WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE L. MARTINEZ, ***Applicant,*** **vs.** **JACK NEAL & SON, INC.; FREMONT COMPENSATION INSURANCE COMPANY, In Liquidation; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION; and CAMBRIDGE INTEGRATED SERVICES, INC. (Servicing Facility),** ***Defendants.***	**Case No. SRO 0107686** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

On June 10, 2004, the Appeals Board granted the petition for reconsideration filed by defendant, California Insurance Guarantee Association ("CIGA"), in which CIGA challenged of the Findings and Award issued by the workers' compensation administrative law judge ("WCJ") on March 24, 2004. In the WCJ's decision, it was found that applicant, Jose L. Martinez ("applicant"), sustained industrial injury to his low back and psyche on August 13, 1999, while employed as a heavy equipment operator by Jack Neal & Son, Inc. It was also found that, at the time of applicant's injury, the employer was insured by Fremont Compensation Insurance Company ("Fremont"), which is now insolvent and whose "covered claims" have become the liability of CIGA. (See Ins. Code, §1063 et seq.) In relevant part, it was further found that Fremont unreasonably delayed the provision of medical benefits. Therefore, the decision imposed a 10-percent penalty against all medical benefits under Labor Code section 5814 ("section 5814"), to be paid by CIGA.

CIGA's petition contends in substance: (1) that, under Insurance Code section 1063.1(c)(8) ("section 1063.1(c)(8)"), as amended effective on January 1, 2004, it is no longer liable for any

section 5814 penalties for an insolvent insurer's unreasonable delay in paying benefits, i.e., section 1063.1(c)(8) now excludes section 5814 penalties from the definition of "covered claims;" and (2) that the amendments to section 1063.1(c)(8) apply to all awards issued on or after the January 1, 2004 effective date of the amendments.

Because of the important legal issue presented, and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, §115.)[1] Based on our review of the relevant statutory and case law, we conclude that section 1063.1(c)(8), as amended, applies to all awards issued on or after the amendments' January 1, 2004 effective date. Therefore, with respect to any award issued after 2003, CIGA may not be held liable for any section 5814 (or 5814.5) penalties based on an insolvent insurer's pre-liquidation unreasonable delay or refusal in paying benefits because such penalties are now excluded from the definition of "covered claims."

I. BACKGROUND

Applicant sustained an admitted industrial injury to his low back on August 13, 1999, for which Fremont assumed liability.

On August 14, 2000, applicant's primary treating physician, Gary P. McCarthy, M.D., indicated that applicant would need surgical decompression of his back at L4-5, and ordered a lumbar MRI.

On September 29, 2000, the radiologist issued a report on the lumbar MRI, stating it showed degenerative disc desiccation at the L3-4, L4-5, and L5-S1 levels; moderate narrowing of the left L5-S1 neural foraminal canal; and a congenitally small spinal canal.

On October 4, 2000, Dr. McCarthy discussed the MRI report and stated that applicant is a candidate for (and wished to have) surgical decompression at L4-5 and L5-S1. At the same time,

[1] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, §10341; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].)

Dr. McCarthy also wrote a prescription for an L4-5 laminectomy/discectomy.

On October 4, 2000, Dr. McCarthy's office faxed Fremont a request to authorize the surgery, together with supporting documentation. Surgery was not then authorized. Further requests for surgery were made on October 12 and 17, 2000.

On October 31, 2000, applicant was evaluated by Donald L. Trauner, M.D., as Fremont's qualified medical evaluator ("QME") in orthopedics. On November 14, 2000, Dr. Trauner issued a report agreeing with Dr. McCarthy that "decompression of [applicant's] offending disc would be in order."

On December 6, 2000, applicant's counsel wrote Fremont to again request authorization for the surgery recommended by Dr. McCarthy.

On January 5, 2001, Fremont authorized surgery.

As discussed above, the WCJ's March 24, 2004 decision found that Fremont unreasonably delayed the provision of surgery, and it imposed a 10-percent penalty against all medical benefits under section 5814, to be paid by CIGA. On reconsideration, CIGA has not challenged the determination that Fremont unreasonably delayed medical treatment. CIGA, however, does assert that, under the amendments effective on January 1, 2004, section 1063.1(c)(8) now excludes section 5814 penalties from the definition of "covered claims" for which CIGA is liable, and that the amendments to section 1063.1(c)(8) apply to all awards issued on or after January 1, 2004.

