WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PAUL NEYER, *Applicant*

vs.

MISSION LINEN SUPPLY, Permissibly Self-Insured, CALIFORNIA INSURANCE GUARANTY ASSOCIATION for CREDIT INDEMNITY COMPANY, in liquidation; ARROWPOINT CAPITAL, *Defendants*

Adjudication Numbers: ADJ4336300 (VNO 0429778) ADJ3180323 (VNO 0425253) ADJ3602025 (VNO 0425255) ADJ1492342 (VNO 0362819)
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board previously granted reconsideration to further study the factual and legal issues in this case.[1] This is our decision after reconsideration.

Defendant Mission Linen Supply, permissibly self-insured (Mission Linen) seeks reconsideration of the April 9, 2018 Findings and Order issued by the workers' compensation arbitrator. The arbitrator ordered Mission Linen to reimburse Arrowpoint for sums paid to the California Insurance Guarantee Association (CIGA) in excess of Arrowpoint's pro rata share of liability.

Mission Linen contends that it is not liable to Arrowpoint for Arrowpoint's settlement with CIGA, arguing that the settlement solely benefited Arrowpoint. Mission Linen also contends that the Compromise and Release agreement between Mission Linen, Arrowpoint, and applicant precludes Arrowpoint from obtaining reimbursement or contribution from Mission Linen. Finally, Mission Linen argues that if it does have liability for a portion of the CIGA settlement, the order directing Mission Linen to pay a pro rata share is contrary to the evidence.

Defendant Arrowpoint filed an Answer. The arbitrator prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied. We have considered the Petition for Reconsideration and the contents of the Report, and

[1] Deputy Commissioner Anne Schmitz, who previously served as a panelist in this matter is unavailable to participate further. Another panel member was assigned in her place.

we have reviewed the record in this matter. For the reasons discussed below, as our decision after reconsideration, we will rescind the arbitrator's April 8, 2018 Findings and Order and return the matter to the arbitrator to determine reimbursement applying the legal principles discussed below.

In ADJ492342, applicant sustained a specific injury to his shoulder and lower extremity while employed on January 2, 1996.

In ADJ4336300, applicant sustained a specific injury to his low back and hips on June 30, 1997. On those dates, Mission Linen was permissibly self-insured.

In ADJ180232, applicant sustained injuries to multiple body parts as a result of a motor vehicle accident on October 9, 2000. Mission Linen was insured by Credit General Indemnity. Credit General went into liquidation on January 5, 2001 and CIGA was joined as a party.

In ADJ3602025, applicant sustained a cumulative trauma injury through March 21, 2001 to multiple body parts, including his back, neck, bilateral upper and lower extremities. Credit General insured Mission Linen through February 2001, and Arrowpoint insured Mission Linen for the remainder of the cumulative trauma period.

Applicant resolved all four claims by Compromise and Release. Mission Linen and Arrowpoint entered into a Compromise and Release with applicant in 2011. Thereafter, Arrowpoint settled CIGA's contribution claim for $225,000.

Arrowpoint asserts that Mission Linen should reimburse Arrowpoint $41,653. (Answer, p. 5.) Mission Linen asserts that it is at most liable for 10% of the treatment costs for applicant's low back only. (Petition for Reconsideration, p. 13.)

In his Report, the arbitrator explained: "The Appeals Board should recognize that this arbitrator has not issued an award as to the exact or specific amount recoverable by Arrowpoint from Mission Linen." (Report, p. 2.) While an arbitrator does not need to determine a specific dollar amount, an arbitrator should divide liability between insurers in a manner that could permit the insurers to make a calculation. While a "pro rata" liability is an appropriate way to divide liability among insurers who are jointly and severally liable for a cumulative trauma injury, it is not an appropriate method for dividing liability for successive injuries.

Labor Code[2] section 5500.5 was enacted in 1951 to codify the holding in *Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79 [11 Cal.Comp.Cases 226] that an employee who sustains an injury as a result of a progressive occupational disease may obtain an award for the

[2] All further statutory references are to the Labor Code unless otherwise noted.

entire amount of permanent disability from any one employer or insurer and the defendant held liable will have the burden of seeking apportionment. "Section 5500.5 is long and complex, but its design is reasonably clear. It is intended to allow an employee to recover for his entire cumulative injury from one or more employers of his choosing for whom he worked within the preceding five years, even though a portion of his injury was incurred in prior employments. The employer or employers against whom compensation is awarded are in turn authorized to seek contribution from other employers in the five-year period." (*Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 322, 325–326 [44 Cal.Comp.Cases 212].) For workers' compensation claims filed after January 1, 1981, the injured worker may elect against any employer in the year immediately preceding his or her injury. (Lab. Code, § 5500.5(a).)

