WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

YASMIN DUENAS, *Applicant*

vs.

WORKFORCE SOLUTIONS, INC.; CIGA by and through its servicing facility INTERCARE CMS for ULLICO CASUALTY COMPANY, in liquidation, KOMAR DISTRIBUTION SERVICES; PACIFIC INDEMNITY COMPANY/CHUMM GROUP, administered by CHUBB & SON, *Defendants*

Adjudication Number: ADJ8375307
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to further study the factual and legal issues in this case. This is our decision after reconsideration.

Defendant Pacific Indemnity Company (Pacific) seeks reconsideration of the May 2, 2018 Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed on April 4, 2012 as a Production Scanner by Workforce Solutions (general employer) and Komar Distributions (special employer) claims to have sustained injury arising out of and in the course of employment to multiple body parts. The WCJ also found that Pacific was "other insurance" for purposes of Insurance Code section 1063.1 and that the California Insurance Guarantee Association (CIGA) was entitled to reimbursement from Pacific in the amount of $10,907.47.

Defendant Pacific contends that the WCJ erred in finding that Pacific was "other insurance," arguing that the finding was not supported by the evidentiary record and is not relevant to the issues raised by Pacific at the hearing.[1] Pacific also contends that the WCJ erred in awarding CIGA $2,739.07 of the $10,907.47 awarded because CIGA is not entitled to reimbursement of loss

[1] Despite disputing the finding of "other insurance," defendant also "conceded" that "joint and several liability exists with regard to the injured worker's claims for *temporary disability indemnity and treatment…*" (Petition, p. 11.) Therefore, it appears the only amount in dispute is the $2,739.07 of UR and bill review expenses which Pacific characterizes as "loss adjustment expenses."

adjustment expenses incurred after the appointment of a liquidator. Pacific also argues that the panel decisions cited by the WCJ in the Opinion on Decision are not binding precedent and no longer reflect current categories used to classify these expenses by the Workers' Compensation Insurance Rating Bureau (WCIRB).

CIGA filed an Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied. We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the WCJ's decision.

The issue presented in this case is whether CIGA is entitled to reimbursement for bill review and utilization review (UR) services in the amount of $2,739.07. The parties agree that medical treatment expenses are reimbursable but disagree on whether bill review and UR are reimbursable as medical treatment. The WCJ relied on panel decisions that held that because bill review and UR expenses were considered medical treatment for purposes of data that insurers are required to report, those expenses are reimbursable medical treatment expenses. However, as Pacific points out in its Petition for Reconsideration, since 2010, UR and bill review expenses have been reported as cost containment expenses rather than as medical treatment.

As will be discussed in further detail below, in cases where an insurer is jointly and severally liable for benefits with CIGA, reimbursable expenses include expenses that defendant is required to incur as part of the benefit delivery system. While medical treatment expenses are reimbursable, cost containment expenses do not need to be considered medical treatment to be reimbursable. Furthermore, insurer data reporting requirements are not dispositive on whether an expense is reimbursable. We will affirm the WCJ's determination that CIGA is entitled to reimbursement of those expenses because they are required expenses when providing medical treatment in the current system.

CIGA's liability is specifically defined in Insurance Code section 1063.1 as "covered claims." (Ins. Code, § 1063.1.) In the case of a policy of workers' compensation insurance, CIGA must cover the obligations of an insolvent insurer "to provide benefits under the workers' compensation law." (Ins. Code § 1063.1(c)(1)(F).) "[C]overed claims" under section 1063.1 "are not coextensive with an insolvent insurer's obligations under its policies." (*Industrial Indemnity Co. v. Workers' Comp. Appeals Bd. (Garcia)* (1997) 60 Cal.App.4th 548, 557 [62 Cal.Comp.Cases 1661].) Insurance Code section 1063.1(c)(5)(A) states: "'Covered claims' does not include an

obligation to insurers, insurance pools, or underwriting associations, nor their claims for contribution, indemnity, or subrogation, equitable or otherwise, except as otherwise provided in this chapter." (Ins. Code, § 1063.1 (c)(5)(A).) In addition, "'Covered claims' shall not include any loss adjustment expenses, including adjustment fees and expenses, attorney's fees and expenses, court costs, interest, and bond premiums, incurred before the appointment of the liquidator."[2] (Ins. Code, § 1063.2(h).)