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II. DISCUSSION

CIGA's statutory mandate is that it "shall pay and discharge [the] covered claims" of insolvent insurers. (Ins. Code, §1063.2(a).) CIGA's liability, however, is solely limited to the payment of "covered claims." (*Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd*. (*Karaiskos*) (2004) 117 Cal.App.4th 350, 356 [69 Cal.Comp.Cases 183, 186]; *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd*. (*Mangum*) (2003) 112 Cal.App.4th 358, 363-364 [68 Cal.Comp.Cases 1444, 1447-1448]; *Denny's, Inc. v. Workers' Compensation Appeals Bd*. (*Bachman*) (2003) 104 Cal.App.4th 1433, 1438 [68 Cal.Comp.Cases 1, 4].)

Insurance Code section 1063.1(c)(1) sets forth the general definition of "covered claims," which, as relevant here, includes "the obligations of an insolvent insurer ... (i) imposed by law and within the coverage of an insurance policy of the insolvent insurer … [and] (vi) in the case of a policy of workers' compensation insurance, to provide workers' compensation benefits under the workers' compensation law of this state ... ." (Ins. Code, §1063.1(c)(1); *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd*. (*Karaiskos*), *supra*, 117 Cal.App.4th at p. 356 [69 Cal.Comp.Cases at p. 186; *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd*. (*Mangum*), *supra*, 112 Cal.App.4th at p. 364 [68 Cal.Comp.Cases at p. 1448].)

Insurance Code sections 1063.1(c)(3) through (c)(12) and 1063.2, however, set forth the specific statutory exclusions to the general definition of "covered claims." (*American Nat. Ins. Co. v. Low* (2000) 84 Cal.App.4th 914, 920-921; *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.* (*Garcia*) (1997) 60 Cal.App.4th 548, 557 [62 Cal.Comp.Cases 1661, 1667]; *Cal. Ins. Guar. Ass'n v. Workers' Comp. Appeals Bd.* (*Jenkins*) (1992) 10 Cal.App.4th 988, 995 [57 Cal.Comp.Cases 660, 664]; *Interstate Fire & Casualty Co. v. Cal. Ins. Guar. Ass'n* (1981) 125 Cal.App.3d 904, 908.)

Prior to the amendments to section 1063.1(c)(8), CIGA was liable for section 5814 penalties imposed based on an insolvent insurance carrier's pre-liquidation unreasonable delay in paying benefits because section 5814 penalties were held to fall within the general definition of "covered claims," and not to fall within any of the statutory exclusions. (*Hershman v. James*

Eisenberg Medical Group (2002) 67 Cal.Comp.Cases 808 (Appeals Board en banc), writ den. sub nom. *Cal. Ins. Guar. Ass'n v. Workers' Comp. Appeals Bd.* (*Hershman*) (2002) 67 Cal.Comp.Cases 1606; see also, *Carver v. Workers' Comp. Appeals Bd.* (1990) 217 Cal.App.3d 1539, 1543 [55 Cal.Comp.Cases 36, 39]; *Cal. Ins. Guar. Ass'n v. Workers' Comp. Appeals Bd. (Novak)* (2002) 67 Cal.Comp.Cases 315 (writ den.); *Cal. Ins. Guar. Ass'n v. Workers' Comp. Appeals Bd. (Harris)* (2002) 67 Cal.Comp.Cases 171 (writ den.).)

Effective January 1, 2004, however, section 1063.1(c)(8) was amended to state:

> " 'Covered claims' does not include any amount awarded as punitive or exemplary damages, *nor any amount awarded by the Workers' Compensation Appeals Board pursuant to Section 5814 or 5814.5 because payment of compensation was unreasonably delayed or refused by the insolvent insurer*." (Emphasis added.)

In construing a statute, the Appeals Board's fundamental purpose is to determine and effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289]; *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476, 480]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652, 657]; *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd*. (*Karaiskos*), *supra*, 117 Cal.App.4th at p. 355 [69 Cal.Comp.Cases at p. 185].) Thus, the WCAB's first task is to look to the language of the statute itself. (*Ibid.*) The best indicator of legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at pp. 387-388 [58 Cal.Comp.Cases at p. 289]; *Gaytan v. Workers' Comp. Appeals Bd*. (2003) 109 Cal.App.4th 200, 214 [68 Cal.Comp.Cases 693, 702]; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (*Lopez*) (1999) 76 Cal.App.4th 513, 516 [64 Cal.Comp.Cases 1350, 1351].) When the statutory language is clear and unambiguous, there is no room for interpretation and the WCAB must simply enforce the statute according to its plain terms. (*DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at p. 387 [58 Cal.Comp.Cases at p. 289]; *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd.* (*Arvizu*)

