WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LORI WILSON, ***Applicant***

vs.

PROSPECT MORTGAGE AND TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, ***Defendants***

Adjudication Number: ADJ8885673
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR 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 report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 13, 2021

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

LAUGHLIN, FALBO, LEVY & MORESI
LAURA G. CHAPMAN & ASSOCIATES
MICHAEL SULLIVAN & ASSOCIATES
MULLEN & FILIPPI
STEVEN SIEMERS

PAG/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

STATEMENT OF CONTENTIONS

Defendant, Alameda Mortgage Corporation, insured by Preferred Employers Insurance Company (hereinafter "Alameda/Preferred") filed a timely and verified Petition for Reconsideration dated March 16, 2021 with the Oakland District Office of the Division of Workers' Compensation, although the Petition did not reach the undersigned until March 29, 2021, when it was emailed to me by the Oakland District Office. The Petition was filed in response to the Conclusions of Law & Orders and Opinion on Decision issued by the undersigned arbitrator by email on dated February 20, 2021, pursuant to Labor Code sections 5270 et seq.

The February 20, 2021 Conclusions of Law & Orders were as follows:

Conclusions of Law

1. The Petition for Contribution filed by Travelers/Prospect was not timely filedas to the 02/05/2015 Stipulated Award, but was timely filed as to all other species of benefits, including those that served as the basis for the Compromise and Release Agreement, Ordered Approved on 08/07/2019.
2. There is substantial medical evidence sufficient to support a finding of the contribution to which Travelers/Prospect is otherwise entitled.
3. There is insufficient evidence upon which to find that Travelers/Prospect wasobligated to pursue subrogation in applicant's personal injury civil action filed subsequent to the cumulative trauma period herein to mitigate damages in order to preserve its right to seek contribution.

Orders

GOOD CAUSE APPEARING THEREFORE,

IT IS ORDERED that Travelers/Prospect is entitled to contribution as against Preferred/Alameda and Travelers/Alameda, to the extent of their proportionate shares of the liability period, as to the amount making up the Compromise and Release Agreement, in amounts to be adjusted between the parties with jurisdiction reserved.

IT IS FURTHER ORDERED that Travelers/Prospect is also entitled to contribution as against Preferred/Alameda and Travelers/Alameda, as to all payments of medical treatment costs and/or any appropriate costs defined as "incurred losses" as opposed to "expenses" by the California Workers' Compensation Uniform Statistical Reporting Plan, in amounts to be adjusted between the parties with jurisdiction reserved.

Alameda/Preferred contends in its Petition for Reconsideration that Travelers is not legally entitled to contribution against Alameda/Preferred based upon its pro rata share of the amounts paid per the Compromise and Release in this matter 1) because the value of the Compromise and Release is not based on substantial evidence, 2) because Travelers did not seek subrogation in connection with a motor vehicle accident that was not the subject of the injury in question and 3) because the contribution in this matter should not be based on a pro rata share basis.

DISCUSSION

The reasoning for the conclusion reached in my Conclusions of Law and Orders can be found in my Opinion on Decision, which reads as follows:

Opinion on Decision

Introduction

This matter has been submitted to arbitration pursuant to Labor Code sections 5270, et seq. Travelers Property Casualty Company, carrier for Prospect Mortgage, LLC (hereinafter "Travelers/Prospect") seeks contribution from both Preferred Employers Insurance Company, carrier for Alameda Mortgage Corporation (hereinafter "Preferred/Alameda") and Travelers Property Casualty Company, carrier for Alameda Mortgage Corporation (hereinafter "Travelers/Alameda").

Applicant alleged an injury to multiple body parts during a cumulative period through 08/01/2012. During the relevant time period applicant worked for the following employers with the following workers' compensation insurance coverage:

- Alameda Mortgage/Preferred Employers from 08/01/2011 to 02/22/2012
- Alameda Mortgage/Travelers from 02/23/2012 to 03/30/2012
- Prospect Mortgage/Travelers from 04/01/2012 to 08/01/2012

On 02/05/2015 Travelers/Prospect and applicant stipulated to injury arising out of and occurring in the course of employment to the right elbow and neck, as well as to 104 weeks of temporary disability indemnity and the resolution of an Employment Development Department lien (See Preferred/Alameda Exhibit C). Then on 08/07/2019 Travelers/Prospect and applicant entered into a Compromise and Release Agreement resolving all remaining issues in dispute (See Travelers/Prospect Exhibit A and Preferred/Alameda Exhibit H).

