

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **MARK MICELI,**

5 *Applicant,*

6 **vs.**

7 **JACUZZI, INC.; REMEDYTEMP, INC.;**
8 **AMERICAN HOME ASSURANCE CO.;**
9 **CALIFORNIA INSURANCE GUARANTEE**
10 **ASSOCIATION for RELIANCE NATIONAL**
11 **INDEMNITY CO., In Liquidation,**

12 *Defendants.*

Case No. POM 248928

OPINION AND DECISION
AFTER REMITTITUR
(EN BANC)

13 **INTRODUCTION**

14 In an opinion ordered by the Supreme Court not to be published, the Court of Appeal found
15 that the special employer's insurance in this case is not "other insurance" available to applicant
16 within the meaning of Insurance Code section 1063.1(c)(9). Based on that finding, the Court of
17 Appeal reversed our earlier en banc decision, set aside the dismissal of the California Insurance
18 Guarantee Association (CIGA) as a defendant, and returned the matter to the Appeals Board for
19 further proceedings. The remittitur included no award of costs. In reaching its decision, the Court
20 of Appeal took judicial notice of additional documents and considered responses submitted by the
21 Workers' Compensation Insurance Rating Bureau (WCIRB) and the California Commissioner of
22 Insurance (Insurance Commissioner) to questions asked by the Court.

23 Following remittitur, RemedyTemp, Inc. (RemedyTemp) and CIGA jointly filed a letter
24 with the Appeals Board requesting that the May 14, 2002 order consolidating and staying all cases
25 involving RemedyTemp, with dates of injury between July 22, 1997 and April 1, 2001, continue in
26 effect pending a decision on RemedyTemp's request to be dismissed from each of the consolidated
27 cases. CIGA and RemedyTemp also jointly requested that the Appeals Board provide guidance to
parties and the workers' compensation administrative law judges on how they should proceed

1 pending resolution of RemedyTemp's request for dismissal from the consolidated cases. In
2 addition, American Home Assurance Co. (Assurance) filed a petition with the Appeals Board
3 requesting an award of costs it claimed to have incurred on appeal. We now address the effect of
4 the Court of Appeal decision, the letter jointly filed by RemedyTemp and CIGA, and Assurance's
5 petition to recover costs on appeal.¹

6 We conclude:

7 1. Our en banc decision in this case was reversed by the Court of Appeal and for that
8 reason it is not legal precedent. In addition, the unpublished Court of Appeal decision in this case
9 may not be generally cited or relied upon in any other action, except when relevant under the
10 doctrines of law of the case, res judicata or collateral estoppel;

11 2. The May 14, 2002 consolidation and stay order was only intended to apply during the
12 pendency of the appellate proceedings in this case and it is now rescinded so that each case
13 covered by that order may be individually resolved on its own particular facts;

14 3. The request by RemedyTemp to be dismissed from each of the consolidated cases is
15 denied because the consolidation order no longer applies and there is no authority to support
16 dismissal because the Court of Appeal decision was decertified for publication by the Supreme
17 Court.

18 4. The joint request by RemedyTemp and CIGA for a new consolidation and/or stay order
19 is denied because each case must be evaluated on its own facts, including consideration of the
20 intent of the parties and the effect of the various insurance policies involved;

21 5. The petition filed by Assurance for reimbursement of costs it claims to have incurred in
22 the Court of Appeal proceeding is dismissed.

23 We will return this case to the trial level for further proceedings in accordance with this
24 decision and the decision of the Court of Appeal.

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¹ Chairman Miller and Commissioner Caplane recused themselves from participation in this decision.

1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 Applicant injured his left ring finger on March 1, 2000, while working as a shipper/receiver
3 on the property of defendant and special employer Jacuzzi, Inc. (Jacuzzi).² Applicant’s general
4 employer at that time was the staffing company, RemedyTemp. RemedyTemp was insured for
5 workers' compensation purposes by Reliance National Indemnity Co. (Reliance), and Jacuzzi was
6 insured by both Reliance for its special employees and by Assurance for its own employees.
7 Under a written agreement between RemedyTemp and Jacuzzi, RemedyTemp was to provide
8 workers' compensation insurance coverage for applicant and to hold Jacuzzi harmless from any
9 workers' compensation claims involving employees of Reliance.

