

1 WORKERS' COMPENSATION APPEALS BOARD

2 STATE OF CALIFORNIA

3 Case No. SBR 0207184

4 CHRISTINE HILT,

5 *Applicant,*

6 vs.

7 SAN ANTONIO COMMUNITY HOSPI-
8 TAL, Permissibly Self-Insured, c/o
9 HAZEL RIGG RISK MANAGEMENT
10 SERVICES,

11 *Defendants.*

12 OPINION AND ORDER
13 GRANTING RECONSIDERATION
14 AND DECISION AFTER
15 RECONSIDERATION

16 Defendant seeks reconsideration of the Findings and Order issued
17 June 18, 1994 in which workers' compensation judge (WCJ) Dennis
18 Zimmerman found that the parties were not bound by the Compromise and
19 Release Agreement (C&R) they executed and which was approved by Order
20 Approving Compromise and Release (OACR) on February 3, 1992.¹ Based on
21 this finding, WCJ Zimmerman held that the parties could proceed to litigate
22 the workers' compensation benefits due applicant, if any, less credit to
23 defendants for any sums previously paid. In so ruling, WCJ Zimmerman in
24 effect granted applicant's petition to set aside the OACR which had
25 previously been found adequate by WCJ Guido Casari.

26 Defendant contends error, arguing that the case was not before WCJ
27 Zimmerman on the issue of rescinding the OACR. Defendant asserts that the
only issue before WCJ Zimmerman was whether applicant's Petition to Set
Aside Compromise & Release Agreement had merit. Defendant contends
that WCJ Zimmerman abused his discretion where there was no fraud,

¹ WCJ Zimmerman indicates that the correct date should be February 3, 1993, but that a clerical error was made. We shall correct the date at the end of our opinion.

1 mistake, duress, or incompetence shown, and where no good cause to set
2 aside the C&R was allegedly shown.

3 Based on the record, and for the reasons set forth below, we will grant
4 reconsideration, rescind the Findings and Order of June 16, 1994, and
5 reinstate WCJ's Casari's OACR, the date of which we will correct to February
6 3, 1993.

7 The record discloses that applicant claimed industrial injury on
8 November 13, 1991. In addition to filing a workers' compensation claim,
9 applicant filed a third-party personal injury case in connection with the
10 industrial incident.

11 The parties entered into the C&R during the pendency of the third-
12 party suit. The C&R settled applicant's workers' compensation case for
13 \$2,275.00 plus medical-legal lien claims in an amount to be adjusted. The
14 settlement agreement indicates that "[i]n addition to the consideration paid
15 to the applicant through this [C&R], defendant agrees to waive subrogation
16 recovery and to waive assertion of third party credits for amounts paid
17 through this [C&R]...." (C&R, at ¶ 10.)

18 The C&R recites that "[d]efendants have admitted applicant sustained
19 an industrial injury to her right upper extremity on [November 13, 1991],"
20 but also requests that the WCJ make a special finding about "all injuries
21 other than the admitted right upper extremity injury." The C&R recites that
22 parties acknowledge a significant dispute as to the factual basis of any other
23 injury claims. With respect to any prima facie case of entitlement to
24 vocational rehabilitation benefits and services, it further recites that
25 applicant waives and releases any right to claim benefits under Labor Code
26 section 139.5 In support of applicant's waiver of rehabilitation and death
27 benefits, the C&R specifically recites:

1 *1. Applicant initially reported an injury only to
2 the right arm.

3 *2. The vehicle applicant was riding in at the time
4 of the 11-13-91 accident sustained only minor
5 damage, i.e., scratches to the front bumper and
6 broken plastic lens's (sic) cover to a turning light[,] indicating that there was only a minor collision.

7 *3. Applicant returned to her usual and customary
8 duties on 11-21-91 and worked until 11-27-91.
9 Applicant voluntarily resigned and informed her
10 supervisor that she was resigning because her car
11 lease was too costly and she intended to work at
12 Kaiser Hospital near her home in Fontana.

