

1 **WORKERS' COMPENSATION APPEALS BOARD**
2 **STATE OF CALIFORNIA**
3

4 **LUIS ALVARENGA,**
5

6 *Applicant,*

7 **vs.**

8 **SCOPE INDUSTRIES; COMMERCE &**
9 **INDUSTRY INSURANCE, administered by,**
10 **AIG CLAIMS,**

11 *Defendants.*

Case No. ADJ8873556
(Van Nuys District Office)

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND
DECISION AFTER
RECONSIDERATION

12 Defendant has filed a Petition to Set Aside, or in the alternative a Petition for Reconsideration of
13 the Order to Approving Compromise and Release (OACR) issued on March 17, 2016, by the workers'
14 compensation administrative law judge (WCJ), which approved the March 17, 2016 Compromise and
15 Release (C&R) entered into between defendant and applicant, which included a Medicare Set Aside
16 (MSA) of \$24,079.23, which the parties did not submit to the Center for Medicare Services (CMS) for
approval.

17 Defendant contends that the parties entered into the C&R by mutual mistake because the parties
18 believed in error that applicant's MSA did not require CMS approval, and defendant alleges that the
19 MSA does require CMS approval and defendant only discovered this after the OACR issued.

20 We have not received an answer from applicant. We received a Report and Recommendation on
21 Petition for Reconsideration (Report) from the WCJ recommending that we deny reconsideration.

22 We have considered the allegations of the Petition for Reconsideration and the WCJ's Report.
23 Based on our review of the record and for the reasons stated below, we will grant defendant's Petition for
24 Reconsideration and as our Decision after Reconsideration we will rescind the March 17, 2016 OACR
25 and return this matter to the trial level for further proceedings consistent with this opinion.

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FACTUAL AND PROCEDURAL BACKGROUND

On March 17, 2016, the parties entered into a C&R agreement resolving this matter in its entirety for \$39,000.00 less \$11,040.00 permanent disability advances and less \$5,850.00 for attorney fees, leaving applicant with a balance of \$22,110.00 lump sum. At the time the parties entered into the C&R, applicant was a Medicare beneficiary. Per the comments on Paragraph 9 of the C&R:

PARTIES SECURED MSA AT \$24,079.23. PER HELIOS SETTLEMENT SOLUTIONS TEAM, THE AMOUNT DOES NOT MEET THE REVIEW THRESHOLD CMS ESTABLISHED FOR THEIR REVIEW PROCESS. AS SUCH, DOES NOT HAVE TO BE SUBMITTED FOR REVIEW AND APPROVAL.

On April 4, 2016, defendant filed a Petition to Set Aside the C&R on the grounds of mutual mistake of fact. Defendant states that after the C&R was approved, defendant was advised by its MSA vendor that CMS approval of the MSA was required.

DISCUSSION

Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1] (*Weatherall*).)

The Workers' Compensation Appeals Board and/or WCJ inquires, "... into the adequacy of all compromise and release agreements and may, in [its] discretion, set the matter for hearing or take evidence when necessary to determine whether the agreement should be approved, or disapproved[.]" A workers' compensation compromise and release must be adequate. (Lab. Code, § 5001; *Johnson v. Workmen's Comp. Appeals Bd. (Johnson)* (1970) 2 Cal.3d 964, 973 [35 Cal.Comp.Cases 362], quoting *Chavez v. Industrial Acc. Com.* (1958) 49 Cal.2d 701, 702.) An injured worker is thus protected from "unfortunate compromises" resulting from "economic pressure or lack of competent advice." (*Id.*) A compromise and release can be rescinded, altered or amended by the Board within the five-year jurisdictional period, "... upon a showing of 'good cause.'" (*Smith v. Workers' Comp. Appeals Bd. (Smith)* (1985) 168 Cal.App.3d 1160, 1169 [50 Cal.Comp.Cases 311].) "This would require a showing of fraud, mutual mistake of fact, duress or undue influence." (*California General Tire v. Workers' Comp. Appeals Bd. (Talbott)* 67 Cal.Comp.Cases 1336, 1340 referencing *Smith, supra*.)

1 Whenever a party is either a Medicare beneficiary or is reasonably foreseeable to become a
2 Medicare beneficiary within 30 months of the settlement date, the parties are required to protect
3 Medicare's interest in settling future medical treatment. (42 U.S.C. § 1395y(b)(2); see also, CMS
4 Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) Reference Guide, version 2.5, rev.
5 April 2016, available at <https://www.cms.gov>.)

