WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GREGG HAMILT, *Applicant*

vs.

L&N UNIFORM SUPPLY COMPANY; ST. PAUL FIRE & MARINE INSURANCE COMPANY; TRAVEL INSURANCE COMPANY; WAUSAU BUSINESS INSURANCE COMPANY (LIBERTY MUTUAL), *Defendants*

Adjudication Numbers: ADJ805478 (MON0252830); ADJ1289904 (MON0242347); ADJ2355545 (MON0242346)
Marna del Rey District Office

OPINION DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the Arbitrator with respect thereto. Based on our review of the record, and for the reasons stated in the Arbitrator's March 16, 2022 report, which we adopt and incorporate, we will affirm the February 7, 2022 Arbitrator's Findings and Award.

Finally, we note that, while this matter was pending on reconsideration, the workers' compensation administrative law judge (WCJ) issued a September 13, 2022 Order approving stipulations of settlement between the parties. However, because district offices are precluded from acting on a case while it is pending on reconsideration, (Cal. Code Regs., tit. 8, § 10961), the September 13, 2022 Order is void and should be reissued.

[1] Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 7, 2022 Arbitrator's Findings and Award is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 21, 2022

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

MULLEN & FILIPPI
LAW OFFICES OF KIRK & MYERS
WOOLFORD & ASSOCIATES
MARK KAHN, ARBITRATOR

PAG/abs

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

ARBITRATOR'S REPORT AND RECOMMENDATION ON RECONSIDERATION

I.

INTRODUCTION

The above-captioned matter having been set for Arbitration on January 11, 2022, before Mark L. Kahn, Arbitrator, on the issue of contribution. At that Arbitration, the parties reached Stipulations, Issues and admitted Exhibits into evidence and agreed to submit the matter on the present record.

On February 7, 2022, the Arbitrator Found and Awarded as follows:

FINDINGS

1. The Arbitrator found that Arrowood Indemnity does not have a right to seek reimbursement/contribution for any monies paid after the date of the two Orders Approving Compromise and Release Agreements by the Appeals Board.

2. The Arbitrator found that St. Paul Fire and Marine Insurance Company (Travelers Insurance Company) and Wausau Business Insurance Company (Liberty Mutual) were able to settle and did settle their two claims by way of Compromise and Release Agreements, pursuant to case law, and, therefore, have no liability for contribution/reimbursement against Arrowood Indemnity as of the date of approval of the Compromise and Release Agreements by the Appeals Board.

3. The Arbitrator found that St. Paul Fire & Marine Insurance Company (Travelers Insurance Company) and Wausau Business Insurance Company (Liberty Mutual) are only responsible for one-third monies paid by defendant, Arrowood Indemnity, prior to the date of the Orders Approving Compromise and Release Agreement by the Appeals Board.

4. The Arbitrator found that this case involves a separate specific injury against a separate insurance company insuring the same employer and two separate continuous trauma injuries against two other separate insurance companies insuring the same employer. Therefore, the Arbitrator finds that Labor Code §5005 does not apply to the facts of this case.

5. The Arbitrator found that from the date of the approval of the two settlements by the Appeals Board against Travelers and Wausau/Liberty Mutual, their liability for further medical treatment ended for those two insurance companies on the date the Compromise and Release Agreement were approved by the Appeals Board.

6. The Arbitrator found from the date of the approval of the two settlements by the Appeals Board against Travelers and Wausau/Liberty, Arrowwood became the only defendant liable for further medical treatment for the applicant in order to avoid a windfall to the applicant.

7. The Arbitrator found that from the date of the approval of the two settlements by the Appeals Board against Travelers and Wausau/Liberty, Arrowood had a right to assert that they

were only liable for their pro-rata share liability for further medical treatment of one-third, based on the Findings and Award issued by the Appeals Board.

8. The Arbitrator found that Arrowood is entitled to prior to the approval of two Compromise and Release Agreements to contribution/reimbursement of one-third of all those benefits from which they are entitled to for contribution/reimbursement from Travelers and Wausau paid prior to approval of the Compromise and Release Agreements.

9. The Arbitrator found that St. Paul Fire, Marine Insurance Company (Travelers Insurance Company), Arrowood and Wausau Business Insurance Company (Liberty Mutual) are only responsible for on-third monies paid to the applicant prior to the date of the Orders Approving Compromise and Release Agreement by the Appeals Board.

10. The Arbitrator found that St. Paul Fire and Marine Insurance Company (Travelers Insurance Company) and Wausau Business Insurance Company (Liberty Mutual) were able to settle their two claims by way of a Compromise and Release Agreement, pursuant to general case law and not pursuant to Labor Code §5005 and, therefore, they have no liability for contribution/reimbursement against Arrowood Indemnity as of the date of approval of the Compromise and Release Agreements.