If CIGA and a solvent insurer are jointly and severally liable for a benefit, the solvent insurer must pay the benefit and CIGA is relieved of liability. (Lab. Code, § 5500.5; *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (*Weitzman*) (2005) 128 Cal.App.4th 307; *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (*Hooten*) (2005) 128 Cal.App.4th 569; *Denny's Inc. v. Workers' Comp. Appeals Bd.* (*Bachman*) (2003) 104 Cal.App.4th 1433.) In this case, it is not disputed that Pacific and CIGA are jointly and severally liable for medical treatment.

An employer must provide an injured worker with medical treatment to cure or relieve the injured worker from the effects of an industrial injury. (Lab. Code, §4600.) Timely provision of reasonable medical treatment is an essential element of workers' compensation. (Cal. Const., Article XIV, § 4; *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 87 [31 Cal.Comp.Case0s 93]; *Zeeb v. Workmen's Comp. Appeals Bd.* (1967) 67 Cal.2d 496, 501 [32 Cal.Comp.Cases 441]; *Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566]; see also, Lab. Code, §4600.) If the employer neglects or refuses to provide reasonable medical care, "the employer is liable for reasonable expense incurred by or on behalf of the employee in providing treatment." (Lab. Code, §4600(a).)

Reasonable medical treatment must be provided based on the Medical Treatment Utilization Schedule (MTUS) and paid for in accordance with the Official Medical Fee Schedule (OMFS). (Lab. Code, §§ 4600(b), 4603.2(b)(2), 5307.1 and 5307.27.) Employers must establish a UR process to resolve disputes over whether medical treatment should be authorized. (Lab. Code, §4610.) The Legislature required employers to establish a UR process to ensure that a medical expert makes the decision to deny, delay, or modify treatment. (*State Comp. Ins. Fund v. Workers'*

[22] We note that while CIGA is not required to pay or reimburse an insurer for these expenses, this section does not preclude CIGA from being reimbursed for these expenses.

Comp. Appeals Bd. (Sandhagen) (2008) 44 Cal.4th 230, 241 [73 Cal.Comp.Cases 981.) In *Sandhagen*, the California Supreme Court concluded that "the Legislature's purpose in enacting the utilization review process in section 4610" was "to require employers to conduct utilization review when considering employees' requests for medical treatment." (*Id.* at 244-245.) A major legislative reform package, Senate Bill No. 863 (2011-2012 Reg. Sess. chaptered as Statutes 2012, chapter 363 (SB 863)) created an Independent Medical Review (IMR) process to address treatment disputes not resolved by UR. (Lab. Code, §4610.5.)

Similarly, to dispute a medical provider's bill for medical treatment services, an employer must pay or object to provider bills within a certain time frame and provide an explanation of review for any bills not paid. (Lab. Code, §§ 4603.2.) SB 863 added language to section 4603.2 setting "forth requirements for the second review that a medical provider may request (and must request) prior to seeking independent review of a bill." (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2014) 232 Cal.App.4th 543, 555 [79 Cal.Comp.Cases 1481].) SB 863 also added section 4603.6 which establishes an Independent Bill Review (IBR) process, including setting forth when an IBR may be requested, what will occur if an IBR is not requested within the prescribed time, how such a request is to be made, and how the IBR will be assigned to, and addressed by, an independent reviewer.

In sum, the Labor Code requires employers to provide reasonable medical treatment and pay reasonable bills submitted by treatment providers. The UR process and bill review processes to determine reasonableness are mandatory. The administrative dispute resolution processes of IMR and IBR also assume that employers have established UR and bill review programs. (Cal. Lab. Code, §§ 4603.6, 4610.5.) Thus, cost containment measures are an integral part of the provision of medical treatment after SB 863. "[T]he Legislature has created a highly regulated compensation system for injured workers with the twin goals of providing prompt medical treatment and containing costs." (*Adventist Health v. Workers' Comp. Appeals Bd. (Fletcher)* (2012) 211 Cal.App.4th 376, 385 [77 Cal.Comp.Cases 935].) While cost containment expenses may not directly benefit an injured worker, employers are required to incur these expenses to provide medical treatment. Medical expenses are required by the Labor Code and are "benefits under the workers' compensation law." (Ins. Code § 1063.1(c)(1)(F).)