Disputes over the right of contribution pursuant to Section 5500.5 are required to be submitted to arbitration and the cost of arbitration is split between the parties. (Lab. Code, §§ 5273, 5275(a).) Arbitrators have all of the duties and responsibilities of workers' compensation administrative law judges except arbitrators do not have the power of contempt and do not have the power "to order the injured worker to be evaluated by a qualified medical evaluator pursuant to Sections 5701 and 5703.5." (Lab. Code, §5272(a).) The arbitrator's decision "shall have the same force and effect as an award, order, or decision of a workers' compensation judge." (Lab. Code, § 5277(c).) Parties are prohibited from ex parte communication with an arbitrator and from disclosing offers of settlement to the arbitrator. (Lab. Code, § 5278.)

Whether an applicant has elected against a defendant or not, the litigation expenses associated with arbitration provide a financial incentive for defendants to settle a contribution action. When parties fail to settle, they proceed to arbitration which is akin to a trial with the arbitrator performing the functions of a trial judge. Like a workers' compensation judge, an arbitrator must "make and file findings upon all facts involved in the controversy and [make and file] an award, order or decision stating the determination as to the rights of the parties. . .[and include] a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made" after the case is submitted.

Employers during the Section 5500.5 period have joint and several liability for all benefits and an applicant may elect against any defendant who is liable for a portion of the cumulative trauma. The elected against defendant may then initiate contribution proceedings to apportion liability. A "pro rata" division of liability is generally accepted and appropriate when apportioning

liability for a cumulative trauma injury between two insurers. Under Section 5500.5, the number of days an insurer covered during a 5500.5 period can be used to establish a percentage of the total liability that the insurer must contribute.

A party may also seek contribution or reimbursement where multiple injuries contribute to permanent disability, temporary disability, or a need for medical treatment. The Labor Code requires that permanent disability be apportioned between injuries. (Lab Code, §§ 4663. 4664; *Benson v. Permanente Medical Group* (2009) 170 Cal. App. 4th 1535 [74 Cal. Comp. Cases 113].) However, there is no apportionment of medical treatment and temporary disability benefits.

An employer is required to provide medical treatment "that is reasonably required to cure or relieve the injured worker from the effects of his or her injury…" (Lab. Code § 4600.) If the need for medical treatment is partially caused by applicant's industrial injury, the employer must pay all of the injured worker's reasonable medical expenses. (*Granado v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 399, [33 Cal.Comp.Cases 647].) An injured worker is entitled to medical care for a non-industrial condition that must be treated in order to cure or relieve the effects of an industrial injury. (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, [48 Cal.Comp.Cases 566].) A similar analysis applies to temporary disability benefits. In *Granado,* the Supreme Court explained:

> The legislative policy of making temporary disability payments a substitute for lost wages would be frustrated to a substantial degree if the disabled worker must await doctor's examinations, complex reports, and the resulting hearing, which may be protracted, to determine the question of apportionment of disability. If apportionment is permitted, employers can be expected, when apportionment questions arise, to withhold temporary disability payments until determination of the question, thus frustrating the policy reflected by section 4650 of the Labor Code requiring payment of temporary benefits on the eighth day after the injured employee leaves work. The expeditious payment of benefits is part of the "social public policy of this State" (Cal. Const., art. XX, § 21), and any delay in the payment of temporary benefits, the substitution for wages of the disabled worker, obviously will work great hardship.
> (*Granado, supra,* 69 Cal.2d 399, 404.)

Therefore, where more than one injury contributes to a need for temporary disability or medical treatment, each defendant with a contributing injury has joint and several liability for those benefits.[3]

In cases where two or more insurers are jointly and severally liable, an applicant may obtain benefits from any liable defendant. This promotes the prompt payment of benefits to the applicant. Thereafter, liability may be divided among insurers in a supplemental proceeding. (*Royal Globe Ins. Co. v. Industrial Acci. Com. (Lynch)* (1965) 63 Cal.2d 60, 64 [30 Cal.Comp.Cases 199].) In general, as between two insurers, a division of liability of non-apportionable benefits should follow the division of liability for permanent disability. "There should be no distinction between apportionment among carriers for temporary disability and for permanent disability." (Ibid.)