6 A WCMSA allocates a portion of the WC settlement for all future claim-
7 related medical expenses that are covered and otherwise reimbursable by
8 Medicare ("Medicare covered"). When a proposed WCMSA amount is
9 submitted to CMS for review and the claimant (who may or may not be a
beneficiary) obtains CMS' approval, the CMS-approved WCMSA amount
must be properly spent before Medicare will begin to pay for care related
to the WC claim.

10 The goal of establishing a WCMSA is to estimate, as accurately as
11 possible, the total cost that will be incurred for all medical expenses
12 otherwise reimbursable by Medicare for claim-related conditions during
13 the course of the claimant's life, and to set aside sufficient funds from the
14 settlement, judgment, or award to cover that cost. WCMSAs may be
funded by a lump-sum single payment, or may be structured, with a fixed
amount of funds paid each year for a fixed number of years, often using an
annuity.

15 Any claimant who receives a WC settlement, judgment, or award that
16 includes an amount for future medical expenses must take Medicare's
17 interest with respect to future medicals into account. If Medicare's
18 interests are not considered, CMS has a priority right of recovery against
any entity that received any portion of a third-party payment either directly
or indirectly—a right to recover, or take back, that payment. CMS also has
a subrogation right with respect to any such third-party payment.

19 (*Id.* at p. 4.)

20 Defendant asserts that the OACR should be set aside due to mutual mistake of fact because the
21 parties were mistaken as to whether CMS is required to review the MSA in this case. However, CMS
22 does not actually require review of any MSA agreements. Per CMS's WCMSA Reference Guide:

23 A claimant may consider seeking CMS approval of a proposed WCMSA
24 amount for a variety of reasons. The primary benefit is the certainty associated
25 with CMS reviewing and approving the proposed amount with respect to the
amount that must be properly spent. It is important to note, however, that
CMS approval of a proposed WCMSA amount is not required.

26 (*Id.* at p. 5 (emphasis added).)

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1 Although CMS review is not required, there are significant consequences when a MSA settlement has
2 not been approved by CMS:

3 If the parties to a WC settlement stipulate a WCMSA amount but do not
4 receive CMS approval, then CMS is not bound by the amount stipulated by
5 the parties, and it may refuse to pay for future claim-related medical
6 expenses, even if they would ordinarily have been covered by Medicare.
7 However, if CMS approves the WCMSA amount and that amount is later
8 properly spent, Medicare will pay Medicare-covered, claim-related
9 medical bills regardless of the amount of care the claimant continues to
10 require.

11 (*Id.* at p. 7.)

12 Defendant alludes to the \$25,000.00 threshold settlement amount as requiring CMS review of the
13 MSA; however, the \$25,000 threshold does not require MSA review. That is merely the minimum
14 settlement amount for which CMS will actually conduct a review. Per CMS:

15 CMS will review a proposed WCMSA amount when the following
16 workload review thresholds are met:

17 • The claimant is a **Medicare beneficiary** and the total settlement amount
18 is **greater than \$25,000.00**; or

19 • The claimant has a reasonable expectation of Medicare enrollment **within**
20 **30 months of the settlement date** and the anticipated total settlement
21 amount for future medical expenses and disability or lost wages over the
22 life or duration of the settlement agreement is expected to be **greater than**
23 **\$250,000.00**.

24 (*Id.* at p. 8 (emphasis in original).)

25 The parties were not mistaken as to whether CMS must review the MSA in this case. CMS does
26 not require review of any MSAs, but only recommends review under certain conditions. The
27 March 17, 2016 OACR will not be set aside on that ground. However, two significant issues arise, both
of which constitute good cause to rescind the OACR. First, based on the language contained within the
C&R, it does not appear that applicant was adequately advised of the effect of the parties' failure to
conduct CMS review of the MSA. If the parties wish to enter into a C&R with an MSA arrangement
without obtaining CMS review, applicant should be advised of the fact that CMS may withhold future
Medicare benefits if CMS deems the settlement to be inadequate.

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1 Second, the C&R is not adequate. The parties state in the comments that the MSA was for
2 \$24,079.23, but applicant only received a total of \$22,110.00 after deductions for permanent disability
3 advances and attorney's fees. The C&R did not include enough funds to cover the MSA, nor did it
4 provide any consideration for non-Medicare covered expenses. In this case, the C&R is inadequate and
5 good cause exists to rescind the order approving.