11. The Arbitrator found that as to the issue of should Arrowood Indemnity be responsible for payment to Wausau Insurance/Liberty Mutual and St. Paul Fire & Marine insurance Company because they overpaid for future medical treatment is irrelevant as both Travelers and Wausau only settled their one-third of future medical treatment in the MSA and there is no contribution rights by either Travelers or Wausau against Arrowood for sums paid for future medical treatment in their Compromise and Release Agreements.

12. The Arbitrator found that the Compromise and Release Agreements between the applicant and Travelers and Wausau bar any rights of Arrowood to contribution after the dates of the Orders Approving Compromise and Release Agreement.

13. The Arbitrator found on the issue of did Wausau Insurance/Liberty Mutual and St. Paul Fire & Marine Insurance Company have an MSA for medication that was denied by Utilization Review thereby over inflating the MSA obtained by Wausau Insurance/Liberty Mutual and St. Paul Fire & Marine Insurance Company, that issue is irrelevant as each defendant is only liable for one-third of further medical treatment.

14. The Arbitrator found that as to the issue of should the two Compromise and Release Agreements be set aside, the Arbitrator has no jurisdiction over a request that Compromise and Release Agreements be set aside. This issue is strictly under the jurisdiction of the Appeals Board.

15. The Arbitrator found that as to the issue of did defendants, Wausau Insurance/Liberty Mutual and St. Paul Fire & Marine Insurance Company, omit the MSA and basis for the settlement as future medical that this issue is irrelevant because defendants, Travelers and Wausau, settled their claims by way of a Compromise and Release and have no right to contribution regarding the proceeds of the Compromise and Release Agreement against Arrowood as to further medical treatment.

16. The Arbitrator found that the Petition for Contribution/Reimbursement filed by Arrowood against Travelers and Wausau is granted for sums paid properly subject to contribution/reimbursement up to the Order Approving Compromise and Release Agreement in amounts to be adjusted between the parties with the Arbitrator retaining jurisdiction in case of a dispute.

17. The Arbitrator found that the Petition for Contribution filed Wausau against Arrowood is granted for sums paid properly subject to contribution/reimbursement in an amount to be adjusted between the parties with the Arbitrator retaining jurisdiction in case of a dispute for sums paid prior to the Order Approving Compromise and Release Agreement.

18. The Arbitrator found that the Petition for Contribution of St. Paul Fire & Marine Insurance Company (Travelers Insurance Company) against Arrowood is granted for sums paid properly subject to contribution/reimbursement in an amount to be adjusted between the parties with the Arbitrator retaining jurisdiction in case of a dispute for sums paid prior to the Order Approving Compromise and Release Agreement.

AWARD

1. Award was made in favor of Arrowood against Travelers and Wausau for sums paid up to the two Orders Approving Compromise and Release Agreement in amounts to be adjusted between the parties with the Arbitrator retaining jurisdiction in case of a dispute.

2. Award was made in favor Wausau against Arrowood for sums paid up to the Order Approving Compromise and Release Agreement in an amount to be adjusted between the parties with the Arbitrator retaining jurisdiction in case of a dispute.

3. Award was made in favor of St. Paul Fire & Marine Insurance Company (Travelers Insurance Company) against Arrowood in an amount to be adjusted between the parties with the Arbitrator retaining jurisdiction in case of a dispute for sums paid prior to the Order Approving Compromise and Release Agreement.

Arrowood Indemnity has now filed this Petition for Reconsideration on the following grounds:

1. The Arbitrator erred in denying defendant, Arrowood Indemnity's, claim to a right of contribution/reimbursement from defendants, Travelers and Wausau, after the date of the Order Approving Compromise and Release.

2. Co-defendant's Compromise and Release Agreements did not extinguish their liability to Arrowood resulting from the Findings and Award dated May 28, 2015.

3. Co-defendant did not resolve liability by way of Compromise and Release as the Findings and Award specifically finds liability to all dates of injury.

II.

FACTS

The applicant alleged three separate injuries against employer, L & N Uniform Supply Company, a specific injury and two continuous trauma injuries.

The matter proceeded to Trial on February 4, 2015.

On May 28, 2015, the Honorable Robert F. Spoeri, Workers' Compensation Judge, issued three separate Finding of Fact and Awards against three different insurance companies based on 8 multiple reports of Agreed Medical Evaluators for three separate injuries.

In case ADJ1289904, it was found that the applicant sustained injury to his lumbar spine, psyche, upper G.I., lower G.I., hypertension, lower extremity/right ankle, headaches, urological/reproductive system and neck as a result of the cumulative trauma during the period July 15, 1994 through July 15, 1995 resulting in permanent disability of 28:2 %. The Award was made against Royal Sun Alliance, Arrowood Indemnity/Global Indemnity.

In case ADJ2355545, it was fund the applicant sustained an injury to his lumbar spine, psyche, upper G.I., lower G.I., hypertension, lower extremity/right ankle, headaches, urological/reproductive system and neck as a result of the cumulative trauma injury during the period August 24, 1997 through August 24, 1998 resulting in permanent disability of 32%. The Award issued against defendant, Wausau Insurance/Liberty Mutual.