10 Reliance, for RemedyTemp, admitted the industrial injury to applicant and began to
11 provide workers' compensation benefits. Thereafter, Reliance was declared insolvent and CIGA
12 became responsible for Reliance’s covered claims. CIGA petitioned for dismissal from the action
13 on the ground that Jacuzzi’s insurer, Assurance, was “other insurance” available to applicant
14 pursuant to Insurance Code section 1063.1(c)(9), which provides in pertinent part, “Covered
15 claims’ does not include (i) any claim to the extent it is covered by any other insurance of a class
16 covered by this article available to the claimant or insured...”

17 On May 14, 2002, Associate Chief Judge Kahn, Regional Manager of the Division of
18 Workers' Compensation, issued an Amended Order of Consolidation and Stay of Proceedings for
19 all cases involving RemedyTemp with dates of injury between July 22, 1997 and April 1, 2001.
20 The consolidation and stay order affected more than 500 cases. This case was allowed to proceed
21 so that the legal issue of insurance coverage believed to be common to the consolidated cases
22 could be addressed.

23 On October 31, 2002, the workers' compensation administrative law judge (WCJ) issued
24 the Findings and Order in this case. The WCJ found that Assurance’s policy was “other
25 insurance” available to applicant within the meaning of Insurance Code section 1063.1(c)(9), and
26

27 ² A complete statement of the facts is included in our earlier en banc decision and in the decision of the Court of
Appeal and will not be repeated herein.

1 ordered CIGA’s dismissal from the case. In December 2002, defendants Jacuzzi, RemedyTemp
2 and Assurance all petitioned for reconsideration of the October 31, 2002 Findings and Order. On
3 January 6, 2003, reconsideration was granted by the Appeals Board in order to allow further study
4 of the factual and legal issues.

5 On March 28, 2003, the Appeals Board issued an en banc decision affirming the WCJ’s
6 finding that the Assurance policy was other insurance available to applicant within the meaning of
7 Insurance Code section 1063.1(c)(9), and affirming the dismissal of CIGA as a defendant in this
8 case. RemedyTemp, Jacuzzi and Assurance petitioned the Court of Appeal for a writ of review. A
9 writ of review was issued and on October 20, 2004, the Court of Appeal filed a decision affirming
10 the Appeal Board’s March 28, 2003 en banc decision that CIGA was properly dismissed as a
11 defendant. However, Assurance, RemedyTemp and Jacuzzi timely petitioned for rehearing and
12 those petitions were granted by the Court of Appeal.

13 Upon rehearing, the Court of Appeal took judicial notice of additional documents attached
14 to Assurance’s petition and requested responses from the WCIRB and the Insurance
15 Commissioner to questions posed by the Court.³ After considering the additional documents and
16 responses, the Court of Appeal vacated its earlier decision and issued a new decision on July 25,
17 2005. The new decision, which was initially certified for publication by the Court of Appeal,
18 reversed the Appeals Board’s March 28, 2003 en banc decision, and held that CIGA should not
19 have been dismissed as a defendant because “other insurance” within the meaning of Insurance
20 Code section 1063.1(c)(9) was *not* available to applicant.

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23 ³ The documents include Exhibits A-D. Exhibit A is a California Endorsement Approved Form No. 11. submitted to
24 the Workers' Compensation Insurance Rating Bureau (WCIRB) in another matter by Assurance. Exhibit B is an
25 August 10, 2004 letter from the WCIRB to Assurance requesting an explanation of the purpose for Form No. 11 (Exh.
26 A). Exhibit C is Assurance’s August 25, 2004 response to the WCIRB’s request for information about Form 11.
27 Exhibit D is a September 13, 2004 fax from the WCIRB to Assurance advising that Form No. 11 (Exh. A) would not
be appropriate for the purpose described by Assurance in its response (Exh. C). Also received by the Court of Appeal
at its request was a December 16, 2004 letter from Gary Cohen, General Counsel for the Department of Insurance,
that provides an opinion in response to the questions posed by the Court of Appeal, and a December 16, 2004
response by the WCIRB to the questions posed by the Court of Appeal, with an attached September 15, 1967 Ruling
No. 157 of the Insurance Commissioner. These documents and the Court of Appeal’s November 18, 2004 Order are
available, or will be available as soon as possible, at http://www.dir.ca.gov/wcab/En_banc_Miceli/Miceli_.pdf.

