement is the subject of the only pending Petition on this issue, which is in evidence and identified as defense exhibit B. That Petition is entitled, in full, **"Petition for Disbursement of Settlement Proceeds Held in Trust by the Boccardo Law Firm Pursuant to Labor Code Section 3852, et seq."** (as noted on page 4, above, the funds have already been disbursed and are not being held in trust; perhaps petitioner seeks imposition of a constructive trust for breach of the terms of the purported civil settlement agreement previously referenced).

There had been no Petition filed to the date of trial by defendant seeking credit (a procedure clearly permitted before the WCAB pursuant to Labor Code Section 3861) in this workers' compensation case for the amount of applicant's recovery (net or gross) from the third party case (i.e. no Petition for Third Party Credit was filed by defendant).

The matter proceeded to trial before the undersigned, solely with respect to the Petition filed by defendant as identified in the preceding paragraph, and was submitted for decision without testimony, based on stipulated facts, and various documents and exhibits basically confirming the stipulated facts. Following consideration of the matter, I issued Findings and Order, determining that the Workers' Compensation Appeals Board lacks subject matter jurisdiction to adjudicate the disbursement and distribution of the settlement proceeds received as a result of the settlement of the third party personal injury lawsuit which had been filed in San Joaquin County Superior Court (ergo, the settlement was "after suit"). As noted in my Opinion on Decision, the WCAB would have jurisdiction to adjudicate a Petition for Third Party Credit (per Labor Code Section 3861), in my opinion, but no such Petition was or has been filed, to my knowledge, so such



litigation would be premature (as the filing of such a Petition for Credit would be a prerequisite to litigation of credit issues, as per Reg. 10450, Title 8, California Code of Regs).

From that decision, which issued and was served on February 2, 2011, defendant timely filed a Petition for Reconsideration, urging that jurisdiction be found and my decision reversed. Following review of the Petition, my opinion remains unchanged. My earlier Opinion on Decision discussed in considerable detail my reasoning and review of the cases cited by Petitioner, and therefore pertinent portions of the Opinion will be restated in full herein, with supplemental comment only as needed to address any points not covered therein.

## **II.DISCUSSION**

### **a. Jurisdiction to Adjudicate Disbursement and Distribution of Settlement Proceeds of Third Party Case**

The WCAB is a court of limited jurisdiction, vested with “full power, authority and jurisdiction to try and determine finally all the matters specified in Section 5300 subject only to the review by the courts as specified in this division.” (L.C. Section 5301; see also L.C. 5310). It is my opinion that the facts and law, as applied to this case, do not support or allow assertion of jurisdiction by the WCAB. Petitioner states, on page 14, lines 3-5, “..the Trial Judge demonstrates a complete lack of understanding of the underlying facts and applicable case law in this dispute with his assertion that: “Based on my understanding and review of applicable law, the filing of complaints, complaints in interventions, and liens are all to be accomplished in the

applicable Superior Court of the State of California with jurisdiction. Settlements of the civil cases are to be accomplished there. Resolutions of disputes related to those cases are to be accomplished in the civil forum, not before the WCAB.”

Petitioner then asserts that this trier of fact erroneously focused on Labor Code Section 3852, and not on Labor Code Section 3860, in making the decision.

First, I believe the initial quoted discussion was generally accurate, and does not reflect, as stated by counsel, a “complete lack of understanding” of this case or applicable law. Secondly, my decision was predicated on the facts of this case, and the general statutory provisions of the Labor Code, not simply Labor Code Section 3852. Labor Code Section 3852 was mentioned more than once by me, but this is understandable in view of the fact that the Petition filed by defendant, which was the subject of this decision, as titled referenced solely Labor Code Section 3852. As noted by me on page 4 of this Report, the Petition at issue herein was entitled, in full, **“Petition for Disbursement of Settlement Proceeds Held in Trust by the Boccardo Law Firm Pursuant to Labor Code Section 3852, et seq.”**

In the Petition for Reconsideration, petitioner now urges that jurisdiction should be found if consideration is limited to Labor Code Section 3860, instead of Labor Code Section 3852. I disagree. The case law does not support such a result, as applied to the facts of this case.