In case ADJ805478, it was found the applicant sustained a specific injury on August 13, 1983 to the lumbar spine, psyche, upper G.I., lower G.I., hypertension, lower extremity/right ankle, headaches, urological/reproductive system and neck resulting in permanent disability of 25:2%. The Award issued against Travelers Indemnity Company.

All three Findings of Fact and Awards found there was proper Benson apportionment of 33.33% to the injury on August 31, 1983 for all work-related injury body parts, 33.33% to the injury for the period July 15, 1994 through July 15, 1995 for all work-related injured body parts, and 33.33% to the injury for the period August 24, 1997 through August 24, 1998 for all work-related body parts.

On February 4, 2015, a Stipulation and Order to Pay Lien Claimant was issued by the Appeals Board. The agreement provided that the lien of the Employment Development Department was settled for $12,144 and was paid one-third by… each of the defendants; Wausau/Liberty Mutual, Travelers, and Arrowood.

On September 21, 2016, in case ADJ805478, for the specific injury of August 31, 1983, defendant, Travelers, and the applicant reached a full and final settlement by way of a Compromise and Release Agreement in the sum of $167,000, new money. The Compromise and Release Agreement provided that the MSA addendum was attached and incorporated by reference. The MSA dated April 1, 2015 was in the sum of $515,168.41 for applicant's future medical care.

On September 21, 2016, the Compromise and Release Agreement in case ADJ805478 was approved by the Appeals Board.

On September 21, 2016, in case ADJ2355545, for the continuous trauma injury from August 24, 1997 through August 24, 1998, defendant, Wausau Business Insurance Company, and the applicant reached a full and final settlement by way of a Compromise and Release Agreement in the sum of $192,000. The Compromise and Release Agreement provided that it was a full and final settlement of any and all claims under the Labor Code of the State of California that applicant has against defendant insurer and defendant employer arising out of this injury. All sums due under the Findings and Award of been paid. This settlement settles all other issues, including future medical treatment. This injury definition: August 24, 1997 to August 24, 1998.

On September 21, 2016, the Compromise and Release Agreement in case ADJ2355545, was approved by the Appeals Board.

Defendant, Arrowood, did not enter into a Compromise and Release Agreement with the applicant.

Arrowood was aware of the two settlements entered into between the applicant and co-defendants and the approval of those settlements by the Appeals Board.

The applicant moved the Appeals Board to transfer administration of the claim for future medical care to defendant, Arrowood, on September 21, 2016. The change of administration of the benefits was approved by the WCJ.

Defendants, Travelers and Wausau/Liberty Mutual, resolved their contribution claims against each other informally around June 2019. Travelers paid the sum of $232,797.57 to Liberty Mutual in full resolution of contribution claims between the two defendants. There are no issues of reimbursement or contribution between Travelers and Liberty Mutual.

Arrowood filed a Petition for Contribution against Wausau/Liberty Mutual and Travelers. Arrowood paid approximately $25,843.96 in indemnity and approximately $141,635.75 in medical expenses. Arrowood claims they are entitled to contribution against Wausau/Liberty Mutual and Travelers for each of their one-third share of monies paid to date and should be ordered to pay one-third of all future medical and monies paid by Arrowood subject to proof.

This contribution Petition was the subject of this Arbitration.

On February 7, 2022, the Arbitrator issued the Findings and Award as set forth above.

On March 3, 2022, Arrowood Indemnity filed a Petition for Reconsideration from the Findings and Award that issued on February 7, 2022 on the ground set forth above.

III.

DISCUSSION

A.

[Arrowwood] filed this Petition for Reconsideration arguing that the Arbitrator erred in denying defendant, Arrowood Indemnity's, claim to a right of contribution/reimbursement from defendants, Travelers and Wausau, after the date of the Order Approving the two Compromise and Release Agreements. Co-defendant's Compromise and Release Agreements did not extinguish their liability to Arrowood resulting from the Findings and A ward dated May 28, 2015. Co-defendant did not resolve liability by way of Compromise and Release as the Findings and Award specifically finds liability to all dates of injury.

The question presented was whether Arrowood Indemnity had a right to seek reimbursement/contribution for any monies paid after the date of the two Orders Approving Compromise and Release Agreements by the Appeals Board based on case law. Do the Compromise and Release Agreements entered into by St. Paul Fire & Marine Insurance Company (Travelers Insurance Company) and Wausau Business Insurance Company (Liberty Mutual) prevent Arrowood from seeking contribution/reimbursement after the date of approval of the two Compromise and Release Agreements by the Appeals Board based on case law?