On 10/17/2019 Travelers/Prospect filed a Petition for Contribution, the moving document seeking the contribution alleged herein (See Travelers/Prospect Exhibit B and Preferred/Alameda Exhibit D). Travelers/Prospect seeks the proportionate share of the liability period from the other two co-defendants.

In response, Preferred/Alameda and Travelers/Alameda allege that the Petition for Contribution was untimely filed and that the medical and lay evidence upon which the Petition relies is insubstantial. Preferred/Alameda also contends that Travelers/Prospect is barred from seeking contribution because it did not pursue a subrogation action against the defendant in an unrelated lawsuit involving a motor vehicle accident in which the applicant sustained injuries to some of the same parts of the body injured in the industrial injury.

Issues

1. Was the Petition for Contribution filed by Travelers/Prospect timely filed?
2. Is there substantial evidence sufficient to support a finding of the contributionrequested?
3. Was Travelers/Prospect obligated to pursue subrogation in applicant's personal injury civil action filed subsequent to the cumulative trauma period herein to mitigate damages in order to preserve their right to seek contribution?

Discussion

As summarized above, Travelers/Prospect seeks contribution from Preferred/Alameda and from Travelers/Alameda. There does not appear to be any dispute regarding the joinder of the two unelected co-defendants.

As has been made clear in *Greenwald v. Carey Distributing Company,* (1981) 46 Cal. Comp. Cases 703, the two unelected co-defendants have a right to a trial *de novo* under Labor Code section 5500.5, in light of the fact that they have had no right to participate in the litigation of this matter due to applicant's election against Travelers/Prospect. (See *Kelm v. Koret of California* (1980) 46 Cal. Comp. Cases 113). Therefore, Preferred/Alameda and Travelers/Alameda have chosen to exercise their rights at this time, and raise the following issues:

1. Timeliness of the Petition for Contribution

Labor Code section 5500.5 (e) states, in pertinent part:

"At any time within one year after the appeals board has made an award for compensation benefits in connection with an occupational disease or cumulative injury, any employer held liable under the award may institute proceedings before the appeals board for the purpose of determining an apportionment of liability or right of contribution."

In *Rex Club v. WCAB* 53 Cal App 4th 1465 (1997) the Court of Appeal stated:

"The one-year time limitation for the filing of a petition for contribution (section 5500.5 (e)) is measured from the date of theWCJ's award, which is considered to be the WCAB's award. (Cal. Code Regs., Title 8, section 10348.) The filing of a petition for reconsideration does not toll or extend the

one-year time limitation. (*Republic Indemnity Co. v. WCAB* (1981) 115 Cal. App. 3d 361, 368 [171 Cal. Rptr. 265, 46 Cal. Comp. Cases 88] *Employers Mutual Liability Insurance Company of Wisconsin v. WCAB (Shrimpf)* (1983) 48 Cal. Comp. Cases 636, 637.)

"However, where a supplemental award is issued awarding a new and distinct class of benefits, a petition for contribution filed within oneyear of the supplemental award is timely as to that award, even though more than one year has passed since the issuance of the original award. (*M.B. Neves Trucking, et al. v. WCAB (Homan)* (1994) 59 Cal. Comp. Cases 770, *Employer's Insurance of Wausau, et al. v. WCAB (Duncan)* (1984) 49 Cal. Comp. Cases 333.)

"Here the petition for contribution was filed in November 1994 within one year of the order approving the compromise and release, which is the equivalent of an award of compensation. (*Greenwald v. Carey Distributing Company,* (1981) 46 Cal. Comp. Cases 703, 708- 709.) Thus, the petition is timely as to that order to the extent the orderawarded a distinct class of benefits, such as permanent disability and vocational rehabilitation benefits, which were not awarded in the original findings of fact and award. (*M.B. Neves Trucking, et al. v. WCAB (Homan),* supra, 59 Cal. Comp. Cases 770, *Employer's Insurance of Wausau, et al. v. WCAB (Duncan)*, supra, 49 Cal. Comp. Cases 333, *Mission Insurance Company v. WCAB* (1978) 43 Cal. Comp. Cases 1143.)"
(*Rex Club*, pages 1472 to 1474.)