In this case, two insurers are asking an arbitrator to allocate liability for benefits owed as a result of a third insurer's insolvency. CIGA does not have an obligation to pay benefits if there is other insurance available. As will be discussed further below, because it is another insurer rather than CIGA that is seeking a division of liability, joint and several liability does not have the same consequences as it would if CIGA were the party seeking contribution or reimbursement.

CIGA's liability is specifically defined in Insurance Code section 1063.1. While section 1063.1, subdivision (c)(1)(vi) defines "covered claims" as "the obligations of an insolvent insurer … in the case of a policy of workers' compensation insurance, to provide workers' compensation benefits under the workers' compensation law of this state," subdivision (c)(9) provides, "'Covered claims' does not include (i) any claim to the extent it is covered by any other insurance of a class covered by this article available to the claimant or insured …."

If there is a solvent insurer for a portion of a cumulative trauma period, that insurer is available "other insurance" for applicant's cumulative trauma injury and CIGA is not liable for benefits. An insurer cannot obtain contribution from CIGA under 5500.5 and CIGA can recover for any benefits paid as a result of the cumulative trauma.

In order to obtain reimbursement for medical treatment and temporary disability in a case where an applicant sustained two work related injuries, CIGA must establish that both injuries contributed to the need for medical treatment or temporary disability indemnity. (*California Ins.*

[3] It is also possible that two defendants may be jointly and severally liable for permanent disability benefits if there is substantial medical evidence that the permanent disability caused by two injuries is "inextricably intertwined." (*Benson, supra.*)

Guarantee Assn. v. Workers' Comp. Appeals Bd. (*Hernandez*) (2007) 153 Cal.App.4th 524.) In *Hernandez,* the Court of Appeal explained the significance of joint and several liability for these benefits in cases where an insurer is insolvent and CIGA is administering a claim as follows,

> Between workers' compensation insurers who are jointly and severally liable for various nonpermanent disability benefits, there is generally pro rata apportionment for the shared liability. (See generally Lab. Code, §§ 3208.2, 5303, 5500.5.) But, CIGA is not another workers' compensation insurer; it is a fund with responsibilities that are limited by statute in order to insure that the worker is protected. CIGA does not protect insurers….SCIF constitutes solvent 'other' insurance' that must reimburse the CIGA fund for the temporary workers' compensation benefits it paid in this matter. (*Id.* at 537.)

In this case, Arrowpoint and Mission Linen were jointly and severally liable with CIGA for different benefits based on different theories of liability. Arrowpoint shared a cumulative trauma period with CIGA and was "other insurance" for all benefits, including permanent disability caused by that cumulative trauma. Mission Linen was jointly and severally liable with CIGA for medical treatment and temporary disability benefits that resulted from applicant's earlier low back injury.

The arbitrator determined that Mission Linen should reimburse Arrowpoint everything "in excess of Arrowpoint's pro rata share of liability." (April 18, 2018, Findings and Order) The arbitrator did not explain how he arrived at this division of liability. If CIGA were still a party to this arbitration, CIGA would be able to obtain reimbursement from Mission Linen for medical treatment and temporary disability for applicant's low back. To the extent Arrowpoint's settlement with CIGA also settled temporary disability or medical treatment benefits for successive injuries with overlapping body parts, Arrowpoint is entitled to reimbursement from Mission Linen.

However, Arrowpoint is not entitled to the same reimbursement that CIGA would be entitled to. If CIGA is a party and there is "other insurance" available, CIGA is relieved of liability. The "other insurance" analysis does not apply to a dispute between two insurers. Arrowpoint can obtain reimbursement from Mission Linen of the portion on the settlement that is Mission Linen's liability for non-permanent disability benefits paid.

When dividing liability between two insurers with two different dates of injury for non-permanent disability benefits, one traditional method is to follow the division of liability for

permanent disability benefits.[4] (*Lynch, supra.)* However, the arbitrator has discretion to allocate liability for benefits in any manner that accomplishes substantial justice between the insurers.

Therefore, we will return this matter to the arbitrator to conduct further proceedings and issue a new decision in the event the parties cannot settle their dispute.

[4] In an Appeals Board panel decision, *Duenas v. Workforce Solutions* (April 14, 2021) ADJ8375307, 2021 Cal. Wrk. Comp. P.D. Lexis 83, the panel clarified that an arbitrator may also make a division of liability between insurers of certain medical cost containment expenses.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the April 9, 2018 Findings and Order is **RESCINDED,** and the matter is **RETURNED** to the arbitrator for further proceedings and a new decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSE RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 22, 2022

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

MARROW MARROW
C RONALD FEENBERG, ARBITRATOR
TOBIN LUCKS

MWH/oo

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