The Arbitrator found the following cases apply to the facts of this case:

In the case of *Jonathan Sanarrucia v. Tobin World, State Compensation Insurance Fund* (2021 Cal. Wrk. Comp. P.D. LEXIS 332), it was held that in a case in which two separate insurers who settled two separate claims filed by an employee, the Board found that neither carrier was entitled to reimbursement. The Board concluded that one insurer could not recover costs from a defendant in a different workers' compensation cases involving an entirely separate injury.

In Sullivan on compensation, the author writes as follows on this issue:

An awkward situation can be created in regard to medical care when the applicant settles against one carrier and then proceeds against another. In one case, an applicant had a specific injury and a continuous trauma claim. The applicant settled the specific injury by of a Compromise and Release Agreement, but proceeded to Trial against the carrier who was liable for the cumulative trauma. The WCJ made an Award, but found himself awarding future medical care only against the second carrier. Naturally, the defense objected loudly that it should be responsible only for the percentage of future medical care that it would have been responsible for absent the C&R.

Sullivan goes on to write, the WCJ was loath to do this. It was unlikely that the medical professionals would have been happy with an insurance carrier paying part of the bills and the applicant paying the rest, especially for treatment that would go on, it seemed, indefinitely. It was noted that in cases in which there has been a Compromise and Release Agreement in the past, the carrier for a later injury is forced to assume liability for all medical needed with no recourse against the applicant or the previous employer.

Turning to the issue of settlement of future medical care when there are multiple cases still pending, the WCJ noted, "the Court's tends to draw a line on the settlement of future medical care where there are multiple pending cases.

The WCJ's solution was to figure out how much of the funds recited in the Compromise and Release Agreement were there to settle medical care. A credit was then given against the applicant. When that ran out, the carrier for the cumulative claim was responsible for all future medical care going forward. (*Big T's Mechanical Repair v. WCAB* (*Deen*) (2001) 66 CCC 621, 622 (writ denied). See also *Sherbank v. WCAB* (1986) 51 CCC 504 (writ denied); *Jessen v. WCAB* (1981) 46 CCC 1210 (writ denied) (WCJ simply denied applicant all but a pro-rata share of medical care)

In the case of *Jessen v. WCAB* (1981) 46 CCC 1210 (writ denied), it was held that in an injured employee who settles part of his cumulative injury claim may only collect a pro-rata portion of his further medical benefits from the non-settling defendants.

In the case of *Hustad* v. [*Workers' Compensation Appeals Board*] (60 Cal. Comp. Cases 1009), the WCJ explained that, in the instant case, all of applicant's industrial injuries were set for hearing on June 28, 1993. Applicant would not have been denied a "complete system" of compensation for her injuries had she settled all of them or tried all of them. WCJ Castranova pointed out that Republic Indemnity had no recourse regarding contribution from the other carriers and/or employers, as it had already settled its liability. The WCJ did not interpret the law as placing 100% liability on Republic Indemnity for treatment costs and TD when it only had 9.12% liability per the IME's opinion.

According to the WCJ, to hold otherwise would permit an injured worker to settle for less than full value with a carrier having the major share of liability for TD and medical treatment and still be entitled to 100% of both benefits from the remaining carriers with only minor exposure. That would create a windfall for applicant, which is not what the law intended.

Based on the WCJ's reasoning, the WCAB denied applicant's Petition for review.

Applicant filed a Petition for Writ of Review, alleging that the WCJ erred because he apportioned applicant's disability based on aggravation of a preexisting condition. Applicant relied on *Granado v. WC.A.B*. (1968) 69 Cal. 2d 399, 71 Cal. Rptr. 78, 445 P.2d 294 [33 Cal. Comp. Cases 647] in asserting that apportionment only applies to PD, but not TD or medical treatment.

Defendant responded, arguing that *Granado* deals with the issue of apportionment of TD and medical treatment between an employee and employer. This case concerned apportionment between multiple employers.

The Writ was denied.

In the case of (*Big T's Mechanical Repair v. WCAB* (*Deen*) (2001) 66 CCC 621) it was held that generally, case law has established that medical treatment is not apportionable to a non-industrial cause as long as there is any industrial component to the need for treatment.

It is an accepted workers' compensation practice that the defendant in a current case is liable for all future medical treatment even when there are prior cases which Compromise and Released the applicant's need for future medical care.

The Courts tends to draw a line on the settlement of future medical care where there are multiple pending cases, where the need for treatment is attributed to all of the pending cases, and where the applicant settles some, but not all of the pending cases.

In this situation, the remaining defendants generally argue that applicant has already been compensated for some of the costs of future medical in the settlement and he should not get a double recovery by requiring the remaining defendants to pay for all the costs of the future medical care.

The WCJ found that it would be equitable to allow Safeco and California Indemnity a credit against future medical costs to the extent of the value of the future medical costs settled by applicant in the C&R for his specific injury. The WCJ pointed out that this would avoid any double recovery by applicant.

The WCJ apportioned the medical care costs.