(1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500, 508]; *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd*. (*Karaiskos*), *supra*, 117 Cal.App.4th at p. 355 [69 Cal.Comp.Cases at p. 185]; *Reeves v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 22, 27 [65 Cal.Comp.Cases 359, 362]; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (*Lopez*), *supra*, 76 Cal.App.4th at p. 516 [64 Cal.Comp.Cases at p. 1351]; *Williams v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 1260, 1265 [64 Cal.Comp.Cases 995, 998].)

Here, section 1063.1(c)(8) expressly states that "covered claims" do not include "*any amount awarded* by the [WCAB] pursuant to Section 5814 or 5814.5 ... ." (Emphasis added.) We believe the clear and unambiguous import of this statutory language is that section 1063.1(c)(8) applies prospectively to any section 5814 (or section 5814.5) awards issued on or after its effective date, i.e., awards issued on or after January 1, 2004. The parties have not offered any other interpretations. We have considered alternative readings of this language, and we find none of them to be plausible.

Because the statutory language is clear and unambiguous, there is no need for construction; therefore, we must simply give effect to section 1063.1(c)(8) in accordance with its plain meaning. Accordingly, we will rescind the section 5814 penalty award against CIGA.[2]

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Appeals Board (En Banc) that the Findings and Award issued by the workers' compensation administrative law judge on March 24, 2004 be, and it is hereby, **ADOPTED** and **AFFIRMED**, with the exceptions that Findings of Fact Nos. 14 and 15 and the Award in its entirety be, and they hereby are, **STRICKEN**

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[2] We note that, although the WCJ made a finding that applicant is entitled to a life pension of $69.57 per week, the WCJ did not include the life pension in the actual Award. We will correct this clerical error.

therefrom and that the following be, and they hereby are, **SUBSTITUTED** therefor:

FINDINGS OF FACT

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14. Fremont Compensation Insurance Company unreasonably delayed the provision of medical treatment.

15. In accordance with Insurance Code section 1063.1(c)(8), California Insurance Guarantee Association is not liable for any Labor Code section 5814 penalty relating to the unreasonable delay in providing medical treatment by Fremont Compensation Insurance Company.

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AWARD

AWARD IS MADE in favor of **JOSE L. MARTINEZ** and against **CALIFORNIA INSURANCE GUARANTEE ASSOCIATION** (for Fremont Compensation Insurance Company, In Liquidation), c/o **CAMBRIDGE INTEGRATED SERVICES, INC**. (Servicing Facility) of:

(A) Temporary disability indemnity at the rate of $490.00 per week from August 13, 1999 to and including January 23, 2002, less credit to defendant for any sums heretofore paid on account thereof in an amount to be adjusted by the parties with jurisdiction reserved;

(B) Permanent disability indemnity in the total amount of $114,655.00 payable at the rate of $230.00 per week beginning January 24, 2002 and continuing for 498.5 weeks, with a life pension thereafter at the rate of $69.57 per week, with any accrued permanent disability indemnity to be paid forthwith, less credit to defendant for any sums heretofore paid on account thereof in an amount to be adjusted by the parties with jurisdiction reserved, less credit to defendant for its overpayments of temporary disability indemnity for the period of January 24, 2002 through March 14, 2002, in an amount to be adjusted by the parties with jurisdiction reserved, and less an attorney's fee of $14,900.00, which is to be commuted from the far end of the permanent disability indemnity award and is to be paid forthwith to Gilbert Dorame, Esq., whose lien is hereby allowed in said amount;

(C) All further medical treatment reasonably required to cure or relieve from the effects of the industrial injury to applicant's low back and psyche, including treatment for chronic pain; and

(D) Reimbursement for self-procured medical expense in accordance with Findings of Fact Nos. 9 and 10, in an amount to be adjusted by the parties, with jurisdiction reserved.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

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MERLE C. RABINE, Chairman

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WILLIAM K. O'BRIEN, Commissioner

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JAMES C. CUNEO, Commissioner

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JANICE JAMISON MURRAY, Commissioner

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RONNIE G. CAPLANE, Commissioner

Not participating _____

FRANK M. BRASS, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 27, 2004

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

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