The matter herein involved an initial Stipulated Award of temporary disability indemnity issued on 02/05/2015 (See Preferred/Alameda Exhibit C). The only specie of benefits awarded in that Award was retroactive temporary disability. And because 104 weeks was expressly identified as the number of weeks of compensation to be covered in this award, the maximum number of weeks allowed by law, that specie of benefits was exhausted for this claim in that Stipulated Award.

Clearly, the Petition for Contribution, filed on 10/17/2019 (see Travelers/Prospect Exhibit B) was not filed within one year of this 02/05/2015 Stipulated Award, and thus is untimely as to the compensation awarded and the species of benefits contained within it.

Since the only specie of benefit included in this Award was temporary disability, the untimeliness of the Petition only bars contribution as to temporarydisability indemnity, and does not impact any other species of benefits. Thus, since all temporary disability benefits were paid pursuant to said Stipulated Award, permanent disability compensation, medical treatment compensation and supplemental job displacement compensation is not time barred.

Costs other than temporary disability indemnity have been incurred over the course of the litigation of this claim, including medical treatment, permanent disability indemnity, supplemental job displacement benefits and

other incurred losses. In addition, the matter was resolved in its entirety when the applicant and Travelers/Prospect entered into a Compromise and Release Agreement that was ordered approved on 08/07/2019 (See Travelers/Prospect Exhibit A and Preferred/Alameda Exhibit H).

As to the losses incurred, other than temporary disability indemnity, Travelers/Prospect's Petition for Contribution is not time barred. This includes medical treatment costs and/or any appropriate costs defined as "incurred losses" as opposed to "expenses" by the California Workers' Compensation Uniform Statistical Reporting Plan[1], subject of course to the further issues discussed below.

As to the amount of the Compromise and Release Agreement, since the statutory cap of 104 weeks of temporary disability indemnity was exhausted in the earlier Stipulated Award, it is safe to conclude that none of the species of benefits that made up the basis for the $282,492.50 paid per the Compromise and Release Agreement constituted the time barred specie of temporary disability benefits.

Furthermore, based upon the terms of the Compromise and Release Agreement, $203,426.00 of that amount was based upon the cost of future medical treatment (as defined by the Center for Medicare Services approved Medicare Set-Aside amount of (the cost of the MSA seed money ($79,256.00) plus the amount necessary to fund future annual payments ($124,170.00)), with the balance attributable to permanent disability indemnity, supplemental job displacement benefits and attorney's fees. The Agreement does not attribute any amount to temporary disability indemnity, nor could it, since as stated above that specie of benefit was exhausted in the earlier Stipulated Award against which contribution is time barred.

Therefore, per *Rex Club,* a contribution claim with regards to the benefits awarded in the 02/05/2015 Stipulated Award is time barred, but the amount paidin relation to the 08/07/2019 Compromise and Release is not, nor are any other payments of medical treatment costs and/or any appropriate losses. Therefore, this contribution claim may proceed with regard to the Compromise and Releaseamount of $282,492.50, as well as other payments of medical treatment costs and/or any appropriate costs defined as "incurred losses" as opposed to "expenses" by the California Workers' Compensation Uniform Statistical Reporting Plan, subject of course to the issues discussed below.

2. The substantiality of the medical record.

Travelers/Prospect and the applicant resolved this matter based on the Compromise and Release Agreement of 08/07/2019, and it is that amount that is now subject, potentially, to contribution, in addition to the other medical

[1] See the following decisions, not cited as binding precedent but as persuasive authority. *Diane Ramos v. San Jose Medical Group* (2008) 36 CWCR 235 and *Donna Sleeter v. Comp First; California Insurance Guarantee Association, administered by Cambridge Integrated Services Group, for Legion Insurance Company, in liquidation, One Beacon Insurance* (May 1, 2009) ADJ3109718 (SDO 0285475).

treatment costs paid outside of the amount of the Compromise and Release Agreement and other "incurred losses". The current question is whether there is substantial medical evidence upon which to support an award of contribution.

