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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CEDRIC LOWE,

Applicant,

vs.

**COAST PEST CONTROL; CALIFORNIA
INSURANCE GUARANTEE ASSOCIATION
and its servicing representative SEDGWICK
CMS, for CAL COMP INSURANCE
COMPANY in liquidation,**

Defendants.

Case Nos. ADJ3387227 (MON 0295804)
ADJ340230 (MON 0359318)
ADJ4438623 (MON 0359321)
(Marina del Rey District Office)

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the August 29, 2013 Order Approving Compromise and Release wherein the workers' compensation administrative law judge (WCJ) approved a Compromise and Release settling applicant's workers' compensation claims for \$225,883.23. As part of the Compromise and Release, defendant agreed to purchase an annuity for the purpose of funding a Medicare set-aside agreement. The Compromise and Release does not state that defendant will take a credit for permanent disability advances.

Defendant contends that the WCJ erred in issuing the Order Approving Compromise and Release, arguing that the Compromise and Release was procedurally defective and that the parties made a mutual mistake of fact in entering into a "new money" settlement when defendant had advanced \$119,170.72 in permanent disability advances.

We have considered the Petition for Reconsideration, and we have reviewed the record in this matter. The WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report), recommending that the petition be denied.

For the reasons discussed by the WCJ in his Report, which we adopt and incorporate by reference and for the reasons discussed below, we will deny reconsideration.

Paragraph 7 of the Compromise and Release agreement reads as follows:

1 "7. The parties agree to settle the above claim(s) on account of the
2 injury(ies) by the payment of the SUM OF

3 \$ 225,983.23
4 Settlement Amount

5 The following amounts are to be deducted from the settlement amount:

6 \$ _____ for permanent disability advances through _____
7 \$ _____ for temporary disability indemnity overpayment, if any
8 \$ 15,411 payable to MSA Seed Money (See Addendums)
9 \$ 160,572.23 payable to MSA Annual Premium (See Addendums)
\$ _____ payable to _____
\$ _____ payable to _____
10 \$ 25,246.00 requested as applicant's attorney's fee.

11 LEAVING A BALANCE OF \$24,754.00, after deducting the amounts
12 set forth above and less further permanent disability advances made after
13 the date set forth above. Interest under Labor Code section 5800 is
included if the sums set forth herein are paid within 30 days after the date
of approval of this agreement."

14 A Compromise and Release agreement is a contract between an employee and employer that
15 requires the approval of the Workers' Compensation Appeals Board to be valid. (Lab. Code § 5001;
16 *Draper v. Workers' Comp. Appeals Bd.* (1983) 147 Cal. App. 3d 502, [48 Cal.Comp.Cases 748].).)
17 Additionally, Labor Code section 5003 requires that every compromise and release "shall specify: ...(d)
18 The amount paid, or due and unpaid, to the employee up to the date of the release or agreement or death,
19 and the amount of the payment or benefits then or thereafter to be made."

20 Here, the agreement does not include a credit for permanent disability advances. Furthermore,
21 given that the agreement involves a Medicare set-aside agreement, defendant could not have taken a
22 credit for \$119,170.72 without applicant himself paying for a portion of the annuity purchased as part of
23 the Medicare set-aside agreement. It appears unlikely that applicant's attorney would agree to such an
24 arrangement and correspondingly unlikely that the Compromise and Release was entered into based on a
25 mutual mistake of fact.

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1 For the foregoing reasons,

2 IT IS ORDERED that defendant's Petition for Reconsideration of the August 29, 2013 Order is
3 DENIED.

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5 WORKERS' COMPENSATION APPEALS BOARD

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8 MARGUERITE SWENEY

9 I CONCUR,

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11 T. 1. 5 2 6 ~
12 FRANK M. BRASS

13
14 
15 ALFONSO J. MORESI



16 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

17 NOV 15 2013

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

20 GOLDSCHMID, SILVER & SPINDEL, ATTN. Lawrence Silver, Esq. -
21 KEGEL, TOBIN & TRUCE
22 CEDRIC LOWE

23
24 MWH/ebc

WCAB CASE NUMBER ADJ3387227(MF); ADJ4438623; ADJ340230

COAST TERMITE & PEST
CONTROL; SEDGWICK CMS
C/O CIGA for CAL COMP
INSURANCE COMPANY, in
LIQUIDATION,

GAIL E RENTZER

1.	Applicant Occupation:	Technician
	Applicant's DOB:	
	Dates of Injury:	
		(1) 07/02/1998 (ADJ3387227) MF; (2) 07/02/1998 – 01/02/1999 (ADJ340230); (3) 08/15/1998 (ADJ4438623)
	Parts of Body Injured:	Neck, back, psyche, shoulder, left upper extremities
2.	Identity of Petitioner:	Defendant
	Timeliness:	Petition for Reconsideration 09/20/2013
	Verification	Verified
3.	Date of Issuance of Compromise And Release:	08/29/2013
4.	Applicant's Answer to Petition for Reconsideration:	09/25/2013
5.	Petitioners Contentions:	The Order Approving Compromise and Release should be set aside

II. **FACTS**

Applicant's case involved three injuries during his employment at Coast Termite & Pest Control. The dates of injury were July 2, 1998, August 15, 1998 and continuous trauma date of July 2, 1998 through January 2, 1999. On May 6, 2008 these cases were settled by Stipulation with Request for Award in the amount of 83% permanent partial disability payable at \$230 per week beginning November 21, 2001 and life pension of \$88.90 per week thereafter.

