WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL BELL, *Applicant*

vs.

COUNTY OF VENTURA, Permissibly Self-Insured; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, *Defendant*

Adjudication Numbers: ADJ12083629
Oxnard District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Defendant County of Ventura, the self-insured employer, seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings, Award and Orders of December 21, 2021, wherein it was found that while employed as a deputy sheriff during a cumulative period ending on March 18, 2016, applicant sustained industrial injury in the forms valvular heart disease, coronary artery disease and hypertensive heart disease, causing permanent disability of 80% and the need for further medical treatment. With regard to the issue of apportionment, it was found that "Labor Code section 4663 does not apply based on the law enforcement presumption." It was also found that "Labor Code section 4664 does not apply based on no evidence of a prior award, finding or stipulation of disability."

The County's Petition is not a model of clarity. It appears that County contends that it is entitled to either apportionment or credit to a Compromise and Release approved on May 7, 2015, wherein applicant and National Union Fire Insurance Company, who insured County of Ventura prior to July of 2002 before the County became self-insured, settled twenty-five different workers' compensation claims, including a claim of industrial injury in the form of hypertension, in exchange for $18,900.00. We have received answers from the applicant and from National Union Fire Insurance Company, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will deny the County's Petition.

Applicant filed the instant claim in 2019, alleging heart injury with dates of exposure spanning applicant's entire employment with the County from 1991 to March 18, 2016. Previously, in late 2001, applicant filed an Application for Adjudication of Claim alleging industrial injury in the form of hypertension, pleading a date of exposure through February 2, 2002 (ADJ3962284). Defendant was insured by National Union until June 30, 2002 and as of July 1, 2002 has been self-insured. The claim in ADJ3962284 was settled in a Compromise and Release approved on May 7, 2015, along with 24 other cases brought by applicant for injuries during National Union's coverage period. The Compromise and Release was between applicant and National Union without the County's involvement. The Compromise and Release contains no stipulation to injury by National Union in case ADJ3962284, does not specify the amount of the settlement attributable to case ADJ3962284 as distinct from the other 24 cases settled, and contains no stipulation regarding any permanent disability attributable to case ADJ3962284.

Turning back to the instant case, applicant was evaluated by panel qualified medical evaluator internist and cardiologist Mark Lensky, M.D. Dr. Lensky testified that applicant sustained a single cumulative injury spanning his entire period of employment. (October 22, 2020 deposition at p. 18.)

Labor Code section 5500.5(a) states, "liability for occupational disease or cumulative injury claims … shall be limited to those employers who employed the employee during a period of [one year] immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first."

The County does not argue in its Petition that the proper section 5500.5 liability period for the instant cumulative injury was during National Union's coverage. Thus, the County has waived this contention. As Labor Code section 5904 makes clear, "The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration." (See also *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113-114

["a busy court…cannot be expected to search through a voluminous record" and it is "not obliged to perform the duty resting on counsel"].)[1]

Although the cumulative injury may have spanned the applicant's entire period of employment, section 5500.5 plainly states that liability is limited to the carriers (or self-insurance) on the risk during the statutory one-year period preceding the earlier of the last day of injurious exposure or the Labor Code section 5412 date of injury. Labor Code section 5500.5(a) makes clear that "liability for the cumulative injury or occupational disease shall not be apportioned to prior or subsequent years…."

County makes much of the language in section 5500.5, "in determining the liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment." This language is best appreciated in its full context:

> If, based upon all the evidence presented, the appeals board or workers' compensation judge finds the existence of cumulative injury or occupational disease, liability for the cumulative injury or occupational disease shall not be apportioned to prior or subsequent years; however, in determining the liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment.

Thus, a previous settlement "may" be considered, along with other factors, in determining whether applicant had a separate, prior specific or cumulative injury which subjects the subsequent cumulative injury to apportionment. Of course, whether periods of exposure caused one or multiple injuries is ultimately a medical question. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 234-235 [58 Cal.Comp.Cases 323].) Here, one injury was found. However, even if applicant had sustained a prior industrial injury in the form of

[1] In any case, while internist Gerald M. Weingarten, who acted as the qualified medical evaluator with regard to the injury alleged in ADJ3962284, initially stated that applicant's hypertension was permanent and stationary as of December 17, 2001 (February 2, 2002 report at p. 3), this is in conflict with his later pronouncement that "20% of his permanent impairment … occurred after 7/31/02." (August 5, 2008 report at p. 7.) In fact, Dr. Weingarten reports that applicant's wall thickness went from 1.36 cm in 2001 to 1.44 cm in 2007 and 1.58 cm in 2008. Thus, without needing to decide the issue because the County has waived it, it appears that applicant's hypertensive heart disease and left ventricular hypertrophy was not permanent and stationary until well into the County's period of self-insurance, making the County the sole carrier on the risk pursuant to section 5500.5.

hypertension, since applicant's injury to the heart as a deputy sheriff is presumptive pursuant to Labor Code section 3212.5, any section 4663 apportionment is precluded by Labor Code section 4663(e).

With regard to Labor Code section 4664(e) apportionment, the WCJ correctly found that that section 4664 does not apply because there was never an award of permanent disability in case ADJ3962284. A Compromise and Release, without more, is not an "award of permanent disability." (See generally *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223 [Appeals Bd. en banc].)

The County also seeks a credit pursuant to Labor Code section 5005, which states in pertinent part:

> In any case involving a claim of occupational disease or cumulative injury, as set forth in Section 5500.5, the employee and any employer, or any insurance carrier for any employer, may enter into a compromise and release agreement settling either all or any part of the employee's claim, including a part of his claim against any employer. Such compromise and release agreement, upon approval by the appeals board or a referee, shall be a total release as to such employer or insurance carrier for the portion or portions of the claim released, but shall not constitute a bar to a recovery from any one or all of the remaining employers or insurance carriers for the periods of exposure not so released.
>
> In any case where a compromise and release agreement of a portion of a claim has been made and approved, the employee may elect to proceed as provided in Section 5500.5 against any one or more of the remaining employers, or against an employer for that portion of his exposure not so released; in any such proceeding after election following compromise and release, that portion of liability attributable to the portion or portions of the exposure so released shall be assessed and deducted from the liability of the remaining defendant or defendants, but any such defendant shall receive no credit for any moneys paid by way of compromise and release in excess of the liability actually assessed against the released employments and the employee shall not receive any further benefits from the released employments for any liability assessed to them above what was paid by way of compromise and release.

However, section 5005 applies only when two employers or carriers are on the risk during the same section 5500.5 liability period. (*County of Yuba v. Workers' Comp. Appeals Bd.* (2006) 71 Cal.Comp.Cases 1598, 1600 [writ denied] ["Section 5005 is limited to single cumulative injuries or occupational diseases, and does not justify apportioning among or between successive industrial injuries…."]

Although County states that applicant's supposed double recovery represents a windfall, we note again that the Compromise and Release agreement in case ADJ3962284 settled multiple cases, with no specific amount apportioned to the alleged hypertension. Given that applicant's heart injury alone caused 80% permanent disability, it does not appear that a settlement of less than $20,000 for multiple claims represents any sort of windfall to the applicant.

We therefore deny the County's Petition.

For the foregoing reasons,

IT IS ORDERED that Defendant County of Ventura's Petition for Reconsideration of the Findings, Award and Orders of December 21, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 11, 2022

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

MICHAEL BELL
DONALD A. COCQUYT
GOLDMAN, MAGDALIN & KRIKES
TESTAN LAW

DW/oo

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. o.o