Therefore, these cases held the WCAB did not err in awarding applicant future medical care against insurance carriers remaining in a case through Trial after applicant had settled his claim with one carrier, when WCAB allowed remaining carriers credit for value of future medical costs previously settled so as to prevent a double recovery.

Applying the above Case Law to facts of this case, the Arbitrator Found as follows:

The facts as set forth above establish the applicant alleged three separate injuries against employer, L & N Uniform Supply Company, a specific injury and two separate continuous trauma injuries.

The matter proceeded to Trial on February 4, 2015. The Trial was against all three defendants.

On May 28, 2015, the Honorable Robert F. Spoeri, Workers' Compensation Judge, issued three separate Finding of Fact and Awards against three different insurance companies, based on multiple reports of Agreed Medical Evaluators for three separate injuries.

The Judge, as to apportionment of all benefits including future medical treatment, found in all three Findings of Fact and Awards that there was proper Benson apportionment of 33.33% to the injury on August 31, 1983 for all work-related injury body parts, 33.33% to the injury for the period July 15, 1994 through July 15, 1995 for all work-related injured body parts and 33.33% to the injury for the period August 24, 1997 through August 24, 1998 for all work-related injured body parts.

On September 21, 2016, in case ADJ805478, for the specific injury of August 31, 1983, against defendant, Travelers, Travelers entered into a separate Compromise and Release with the

applicant for a full and final settlement of applicant's claim claims including further medical 19 treatment.

On September 21, 2016, in case ADJ2355545, for the continuous trauma injury from August 24, 1997 through August 24, 1998, against defendant, Wausau Business Insurance Company, Wausau entered into a separate Compromise and Release Agreement with the applicant for a full and final settlement of all applicant's claims including further medical treatment.

The Appeals Board approved both Compromise and Release Agreements on September 21, 2016.

Defendant, Arrowood, did not enter into a Compromise and Release Agreement with the applicant. Arrowood elected to keep the Award issued by Honorable Robert F. Spoeri on May 28, 2015 in effect against them including the Award of further medical treatment.

Arrowood was aware of the two settlements entered into between the applicant and co-defendants and the approval of those settlements by the Appeals Board.

The applicant moved the Appeals Board to transfer administration of the claim for future medical care to defendant, Arrowood, on September 21, 2016. The change of administration of the benefits was approved by the WCJ.

Arrowood now seeks contribution against Wausau/Liberty Mutual and Travelers of one-third share of monies paid to date from each insurance and one-third of all future medical to be paid by Arrowood.

Both Wausau/Liberty Mutual and Travelers argue contribution/reimbursement should be denied for benefits paid after the date of the Orders Approving the Compromise and Release Agreements by the Appeals Board.

Based upon the above case law, defendants who have separate injuries are allowed to enter inter separate settlement agreements including future medical treatment.

The applicant has a right to settle any of his separate workers' compensation claim against any defendants including settlement of his future medical treatment.

The law as discussed above makes it clear that if an applicant has cases pending at the same time, as is the case here, and seeks to settle some of those cases including future medical treatment, the applicant has a right to enter into such settlement.

However, the case law above establishes that the remaining defendant is only liable for the amount of future medical treatment that is their percentage of liability for their injury.

As was pointed out in the above cases, the non-settling defendant has no recourse regarding contribution/reimbursement from the other carriers and/or employers as they have had already settled their liability.

However, the case law also states that the law is not interpreted as placing 100% liability on the non-settling insurance company for medical treatment.

According to case law to hold otherwise would permit an injured worker to settle for less than full value with a carrier having the major share of liability for TD and medical treatment and still be entitled to 100% of both benefits from the remaining carriers with only minor exposure. That would create a windfall for applicant, which is not what the law intended.

To avoid that windfall, in the case of separate injuries all pending at the same time where some insurance companies elect to settle with the applicant and other insurance companies do not, the remaining carrier is only liable for their percentage of future medical treatment.

This is accomplished in the case law by allowing a credit for the future medical paid by the defendants who settled the case and once that credit is over, the non-settling defendant is liable for all further medical treatment or, in the alternative, the cases found the non-settling only defendant liable for their portion of the future medical treatment. In this case, that was determined by the Award as one-third to each injury.

In this case, Travelers and Wausau elected to settle her case. Arrowood elected not to settle their case.

Therefore, Travelers and Wausau had a right to buy their peace and settle all benefits including future medical treatment.

Normally apportionment of medical treatment is not allowed among industrial injuries or… for non-industrial factors of disability. The applicant is entitled to a l 00% payment of medical treatment although the cost can be paid or allocated among multiple defendants.

The one exception, as in the case here, occurs were there are separate injuries pending at the same time.

If the applicant settles against some of the defendants, the remaining defendants are only liable for their pro-rata share of the cost of future medical care to avoid a windfall for the applicant or for a credit as set forth above.

From the date the two settlements were approved by the Appeals Board against Travelers and Wausau/Liberty Mutual and moving forward liability for further medical treatment ended for those two insurance companies.