In review of the Petition for Reconsideration (see page 14, line 21), petitioner specifically references Labor Code Section 3860 (b), as well as Labor Code Section 3860 (f), which provides that a civil settlement is subject to an employer’s claim for reimbursement. Labor Code Section 3860 (b), in general, however, does not address the jurisdictional issue decided. The jurisdictional issue requires an analysis of the factual context of this case, as well as

consideration of the appellate decisions which have discussed similar factual situations. Based on this analysis, I made my earlier decision, and remain of the opinion that it was correct, contrary to counsel's statement that it was "rooted not in law but in custom and experience on issues which are factually irrelevant to the instant dispute." (Petition for Reconsideration, page 15, lines 20-21).

First, it should be noted that in the Petition for Reconsideration, Petitioner cites three somewhat relevant cases, with respect to the jurisdictional issue presented (in defendant's trial brief, only 2 cases had been cited, both of which I did discuss in my Opinion on Decision). I will briefly and separately discuss all 3 of those cases, and explain why I consider none of them to be controlling on the narrow issue in this case.

Before discussing these cases, however, discussion of Labor Code Section 3860 (f), quoted in full by petitioner in its Petition herein, is warranted. Specifically relevant, in my opinion, is the first sentence of Labor Code Section 3860 (f), the primary code section upon which petitioner apparently relies (although, as noted previously, the original "Petition for Disbursement" referenced only section 3852 in its title). The first sentence of Labor Code Section 3860 (f) states as follows: "... The amount of expenses and attorney's fees referenced in this section shall, on settlement of suit, or on any settlement requiring court approval, be set by the court." (underlining added by this author). In Superior Court (based on my experience and general knowledge), certain cases require court approval, even if settlement is reached before filing of a lawsuit. Such cases include settlements of cases involving minors and others considered legally incompetent. The use of the term "court", in reference and in context, clearly refers to the Superior Court, and not to the appeals board. The use of the term "suit", in reference and in

context, clearly refers to a civil lawsuit, and not to an application for benefits filed with the WCAB. In the case of Albert Carrabello, clearly both Mr. Carrabello and the employer/insurer filed complaints in the San Joaquin Superior Court. These constitute the “suit”. Therefore, in this case we are dealing with “settlement of suit”, by the clear terms of the statute. Thus, by the terms of the statute, the amount of expenses and attorney’s fees shall be set by the “court”, in this case the San Joaquin Superior Court, because settlement was reached after filing of suit (i.e., “on settlement of suit”), and in that court.

None of the cases cited by defendant, in my opinion, support its position. I will discuss each case and the reasons for my conclusion in this regard.

The first case cited by defendant is Gilford v. SCIF (1974) 30 CCC 1020, 41 CalApp3d 828. In this case, applicant filed a personal injury action in Superior Court against a third party, and in that third party personal injury action the applicant sought himself to join his own employer as a party, so as to assist in the litigation of the Witt v. Jackson issue (employer fault or comparative fault). The employer objected to being joined in the civil action and to being forced to participate as a party, and the court of appeal agreed that the employer was improperly joined by applicant, and could not be forced to participate under these circumstances (the issue of employer fault can be raised by the third party defendant, based on my experience and general legal knowledge, by asserting it as an affirmative defense, without joinder of the employer as a party defendant and the resulting expense). This case does not support defendant’s proposition. Any language containing a general discussion of forums is dicta.

The second pertinent case cited by defendant was Hughes v. Argonaut Ins. Co. (2001) 66 CCC 454, 88 Cal. App 4th 517. This case involved an applicant attempting to sue her

employer's workers' compensation insurer in Superior Court for its alleged mishandling of its lien against applicant's third party settlement, including the allocation of attorney's fees in a case where **no civil lawsuit was ever filed**, and where there was a dispute regarding the attorney fee allocation. The Superior Court upheld a demurrer and said the WCAB should deal with these issues, which had never been addressed in any court, nor had the jurisdiction of any court been invoked by the filing of any complaint with respect to the underlying settlement. Again, by reference to Labor Code Section 3860 (f), supra, the result in this case is appropriate; no suit was ever filed so the WCAB was the proper forum for these issues, as upheld by the First District Court of Appeal.

In the instant case, as I have attempted to point out numerous times, **both a complaint and a complaint in intervention were filed in the Superior Court** (the complaint by the plaintiff and the complaint in intervention by the petitioner). Answers were filed in the Superior Court action to both the complaint and the complaint in intervention, raising employer fault. Both cases were the subjects of signed settlement releases in the civil case, memorializing the agreement regarding the \$ 100,000.00 settlement. Both plaintiff and plaintiff in intervention then filed dismissals of their complaint and complaint in intervention. Clearly, the jurisdiction of the Superior Court was invoked, pleadings were filed and dismissed, and some type of settlement agreement reached. Unfortunately for the parties, the lack of clarity regarding the terms of that settlement agreement resulted in ongoing and additional litigation, both in that forum and now with the attempt to vest jurisdiction with the WCAB.