Turning to defendant's contention that the disputed expenses are not reimbursable because they are now classified as loss adjustment expenses by the WCIRB, as discussed above, the key

question is whether the Labor Code requires employers to incur these expenses. However, because past decisions relied on WCIRB reporting requirements to determine whether an expense is reimbursable, we will briefly address this contention. The Insurance Commissioner requires workers' compensation insurers to report claims data to the WCIRB.[3] (Ins. Code, § 11734(a).) The WCIRB collects and reports data to further its rate-making function (both pure premium rates and experience rating) and to fulfill specific statutory duties. The Insurance Commissioner has adopted a Uniform Statistical Reporting Plan (USRP) and an Experience Rating Plan (ERP) to facilitate reporting of data and assignment of an experience modification to each employer that is experience rated.[4] (Ins. Code, §§ 11734, 11736; *Allied Interstate Inc. v. Sessions Payroll Management Inc.* (2012) 203 Cal.App.4th 808.) The WCIRB maintains a classification system that classifies every employer as part of the USRP. (Ins. Code, § 11734(b).) The WCIRB calculates experience ratings for all employers who are sufficiently large to be experience rated.[5] In addition, the WCIRB is required to issue annual reports to the Governor and Legislature analyzing all losses and expenses of member-insurers for the prior year.[6] (Ins. Code, § 11759.1.)

For policies incepting prior to July 1, 2010, bill review and similar cost containment expenses were reported as medical treatment expenses. After July 1, 2010, those expenses were reported in a new category, "medical cost containment expenses." (See e.g. January 1, 2021 Pure Premium Rate Filing, p. B-1[7].) As a result of this change, the WCIRB considers these expenses as allocated loss adjustment expenses (ALAE) or frictional costs. ALAE data may be used to calculate pure premium rates but it is not used to calculate experience modifications. (*State Comp. Ins. Fund v. Superior Court (Schaefer Ambulance)* (2001) 24 Cal. 4th 930, 933-934 [66 Cal.Comp.Cases 16].)

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[3] The Workers' Compensation Insurance Rating Bureau (WCIRB) is the rating agency designated by the Insurance Commissioner.

[4] The ERP and USRP are available at https://www.wcirb.com/filings-and-plans/california-regulations. (Evid. Code, § 452(b).)

[5] Experience Ratings are expressed as a percentage, with a 100% rating applied to an employer who is expected to have average losses for a particular industry. The experience rating is applied to the base premium.

[6] Section 11759.1(d) requires that the WCIRB report "An analysis of expenses of insurers categorized by loss adjustment, acquisition, general expenses, profit, and taxes. Amounts spent for defense attorneys' expense shall be separately identified."

[7]The Filing is at https://www.wcirb.com/sites/default/files/documents/20210101_jan_1_2021_ppr_filing.pdf. (Evid. Code §452(b).)

While the WCIRB is required to collect and report data on losses and expenses, the assignment of a particular cost to a particular category is subject to change as methodologies change for calculating experience ratings and pure premium ratings. Furthermore, whether an expense is considered when calculating an employer's experience modification does not help us assess whether an employer must incur these expenses to provide medical treatment. In this case, the classification of medical cost containment expenses as ALAE by the WCIRB does not preclude finding that those expenses are reimbursable.

The Labor Code requires entities providing medical treatment for workers' compensation injuries to incur certain medical cost containment expenses. Thus, CIGA incurred those expenses "to provide benefits under the workers' compensation law" and those benefits are a covered claim. (Ins. Code, § 1063.1(c)(1)(F).) Accordingly, the WCJ correctly determined that CIGA is entitled to reimbursement for the disputed amount including the $2,739.07 incurred for UR and bill review.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the decision of the workers' compensation administrative law judge is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 14, 2021

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

GUILFORD SARVAS & CARBONARA
LOUIE & STETTLER
YASMIN DUENAS

MWH/oo

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