Per the defendant's Petition for Reconsideration, after the Stipulation and Award had been paid out the parties negotiated a settlement of the claim by Compromise and Release agreement in 2013. An MSA was determined to be \$31,968 and was approved by CMS, the Compromise and Release agreement did not specifically address defendant's intent to take credit for permanent disability benefits. The Compromise and Release resolved the claim for \$225,983.25 to be paid by a structured settlement.

On August 29, 2013 applicant's counsel walked through the Order Approving the Compromise and Release, and this Workers Compensation Administrative Law Judge signed the Order.

On September 18, 2013 the defendant filed a Petition to Set Aside the Order Approving and on September 19, 2013 the parties appeared before this Workers Compensation Administrative Law Judge and the Petition to Set Aside the Compromise and Release was denied.

The defendant then filed a timely Petition for Reconsideration to Set Aside the Order Approving Compromise and Release.

III. **DISCUSSION**

In order to set aside an Order Approving Compromise and Release by the parties, the Petition must establish good cause to set aside the agreement aside. Santa Maria Bontia School District v WCAB (Recinos) (2002) 67CCC848.

Good Cause has been found to include mutual mistake, newly discovered evidence, and/or inadequacy of the settlement. City of Beverly Hills v Workers Comp. Appeals Bd. (Dowdle) (1997) 62CCC1691 (Writ Denied).

In the herein matter, defendant claims that it would be reasonable to "infer applicant's counsel knew a mistake was made in the drafting of the Compromise and Release." (Defendant's Petition for Reconsideration page 4, lines 26 to 27)

Defendants also contend there is a mutual mistake of fact because applicant had received \$125,000 from the prior Stipulation and Award and that is was a mutual mistake for applicant's counsel to believe the settlement was for new money.

The applicant attorney in his response to defendant's Petition for Reconsideration states that taking credit for the \$125,000 in permanent disability paid pursuant to the May 2008 Award and complied with by 2011 was never part of the settlement negotiation. This settlement was based on the value of applicant's life pension, medicare set aside and the value of future medical care not covered by medicare. Additionally the cost of the annuity was over \$160,000 and there is no source to take a deduction of \$125,000 from. It should be noted additionally paragraph 9 (A) of the C&R states as follows:

"Comments:

A. THIS SETTLEMENT RESOLVES ALL ISSUES OF RETROACTIVE TD, PD, MILEAGE REIMBURSEMENT, OUT-OF-POCKET EXPENSES, PENALTIES, INTEREST, LIFE PENSION AND VOCATIONAL REHABILITATION/VOUCHER. B. THIS AGREEMENT SETTLES ALL DISABILITY AND ILLNESS, WHETHER OF A PHYSICAL OR PSYCHIATRIC NATURE, STEMMING FROM, FLOWING FROM, OR RESULTING FROM THE INJURIES ALLEGED HEREIN. C. THIS SETTLEMENT INCLUDES AND INCORPORATES STIPULATED AWARD AT 83% PD OF MAY 6, 2008. *PDAS INCLUDE ATTORNEY'S FEES, AND COMMUTATION."

This comment appears to settle all permanent disability issues.

The defendant also contends the Order Approving the Compromise and Release is unenforceable and the Order is inconsistent because the form states "less credit for permanent disability advances or settlement advances." In this case there were no permanent disability advance, or any settlement advances in connection with this Compromise and Release. In fact, as stated above the permanent disability advance issues were settled per paragraph 9A of the Compromise and Release. The Order also clearly states "per structured settlement and medicare set aside as attached addendum."

Additionally the defense contends the witnesses to the Compromise and Release are not disinterested witnesses. It is alleged the witnesses were employees of applicant attorney's office and could not properly witness applicant's signature. This is not true, however, they simply attested that the applicant signed the Compromise and Release and this would not constitute fraud or rise to grounds set aside a Compromise and Release.

The facts of the defendant's Petition for Reconsideration do not constitute a mutual mistake of fact to warrant setting the Compromise and Release aside. Apparently this is a unilateral mistake by defendant.

The court's role in reviewing and approving a settlement of the parties is to review the agreement for adequacy. The evidence presented to this Workers Compensation Administrative Law Judge was found to be adequate to approve the Compromise and Release and Award.

IV.

RECOMMENDATION

It is respectfully recommended defendant's Petition for Reconsideration be denied.

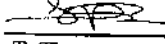
Date: 10/04/2013



Gail Rentzer

Workers' Compensation Administrative Law Judge

Service by mail on parties as shown
on Official Address Record

By:  10-04-2013
T. Thompson