13 *4. Applicant refused to attend defense medical
14 examinations and her deposition[,] making it
15 impossible for defendant to complete discovery or to
16 verify applicant's alleged injuries."

17 The C&R contains further provisions which state:

18 "The applicant and defendants hereby agree and
19 understand that by virtue of this Compromise and
20 Release Agreement, the employer and/or insurance
21 carrier and/or third party administrator is forever
22 released and absolved from liability for any injuries
23 and/or disability whatsoever occurring and/or
24 manifesting in a vocational rehabilitation program
25 whether said injuries have occurred in the past,
26 present or in the future. The parties further
27 specifically agree that defendants are released from
any and all liability for vocational rehabilitation
attorney's fees.

 "Additionally, applicant/claimant hereby waives and
forever relinquishes any conceivable claim that he or
she may have had in the past, present or may have in
the future for any past, present or future injury
occurring in a vocational rehabilitation program
and/or plan of any type whatsoever." (Emphasis in
original.)

 Applicant's third-party suit, which was filed in October 1992, resulted
in a default judgment on or about June 1, 1993. (Petition to Set Aside

1 Compromise and Release Agreement, at p. 2.) In the process of conducting
2 discovery, applicant's attorney discovered that the defendant had no
3 insurance coverage despite having paid for it. (*Id.*) The defendant indicated
4 his belief that his insurance carrier presumably went into bankruptcy. (*Id.*,
5 at p. 3.)

6 On learning that the third-party suit would not provide a recovery,
7 applicant's attorney wrote defendant in January 1993, stating that applicant
8 wished to re-open the workers' compensation case by stipulation because
9 the third-party case did not "pan out" as had been expected. (*Id.*) After
10 defendants declined to stipulate to reopening, applicant filed a petition to
11 set aside the C&R on the grounds of "mutual mistake." (*Id.*, at p. 4.) She
12 alleged that she and defendant had entered into the C&R in the expectation
13 that the third-party case would yield a substantial recovery. (*Id.*) She
14 argued, in essence, that the absence of such a recovery constituted a "mutual
15 mistake."

16 Defendant opposed applicant's petition to set aside the C&R, and
17 requested sanctions. Rather than a mutual mistake of fact, defendant alleged
18 that the "mistake" was that of applicant's attorney "in failing to verify the
19 coverage of the defendants he was proceeding against in the third party case
20 as of some fourteen months after the injury occurred." (Answer to Petition
21 to Set Aside Compromise and Release Agreement; Request for Sanctions, at
22 p. 1.) Defendant further argued that applicant's only remedy was an attorney
23 malpractice claim, if any such malpractice occurred, and asserted that
24 applicant had not shown good cause under the law to set aside the C&R.

25 Although WCJ Casari had approved the C&R, the issue of setting it
26 aside was determined by WCJ Zimmerman to whom the matter was
27 submitted on April 11, 1994. WCJ Zimmerman reviewed the pleadings and

1 the record. In reaching his decision, WCJ Zimmerman rejected the
2 argument that there was a mutual mistake of fact, seeing the issue instead as
3 whether the C&R was adequate.

4 WCJ Zimmerman concluded that WCJ Casari's determination that the
5 settlement was adequate was "based in part on the condition subsequent
6 contained in the compromise and release that applicant would have a third-
7 part recovery." (Report and Recommendation on Petition for Recon-
8 sideration [Report], at p. 2.) WCJ Zimmerman decided that because there
9 was no third-party recovery, "then part of the consideration for the [C&R]
10 did not occur and the condition subsequent which the [OACR] required was
11 non-existent. The condition subsequent being non--existent[,] the [C&R]
12 would not be adequate and the [OACR] would not exist."