Arrowood then became the only defendant liable for further medical treatment.

However, to avoid a windfall to the applicant, Arrowood had a right to assert that they were only liable for their pro-rata share liability for further medical treatment of one-third based on the findings found by the WCJ or a credit for the amount paid for future medical treatment in each settlement.

Apparently, Arrowood did not raise this issue or apply this issue of only being responsible for payment of one-third of medical treatment after the settlements were approved or a credit.

It appears Arrowood elected to pay applicant's further medical treatment in the full amount.

In the opinion of the Arbitrator, that was Arrowood's choice to pay all medical further treatment when they were only liable for one-third of the medical treatment from the time the two Compromise and Release Agreements were approved or a credit.

The fact they paid all further medical treatment after the date of the Orders Approving Compromise and Release Agreements does not permit them to now seek contribution/reimbursement against Wausau and Travelers as they had a full and final settlement of both their cases.

In the opinion of the Arbitrator, based on the facts of this case, Wausau and Travelers have no liability for contribution/reimbursement to Arrowood after the date of approval of the Compromise and Release Agreements by the Appeals Board. The two Compromise and Releases when approved by the Appeals Board fully settled all rights the applicant had against each of those two insurance companies including further medical treatment.

Because this was a case involving three separate injuries litigated at the same time, once the Compromise and Release Agreements were approved by the Appeals Board, there were no rights of contribution/reimbursement against each of those defendants going forward.

When after the Compromise and Release Agreements were approved and administration of future medical treatment was transferred by the Appeals Board to Arrowood, they should have asserted their right and have the Judge only hold them responsible for one-third of any further medical treatment.

Arrowood was entitled to, after the approval of two Compromise and Release Agreements, to only pay applicant one-third of applicant's further medical treatment. The fact they did not assert this issue does not create a right to contribution or reimbursement against the two defendants who had a full and final settlement agreement with the applicant approved by the Appeals Board.

In this case, Arrowood was responsible for having to pay one-third of the applicant's further medical treatment and the applicant was responsible for payment of the remaining two-thirds out of the proceeds of the two Compromise and Release Agreements. The fact the applicant may have found it difficult to obtain medical treatment because of this payment method, pursuant to the case law, is what occurs because was the applicant's makes a choice by electing to settle two of the cases. This is the procedure set forth in the above case law to avoid the applicant obtaining a windfall by settling against some defendants and having the remaining defendant pay 100% of further medical treatment.

The MSA provided that the applicant should have had the funds to pay for the other two-thirds of the medial treatment. If he did not choose to use the funds in that way, that would have been the applicant's choice.

Therefore, the Arbitrator found that Arrowood has no right to seek contribution/reimbursement for any benefits Arrowood paid after the approval of the two Compromise and Release Agreements against Wausau/Liberty Mutual and Travelers.

Arrowood claims and is entitled to contribution/reimbursement for benefits they paid prior to the approval of the Compromise and Release Agreements against Travelers and Wausau.

Arrowood is entitled to contribution/reimbursement of one-third of all those benefits from which they are entitled to recover for in contribution/reimbursement from each of Travelers and Wausau.

Therefore, the Arbitrator found that Arrowood is entitled to contribution against Travelers and Wausau of one-third each of all benefits paid up to the date of the Order Approving Compromise and Release in an amount to be adjusted between the parties with the Arbitrator retaining a jurisdiction in case of a dispute any issue including an issue of what is allowed in contribution/reimbursement.

The Arbitrator found that Arrowood is not entitled to contribution/reimbursement on permanent disability as the Workers' Compensation Judge issued separate Awards against each insurance company.

The Arbitrator found that Arrowood Indemnity does not have a right to seek contribution/reimbursement for any monies paid after the date of the two Orders Approving Compromise and Release Agreements by the Appeals Board against Wausau and Travelers.

The Arbitrator found that St. Paul Fire & Marine Insurance Company (Travelers Insurance Company) and Wausau Business Insurance Company (Liberty Mutual) are only responsible for one-third monies paid by defendant, Arrowood Indemnity, prior to the date of the Orders Approving the Compromise and Release Agreement by the Appeals Board.

The Arbitrator found that St. Paul Fire & Marine Insurance Company (Travelers Insurance Company) and Wausau Business Insurance Company (Liberty Mutual) were able to settle their two claims by way of a Compromise and Release Agreement, pursuant to general case law and not pursuant to Labor Code §5005, and, therefore, they have no liability for contribution/reimbursement against Arrowood Indemnity as of the date of approval of the Compromise and Release Agreements by the Appeals Board.

B.

Defendant, Arrowood Indemnity, sites the case of *Juarez v. Accuride International* (2015 Cal. Wrk. Comp. P.D. Lexis 438) for its proposition that the Compromise and Release Agreements entered into between Travelers and Wausau and the applicant did not extinguish their right to contribution for future medical treatment after the Compromise and Release Agreements were approved by the Appeals Board.