1 CIGA petitioned for Supreme Court review of the July 25, 2005 decision by the Court of
2 Appeal. On October 12, 2005, the Supreme Court denied CIGA’s petition for review. However,
3 the Supreme Court ordered that the Court of Appeal decision *not* be published in the official
4 reports.

5 On October 2, 2005, RemedyTemp filed a request with the Appeals Board for an order
6 dismissing it from every case covered by the May 14, 2002 consolidation and stay order. CIGA
7 filed an objection to that request. On November 3, 2005, this case was remitted to the Appeals
8 Board by the Court of Appeal for further proceedings consistent with its unpublished decision. No
9 award of costs was included in the remittitur. Following remittitur, Assurance filed a petition with
10 the Appeals Board requesting reimbursement of costs it claimed to have incurred in the appeal
11 process before the Court of Appeal.⁴

12 On February 17, 2006, RemedyTemp and CIGA jointly filed a letter with the Appeals
13 Board asking that we “address the considerable uncertainty that exists among the applicants,
14 insurers and employers and their respective counsel as to the status of the consolidated *Miceli*
15 cases following the Court of Appeal’s decision.” In requesting action, CIGA and RemedyTemp
16 note that “the status of the more than 500 claims that were consolidated for purposes of resolving
17 the common legal issue relating to CIGA’s responsibilities has become a source of confusion and
18 dispute...some parties continue to seek discovery or to conduct other proceedings in some
19 individual cases.” Noting RemedyTemp’s earlier October 2, 2005 petition to be dismissed from
20 the consolidated proceedings, CIGA and RemedyTemp specifically requested that the Appeals
21 Board:

22 “[O]rder that all proceedings in all of the consolidated actions be
23 stayed pending a final ruling on [RemedyTemp’s] pending request
24 for dismissal, with the exception of (1) matters relating to the
25 rights or obligations of a party or parties pertaining to medical
issues under Labor Code Section 4060, 4061, 4600, 4600.4, 4601
and 4603, or to discovery rights or obligations under those

26 ⁴ Jacuzzi also petitioned for sanctions and penalties against CIGA pursuant to Labor Code section 5813. However,
27 that petition will not be further addressed in this decision because it is not properly before us as part of the remittitur.
Instead, Jacuzzi may direct its petition for sanctions and penalties to the WCJ for consideration in the first instance
upon return of the case to the trial level.

1 sections, , (sic) and (2) any proceeding in which the alleged special
2 employer was separately insured pursuant to Labor Code Section
3 3700 solely by an insolvent insurer. In the alternative, the parties
4 respectfully request that the [Appeals] Board issue further
guidance on how the parties and judges are to proceed pending a
resolution of the request for dismissal.”

5 **I**
6 **THE EFFECT OF THE JULY 25, 2005 COURT OF APPEAL OPINION**

7 California Rules of Court, rule 976(b) provides that an opinion of the Court of Appeal is to
8 be “published in the Official Reports if a majority of the rendering court certifies the opinion for
9 publication before the decision is final in that court.” In this case, the Court of Appeal initially
10 certified its July 25, 2005 opinion for publication. However, California Rules of Court, rule
11 976(d)(2) further provides that, “The Supreme Court may order that an opinion certified for
12 publication is not to be published...” In this case, the Supreme Court ordered on October 12,
2005, that the Court of Appeal decision not be published in the official reports.

13 California Rules of Court, rule 977 addresses the citation and use of unpublished opinions
14 as follows:

15 “(a) Unpublished opinion

16 Except as provided in (b), an opinion of a California Court of
17 Appeal or superior court appellate division that is not certified for
18 publication or ordered published must not be cited or relied on by a
court or a party in any other action.

19 (b) Exceptions

20 An unpublished opinion may be cited or relied on:

21 (1) when the opinion is relevant under the doctrines of law of the
case, res judicata, or collateral estoppel...”

22 Because the July 25, 2005 Court of Appeal opinion in this case was decertified for
23 publication by the Supreme Court, it may not be relied upon or cited as authority in any other case,
24 including all the other cases covered by the May 14, 2002 Amended Order of Consolidation and
25 Stay of Proceedings, unless an exception of res judicata or collateral estoppel is found to apply. It
26 appears that collateral estoppel may apply in some cases, but its application would be limited to
27 cases involving the same parties and the same issue litigated to finality in this case. All other cases

1 must be addressed on their own facts in light of citeable precedent and legal authority.