At this point, I will briefly discuss the third case cited by defendant in its Petition for Reconsideration, which is **Draper v. Aceto** (2001) 66 CCC 1297, 26 Cal. 4th 1086, the only

California Supreme Court Case (the other two cases cited were both court of appeal decisions). In Draper, the applicant filed a third party lawsuit in Superior Court, and the employer/insurer filed its own complaint. The parties, after suit, had a disagreement regarding the allocation of fees (as per Labor Code Section 3860), and the Superior Court ruled on the Motion (understandably, as in my opinion it had continuing subject matter jurisdiction on the issue). The Draper decision, in my opinion, does not support petitioner's argument that the WCAB has jurisdiction on this issue, at least in a situation (as in the instant case) where the parties filed civil complaints and reached a civil settlement and then had a dispute regarding allocation of attorney fees. The proper forum, and the one with jurisdiction to address the issue, remains the Superior court. In fact, Draper would support exactly the opposite result to the one sought by Petitioner, even though the case was cited by petitioner. Subject matter jurisdiction was vested and remained with the Superior Court, as is the case with Mr. Carrabello, in my opinion.

The foregoing discussion was intended to demonstrate that none of the cases cited by Petitioner, when fairly considered in light of the two forums involved, support defendant's position. They instead support the position that the proper forum and the one with jurisdiction remains the Superior Court, where civil cases ("suits") were filed and settlement reached after such filing, and in that forum.

I attempted to research to see if any other cases support petitioner's argument. I found one Supreme Court case, but it reached the same conclusion as did Draper, supra. This is the case of Summers v. Newman, et al (1999) 64 CCC 852, 20 Cal. 4<sup>th</sup> 1021. This case also involved a dispute regarding allocation of attorney fees under Labor Code Section 3860, et seq, in a situation where attorneys for applicant and the employer both actively participated in a successful

third party civil action and settlement, but then had post-settlement disagreement regarding the allocation of attorney's fees and litigation costs. Again, the California Supreme Court upheld the procedure of a post-settlement motion in superior court "...for an order under section 3860 determining the amount of Teichert's reasonable attorney fees and costs..." The post-settlement order by the superior court judge was upheld in this decision.

There is no case cited by petitioner, or found by me, wherein an intervenor-party, post-settlement (following the filing of a complaint in intervention and invocation of superior court jurisdiction), then sought to invoke the jurisdiction of the WCAB to order disbursement or allocation of the settlement proceeds. This would, in my opinion, involve a possible need to revisit the terms of the settlement and the intent of a superior court judge involved in that settlement. Such attempted "switching" of jurisdictions, in my opinion, is not supported by the statutory or case law authority.

If and when defendant opts to file a Petition for Third Party Credit, the WCAB would have jurisdiction to adjudicate such pleading, in my opinion, and to determine the amount of allowable credit, employer fault, etc (per Labor Code Section 3861, et seq).

### **b. General**

Any award, order or decision must be supported by substantial evidence in light of the entire record. Lamb v. WCAB (1974) 11 Cal3d 274, 39 CCC 310; LeVesque v. WCAB (1970) 1 Cal. 3d 627, 54 CCC 349; Bracken v. WCAB (1989) 214 Cal. App. 3d 246, 54 CCC 349. When findings are supported by solid credible evidence, as in the case of the foregoing determinations

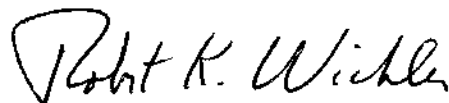
regarding jurisdiction, they are to be accorded great weight and rejected only on the basis of contrary evidence of considerable substantiality. Lamb., supra; Garza v. WCAB (1970) 3 Cal.3d 312, 35 CCC 500. In this case, the finding of lack of subject matter jurisdiction is supported by solid, credible evidence and case law authority, and the petitioner's contrary position, conversely, is not supported by such authority.

**c. Recommendation**

It is recommended that the Petition for Reconsideration be denied.

March 10, 2011

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Dated



\_\_\_\_\_  
ROBERT K. WICKLER  
Workers' Compensation Judge

Filed & Served by mail on all parties listed  
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