6 Accordingly, we grant defendant's Petition for Reconsideration and as our Decision after
7 Reconsideration we rescind the March 17, 2016 OACR and return this matter to the trial level for further
8 proceedings consistent with this opinion.

9 For the foregoing reasons,

10 **IT IS ORDERED** that defendant's Petition for Reconsideration of the Order Approving
11 Compromise and Release issued on March 17, 2016, by the WCJ is **GRANTED**.

12 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'
13 Compensation Appeals Board that the Order Approving Compromise and Release issued on
14 March 17, 2016, by the WCJ is **RESCINDED**.

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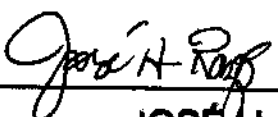
1 IT IS FURTHER ORDERED that this matter is RETURNED to the WCJ for further
2 proceedings consistent with this opinion and a new decision.

3 WORKERS' COMPENSATION APPEALS BOARD

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5 
6 KATHERINE ZALEWSKI

7 I CONCUR,

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11 FRANK M. BRASS

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14 JOSE H. RAZO



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16 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

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18 JUN 03 2016

JUN 03 2016

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

21 JACOB EMRANI
22 LAW OFFICES OF JAMIE SKEBBA
23 LUIS ALVARENGA
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EDL:mm

ALVARENGA, Luis

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

WCAB Case No. ADJ8873556

LUIS ALVARENGA VS. SCOPE INDUSTRIES;
COMERCE & INDUSTRY INSURANCE
administrated by AIG CLAIMS SAN
DIEGO
APPLICANT, DEFENDANT(S).

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE
M. VICTOR BUSHIN APRIL 6, 2016

**REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE ON PETITION FOR
RECONSIDERATION**

INTRODUCTION:

On April 5, 2016, Defendant filed a timely and verified Petition for Reconsideration. Defendant contends the order approving the compromise and release issued on March 17, 2016 should be set aside on the grounds that there is newly discovered evidence and Mutual Mistake regarding submission of the Medicare Set-Aside to CMS for approval.

STATEMENT OF FACTS:

On March 17, 2016, the parties appeared at a Mandatory Settlement Conference at which the parties agreed to settle via Compromise and Release. The parties drafted and executed a Compromise and Release, which was submitted for approval. On March 17, 2016, the undersigned WCJ issued an Order Approving Compromise and Release (hereinafter OACR). It is from this order that Defendant seeks relief.

DISCUSSION:

THE ORDER APPROVING COMPROMISE AND RELEASE SHOULD NOT BE SET ASIDE

Where stipulations are entered into through inadvertence, excusable neglect, fraud, mistake of fact or law, where the facts stipulated have changed or there has been a change in the underlying conditions that could not have been anticipated, or where special circumstances exist rendering it unjust to enforce the stipulation, a court may exercise sound discretion and set aside

the stipulation, but when there has been no mistake but merely a lack of full knowledge of the facts, which is due to the failure of a party to exercise due diligence to ascertain them, there is no proper ground for relief. (Huston v. WCAB, 95 Cal. App. 3d 856, 865-866 (1979.)) . In this case, the Defendant lacked full knowledge regarding submission to CMS (Petition to Set Aside the Order Approving Compromise & Release or in the Alternative, Petition for Reconsideration dated April 4, 2016, herein after Recon, page 2:11). The information provided by the set aside vendor subsequent to the OACR could have been discovered prior to issuance of the OACR.

THERE WAS NO MUTUAL MISTAKE

When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value. (Civil Code §3399). In this case, there was reliance on a statement by Helios Settlement Solutions Team and obtained by Defendant. This was not a mistake of the parties, but a mistake of the vendor and the appropriate action is against the vendor for any damages to the Defendant. The court does not have jurisdiction over Helios Settlement Solution Team, whose erroneous statement has caused possible delay Applicant's case.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that Defendant's Petition for Reconsideration filed April 5, 2016 be denied.

Dated: 4/7/2016



M. Victor Bushin

Workers' Compensation Administrative Law Judge

Filed and Served by mail on all parties
on the Official Address Record

By: Ruzan Bldryan
Ruzan Bldryan