2 **II**
3 **THE STATUS OF THE MAY 14, 2002 AMENDED ORDER OF CONSOLIDATION AND**
4 **STAY OF PROCEEDINGS**

5 As we stated in our March 28, 2003 en banc decision, the consolidation and stay order
6 issued by Associate Chief Judge Kahn on May 15, 2002, was to remain in effect “pending finality”
7 of our March 28, 2003 en banc decision. The condition of “finality” anticipated that the stay
8 would continue in place through the course of any appellate proceedings involving our en banc
9 decision. It was anticipated that the Court of Appeal or Supreme Court would either affirm our en
10 banc decision, or replace it with a published decision that would provide precedent to assist in
11 resolving the issue of CIGA’s liability in the consolidated cases.

12 However, our en banc decision in this case was reversed, but was not superseded by a
13 published decision of the Court of Appeal or the Supreme Court. Nevertheless, the reason for
14 consolidating and staying the other cases “pending finality” of our March 28, 2003 en banc
15 decision no longer applies because the decision in this case is final. Because our March 28, 2003
16 en banc decision was reversed by the Court of Appeal, it no longer is binding precedent on all
17 Appeals Board panels and WCJs. (Cal. Code Regs., tit.8, § 10341; *City of Long Beach v. Workers’*
18 *Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109];
19 *Gee v. Workers’ Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases
20 236]. *Diggle v. Sierra Sands Unified School District* (2005) 70 CCC 1480 (significant panel
21 decision).) Because the May 15, 2002 Amended Order of Consolidation and Stay of Proceedings
22 has no further purpose, it is rescinded and is of no further force and effect.

23 Because the consolidation and stay order is rescinded, each case previously covered by
24 that order must now be individually addressed on its own particular facts. With regard to the issue
25 of the application of Insurance Code section 1063.1(c)(9), individual consideration of each case
26 may require consideration of the particular insurance policies and endorsements in effect in each
27 case. If it is found in a case that “other insurance” within the meaning of Insurance Code section
1063.1(c)(9) is available to an applicant, an order dismissing CIGA may be appropriate. If it is

1 found that “other insurance” within the meaning of Insurance Code section 1063.1(c)(9) is not
2 available to an applicant, an order dismissing CIGA would not be appropriate, but an order
3 dismissing the general employer may be appropriate. Each case must be addressed on its own
4 facts.

5 **III**
6 **REMEDYTEMP’S REQUESTS FOR DISMISSAL**

7 In light of our decision that each consolidated case must be addressed on its own particular
8 facts, it would not be appropriate to dismiss RemedyTemp from any of those cases at this time. As
9 discussed above, the July 25, 2005 Court of Appeal opinion is not binding or citeable precedent in
10 any of the other cases covered by the May 15, 2002 consolidation and stay order, absent some
11 proper application of the doctrines of law of the case, res judicata, or collateral estoppel. Instead,
12 each of those other cases must be individually addressed on its own facts, and RemedyTemp’s
13 liability must be individually addressed in each of those cases.

14 As to RemedyTemp’s request to be dismissed from this case, that issue is not before us as
15 part of the remittitur but it may be addressed in the first instance by the WCJ upon return of this
16 case to the trial level.

17 **IV**
18 **THE JOINT REQUEST BY CIGA AND REMEDYTEMP FOR A NEW ORDER STAYING
AND CONSOLIDATING CASES**

19 We recognize the difficulties now faced by the parties in the cases covered by the earlier
20 May 15, 2002 consolidation and stay order. However, we find that a new consolidation and stay
21 order is not appropriate. A stay order will not assist in resolving issues that that must be addressed
22 by consideration of the particular facts in each case. Instead, each case must proceed on its own,
23 with supplementation of the record to include the various insurance policies and endorsements as
24 may be necessary and appropriate. This will assure that the record in each individual case is
25 properly developed and that a decision is reached in each based upon its own particular facts.

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V
ASSURANCE’S PETITION FOR REIMBURSEMENT OF COSTS ON APPEAL

Assurance filed a petition with the Appeals Board for reimbursement of costs it claimed to have incurred as part of the litigation in the Court of Appeal. Assurance’s petition is not properly directed to the Appeals Board and will be dismissed.