The facts of the *Juarez* case are markedly different than the facts of the present case.

First and most important, the facts that are different from the present case was that in the *Juarez* case, a lien was filed by the insurance company in the continuous trauma case seeking contribution/reimbursement from the insurance company in the specific injury case.

Second, is the fact that is difference from *Juarez* was that in the present case all three cases were litigated at the same time and injury was found in all three cases.

In the *Juarez* case, injury was disputed for the continuous trauma claim and the specific injury had a prior Stipulated Award and later was settled by way of a Compromise and Release Agreement.

The Arbitrator, in the *Juarez* case, found despite the Compromise and Release between the applicant and the insurance company from the specific injury, the Award against them remained in full force and effect until the issue of injury AOE/COE for an alleged cumulative trauma injury was litigated in the supplemental Arbitration proceedings. The defendant could not seek contribution or reimbursement until there was a finding that the applicant sustained a cumulative trauma injury to his lumbar spine, thereby creating a potential claim for contribution against the carrier for the specific injury for the first time. The Arbitrator found the question of liability for the alleged cumulative trauma injury was not litigated until the Arbitration proceedings when injury was found by the Arbitrator for the cumulative trauma injury.

The Arbitrator further found that the Arbitration proceeding occurred as a result of the lien that was filed in the cumulative trauma !aim where co-defendant ultimately settled with the applicant[.]

Defendant's lien in the cumulative trauma case put defendant on notice that co-defendant was seeking reimbursement for medical expenses because there were overlapping parts of body injured in successive injury case.

The Arbitrator found that joint and several liability between defendants was not legally established until after these Arbitration proceedings occurred as reflected in the original Arbitrator’s Findings and Award wherein injury AOE/COE was found for the separate and distinct cumulative trauma injury to the applicant's lumbar spine.

The joint and several liability between defendants was established by a two-pronged concurrence of events - the first was the final Findings and Award for the specific injury of February 22, 1996 to applicant's lumbar spine and the second was the Arbitrator's Findings and Award in the Arbitration proceedings that definitively found a cumulative trauma injury to the lumbar spine based on conflicting medical evidence.

Therefore, the *Juarez* case differs on two important facts from this case. In this case, joint and several liability was determined as of the Trial finding injury in all three cases and no lien was filed by any the defendants in the other cases.

In the opinion of the Arbitrator, what occurred in this case was a Findings and Award was issued for joint liability of future medical, one-third each defendant.

Following the Findings and Award, two of the defendants elected to settle their future medical with the applicant and buy their peace.

One defendant, Arrowood, elected not to settle the future medical treatment.

Arrowood was aware of the two Compromise and Release Agreements and was aware the two defendants paid money for future medical treatment.

At any point Arrowood could have objected to the approval of the Compromise and Releases or, following the approval of the Compromise and Releases, raise the issue credit against future medical treatment for the amount that was that was settled to avoid double recovery by the applicant or only pay their pro-rate share of one-third as found by the WCJ.

When the administrator was changed to Arrowood, they said nothing. They did not elect to file a lien. They did not elect to make an objection or raise the issue of credit or only being liable for their pro-rate share to avoid a double recovery.

To allow contribution/reimbursement in this case, Arrowood would discourage the settlement of individual claims by individual insurance companies. It would allow one insurance company with joint and several liability to prevent the settlements by indicating the co-defendants cannot buy their peace as their contribution rights remain.

This result would be contrary to case law that allows separate defendants to Compromise and Release their case with the applicant.

The Arbitrator allowed contribution up through the date of the two Orders Approving Compromise and Release.

The Arbitrator disallowed any contribution/reimbursement after the dates of the Orders Approving Compromise and Release because joint and several liability had ended and Arrowood was only responsible for future medical treatment and was entitled to a credit for the amount paid or only liable for their pro-rata share of one-third.

To allow contribution/reimbursement in a case like this would discourage partial settlements and prevent the applicant from having the right to settle some of his cases as was the case here and would allow one defendant who refuses to settle to prevent the other two carriers from settling by arguing joint and several liability of future medical treatment remains in effect.

Arrowood next cites the case of *Cortez v. KWM Corp.* (2012 Cal. Wrk. Comp. P.O. LEXIS 62) for the proposition that contribution/reimbursement should be allowed to Arrowood despite the Compromise and Release Agreements settling applicant's claims against Travelers and Wausau.

The *Cortez* case, like the *Juarez* case, is markedly different on its facts.

The first important difference is that the *Cortez* case involves CIGA, which has different rules of liability[.]

Secondly and just as important, in the *Cortez* case, it was held that joint and several liability between CIGA and Argonaut was not legally established until after the Arbitration proceedings occurred as reflected in the original Arbitrator's Findings and Award wherein injury AOE/COE was found for the specific injury of February 1, 1998 and two separate and distinct cumulative trauma injuries.