13 We do not agree with WCJ Zimmerman's conclusion that the third-
14 party recovery was a condition subsequent. The C&R does not have any
15 language stating that the settlement is premised or rests on a successful
16 third-party recovery. The C&R specifically recites only that applicant is
17 *filing* a third-party case and that defendant is waiving any credit and/or
18 subrogation rights it might have with respect to a third-party recovery. It is
19 undisputed that applicant proposed the provision for defendant's waiver of
20 its right to credit or subrogation.

21 The record establishes that applicant was represented throughout the
22 proceedings. Her refusal to cooperate with defendant's discovery efforts and
23 medical evaluations was given with the approval of her attorney. The
24 language describing applicant's relinquishment of any further claims,
25 whether past, present, or in the future, is clear and specific. The settlement
26 admits injury only to the right upper extremity and indicates that any other
27 injury claims are disputed and are settled by the agreement. WCJ Casari,

1 who issued the OACR, specifically stated that in determining the adequacy of
2 the C&R, he considered the "parties' agreements respecting third-party suit
3 and subrogation rights." He did not state that he found the C&R adequate
4 only if there was a third-party recovery.

5 In light of these facts, we agree that there is no issue of mutual
6 mistake. The C&R was arrived at only after the parties negotiated and
7 defendant bargained for settlement of the workers' compensation claim for a
8 fixed amount, with an agreement not to attempt to recoup the sum in the
9 event of a third-party settlement or judgment. Given applicant's refusal to be
10 deposed or to attend defendant's medical evaluations, there is no medical
11 counter-evidence upon which to determine adequacy, but only the fact of her
12 non-cooperation.

13 Accordingly, we are not persuaded that successful resolution of the
14 third-party case was a condition subsequent to the C&R or to approving it as
15 adequate. We will therefore rescind WCJ Zimmerman's decision of June 16,
16 1994 and reinstate the OACR of February 3, 1993.

17 For the foregoing reasons,

18 IT IS ORDERED that defendant's Petition for Reconsideration filed
19 July 8, 1994 is GRANTED.

20 IT IS FURTHER ORDERED that the Findings and Order issued June
21 16, 1994 is RESCINDED.

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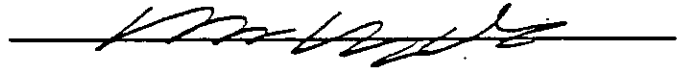
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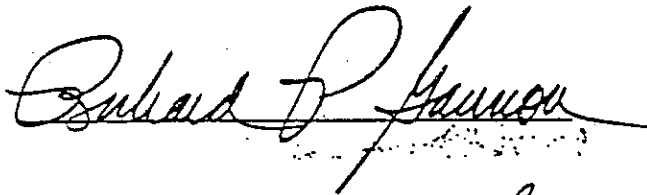
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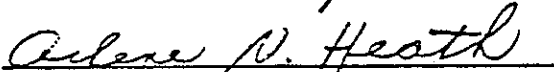
1 IT IS FURTHER ORDERED that the Order Approving Compromise and
2 Release, with a corrected date of February 3, 1993, is REINSTATED, and
3 AFFIRMED and ADOPTED as our Decision After Reconsideration.

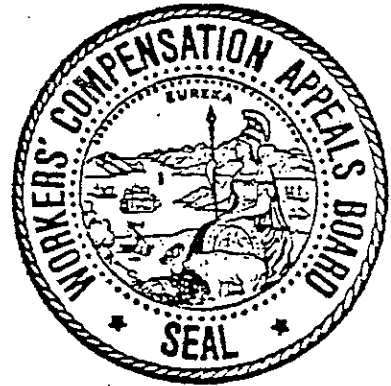
4 WORKERS' COMPENSATION APPEALS BOARD

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7 I CONCUR,

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13 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

14 AUG 3 1 1994

15 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES
16 LISTED ON THE OFFICIAL ADDRESS RECORD EXCEPT
LIEN CLAIMANTS.

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