The Appeals Board has authority to award costs incurred by a party in responding to a petition for writ of review when the petition is summarily denied, or if the Court of Appeal otherwise allows costs. (*Johnson v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 235 [49 Cal.Comp.Cases 716] (*Johnson*)). However, after a writ of review is granted, the issue of appellate costs must be addressed by the Court of Appeal in accordance with the California Rules of Court, which are “applicable to costs in proceedings for review of WCAB decisions.” (*Johnson, supra*; Lab. Code, § 5954; Code Civ. Proc., §§ 1027, 1109.) Under the California Rules of Court, the clerk of the Court of Appeal is to insert a judgment awarding costs to the prevailing party in the remittitur unless the costs are otherwise awarded or denied by the Court in the interests of justice. (Cal. Rules of Court, rule 27(a)(4) and rule 27(b)(1).) If the court clerk “fails to enter judgment for costs, the court may recall the remittitur for correction on its own motion, or on a party's motion made not later than 30 days after the remittitur issues.” (Cal. Rules of Court, rule 27(b)(2).)

In this case, the remittitur issued on November 3, 2005, but it contains no judgment for costs. To our knowledge, the clerk’s failure to enter judgment for costs was not addressed within 30 days after the remittitur issued by a party bringing a motion to correct the omission or by the Court of Appeal on its own motion. In short, Assurance’s petition for costs incurred on appeal is directed to the wrong court. Because the petitions for writ of review were granted, not summarily denied, the Appeals Board is without authority in this case to award costs on appeal to any party. (*Johnson, supra*; Cal. Rules of Court, rule 27.)

For the foregoing reasons,

1 **IT IS ORDERED** as the decision after remittitur of the Appeals Board (en banc) that the
2 Appeals Board’s March 28, 2003 en banc decision, and the October 31, 2002 Findings and Order
3 of the workers' compensation administrative law judge are **RESCINDED** and the following is
4 **SUBSTITUTED** in its place:

5 **FINDINGS**

6 1. At the time of applicant’s injury, defendant, RemedyTemp, Inc., was applicant’s general
7 employer, insured by Reliance National Indemnity Co., now in liquidation, and defendant Jacuzzi,
8 Inc., was applicant’s special employer, insured by American Home Assurance Co.

9 2. Jacuzzi, Inc.’s policy of insurance with American Home Assurance Co. is not available
10 to applicant following the insolvency of Reliance National Indemnity Co.

11 3. The policy of American Home Assurance Co. is not “other insurance” within the
12 meaning of Insurance Code section 1063.1(c)(9).

13 **ORDERS**

14 **IT IS ORDERED** that the petition of the California Insurance Guarantee Association to be
15 dismissed as a defendant is **DENIED** and petitioner remains a party in this case.

16 **IT IS FURTHER ORDERED** that the request by RemedyTemp, Inc., for dismissal from
17 all cases covered by the May 14, 2002 Amended Order of Consolidation and Stay of Proceedings
18 is **DENIED**.

19 **IT IS FURTHER ORDERED** that the May 14, 2002 Amended Order of Consolidation
20 and Stay of Proceedings issued by Associate Chief Judge Kahn, Regional Manager of the Division
21 of Workers' Compensation, for all cases involving RemedyTemp, Inc., with dates of injury
22 between July 22, 1997 and April 1, 2001, is **RESCINDED**, and is of no further force or effect.

23 **IT IS FURTHER ORDERED** that the Joint Request by RemedyTemp, Inc. and the
24 California Insurance Guarantee Association for a new order consolidating and staying cases is
25 **DENIED**.

26 **IT IS FURTHER ORDERED** that the Petition for Reimbursement of Costs and
27 Disbursements on Appeal on Behalf of Defendant American Home Assurance Company filed

1 herein on December 15, 2005, is **DISMISSED**.

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3 **IT IS FURTHER ORDERED** that this matter be **RETURNED** to the trial level for
4 further proceedings and decision by the workers' compensation administrative law judge in
5 accordance with this decision and the decision of the Court of Appeal.

6
7 ***WORKERS' COMPENSATION APPEALS BOARD (EN BANC)***

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9
10 */s/ Merle C. Rabine*
11 ***MERLE C. RABINE, Commissioner***

12
13 */s/ William K. O'Brien*
14 ***WILLIAM K. O'BRIEN, Commissioner***

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16 */s/ James C. Cuneo*
17 ***JAMES C. CUNEO, Commissioner***

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19 */s/ Frank M. Brass*
20 ***FRANK M. BRASS, Commissioner***

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22 */s/ Janice J. Murray*
23 ***JANICE J. MURRAY, Commissioner***

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26 ***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***
27 ***5/12/06***

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

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