The Arbitrator's Findings and Award found joint and several liability between CIGA and Argonaut was established by a two-pronged concurrence of events -the first was the final Findings and Award against CIGA and the second was the Arbitrator's Findings and Award dated November 16, 2011 in the Arbitration proceedings finding AOE-COE, which is the first time joint and several [lability] was established between CIGA and Argonaut. In this case, unlike *Cortez*, joint and several liability was established prior to the Arbitration when the Findings and Award issued finding one-third each liable.

Therefore, in the opinion of the Arbitrator, neither *Juarez* or *Cortez* cases are applicable to the facts of this because in both of those cases, joint and several liability was not established until the Arbitration hearing and, in this case, joint and several liability was established by the Findings and Award of the WCAB.

C.

Defendants next argues the cases cited by the Arbitrator set forth above are distinguishable on their fact from the present case. The Arbitrator, for the reasons set forth above, believes those cases are applicable to the facts of this case.

In addition, it is the opinion of the Arbitrator to allow contribution/reimbursement in this case discourages and prevents separate settlements when cases involve joint and several liability and, in those cases, defendants cannot by their peace if one of the other defendants decides to not settle the case.

To allow contribution/reimbursement in this case would allow a non-settling defendant to prevent other defendants and applicant from settling other cases anytime there is joint and several liability on future medical treatment because contribution/reimbursement would still be allowed rather than the parties buying their peace and settling all issues.

The solution is as set forth in the case law above that concludes that the non-settling defendant either receive a credit regarding applicant's future medical treatment for the amount paid by the other defendants toward further medical treatment in their settlements or the non-settling defendant only pays their pro-rata share of liability.

Further, Arrowhead could have avoided the whole problem by raising the issue of the fact 18 they were no longer responsible for 100% of applicant's future medical treatment as the other 19 defendants settled their two-thirds of the future medical treatment and that was the choice 20 Arrowood made when they were ordered to administer the future medical award.

Arrowood apparently chose not to raise that issue and pay the full value future medical treatment. It was Arrowood's conduct that resulted in their paying 100% of applicant's medical treatment after the approval of the two Compromise and Release Agreements.

Arrowood now wants the other two insurance companies to correct their error by having to reimburse Arrowood for two-thirds of medical treatment Arrowood paid to the applicant after the Compromise and Release Agreements were approved.

This would have a very negative effect on the applicant and defendants' ability to settle cases when further medical treatment has joint and several liability.

D.

Arrowood lastly agues the two Compromise and Release Agreements lacked language settling Arrowood's right to contribution/reimbursement.

Each of these cases were separate injuries and the other two insurance companies were not parties to the other cases.

In this case, there was three separate cases pending at the same time, litigated at the same time and which were found to have separate Awards as to permanent disability after apportionment of one-third to each injury and were found to have joint and several liability for future medical treatment with one-third each injury.

In the opinion of the Arbitrator, each defendant has a right to settle their individual cases when all three cases are pending at the same time, so long as the settling defendants give notice of the settlement to the remaining defendants, therefore, allowing the remaining defendant to raise appropriate issues such as credit or limited liability because part of the Award has been settled.

Arrowood cannot argue that they can seek contribution/reimbursement because of lack of language in the settlement agreement settling the Arrowood's contribution/reimbursement rights.

Such language is unnecessary in the settlement agreements as there were no liens for contribution/reimbursement filed in the other cases, the Arbitrator allowed contribution up to the dates approving the Compromise and Release Agreements, the Compromise and Release Agreements clearly settled each defendants' liability for future medical treatment after the dates the settlements were approved, Arrowood was not a party to the other two Compromise and Release Agreements and the Compromise and Release Agreements were served on Arrowood putting them on notice two-thirds of the joint and several liability for future medical treatment was settled and they had credit rights or were only liable for their pro-rata share going forward for further medical treatment[.]

Therefore, in the opinion of the Arbitrator, the Compromise and Release Agreements that clearly settled future medical liability for both specific injuries were served on the co-defendant and not only was Arrowood on notice of the settlements, but they themselves elected not to settle and, therefore, no specific language in the Compromise and Release regarding contribution or reimbursement was required.

Arrowood was aware when they were served with the Orders Approving Compromise and Release Agreements settling both cases including the other defendants' joint and several liability for further medical treatment and that combined with the change of administrator of further medical treatment to Arrowood, put Arrowood on notice that they were now the only defendant liable for future medical treatment and in accordance with case law they should have raised the issue of the settlement of two-thirds of joint and several liability with Arrowood having a right to a credit or only pay their pro-rata share of liability to avoid the applicant receiving a double recovery.

IV.

RECOMMENDATION

For the foregoing reasons, it is recommended that reconsideration be denied.

DATED: March 16, 2022

Respectfully submitted,

ALTMAN & BLITSTEIN

By: MARK L. KAHN,
ARBITRATOR