As stated earlier, unelected defendants have a right to a *trial de novo* pursuant to *Greenwald* as to the issues involving the elected defendant's contribution claim. In *Greenwald* an unelected defendant was joined after the case-in-chief was litigated, and the right of this unelected defendant to a *trial de novo* was protected. The language of the Board in the *en banc* decision is instructive:

"In *Greenwald* applicant proceeded against an elected defendantpursuant to Labor Code section 5500.5 (c) and received a Findings and Award. The elected defendant instituted contribution herein against the other defendants allegedly within the period of hazardous employment exposure pursuant to Labor Code section 5500.5 (e). The question arises as to what issues the elected defendant(s) may raise if they can include issues previously adjudicated in the initial proceedings. Subsection (c) provides for the election thusly:

> "… the employee … may elect to proceed against any one or more of such employers. Where such an election is made, the employee must successfully prove his claim against oneof the employer's named, and any award … shall be a joint and several award… if … it should appear that there is another proper party … shall be joined as a defendant … but the liability of such employer shall not be determined until supplemental proceedings are instituted … shall not be entitled to participate in any of the proceedings … on supplemental proceedings, however, the right of the employer to full and complete examination or cross- examination shall not be restricted."

"Since the applicant need only prove his case against the elected defendant, it stands to reason that the other defendants may raise the issue of whether or not applicant was "exposed to the hazards of occupational disease or cumulative injury" during their respective periods of insurance coverage (in the case of a carrier) or periods of employment (in the case of an employer).

"Subsection (d), moreover, applied to "employment exposing the employee to the hazards of the claimed occupational disease or cumulative injury" and provided that, "The respective contributions of such insurers shall be in proportion to employment during their respective periods of coverage." A defendant who can prove, therefore, that its period of employment or coverage is not hazardous would have no such liability. Cf. *Stanley v. Western Air and refrigeration, et al.* (Board *en banc*, March 26, 1981) 9 CWCR 65.

"The other defendants may also produce more definitive evidence on the hazardous employment which may vary with the periods of employment

found in the original findings and award. This they may do, however, since the prior finding is not res judicata as it came out of proceedings involving different parties and/or the non-elected defendants were not fully represented and their interests were not identical. (Citation). Indeed, the very purpose of the contribution proceeding is to allow those issues to be fully litigated.

"This conclusion would seem compelled, moreover, by the language in Labor Code section 5500.5, at Subsection (c):

> "… on supplemental proceedings, however, the right of the employer to full and complete examination or cross-examination shall not be restricted."

"It is true that Subsection (e) also provides that contribution proceedings, 'shall be limited to a determination of the respective contribution rights, interest of liabilities of all the employers joined in the proceedings …' This language is broad enough, however, to allow the non- elected defendants to raise all issues appropriate to their respective liabilities. The only limitation the Board foresees is in the finding of employment against the elected defendants. (Citation). Subsection (e) goes on to state, furthermore, that:

> "… However, if the appeals board finds on supplemental proceedings for the purpose of determining an apportionmentof liability or of a right to contribution that an employer previously held liable in fact has no liability, it may dismiss such an employer and amend its original award in such a manner as may be required."

"Certainly, if the elected defendant can re-litigate its liability, the non-elected, non-participating defendant(s) can litigate theirs in the first instance. The above language must be read in light of the earlier language in that same subsection, however, that the contribution proceedings, 'shall not diminish, restrict, or alter in any way the recovery previously allowed the employee…' that is only to repeat that the contribution proceedings, by their nature, are limited to an ultimate determination of the contributive shares of liability among the defendants and do not extend to a re-litigation of applicant's rights, previously determined. The worst scenario that this procedure presents to the elected defendant is that after extensive litigation in the contribution proceedings, all the other defendants are able to prove no hazardous exposure during their respective periods of coverage or employment, leaving the elected defendant where it started.

…

"The Board agrees that the logical implication of this procedure is that a non-participating defendant(s) shall have an opportunity to defend itself as to any matter affecting its liability in the subsequent proceedings."(*Greenwald v. Carey Distribution Company* (1981) 46 Cal. Comp. Cases 703, at pages 707 to 709).

Clearly, Preferred/Alameda and Travelers/Alameda have a right to a *trial de novo* on the issue of contribution, and any issues related to it. Other than

the duty to mitigate issue addressed below, the unelected defendants have only contended that the medical evidence provided by Dr. Charles was insubstantial. They have not offered any contrary medical evidence on the issue of level of permanent disability, the need for past or future medical care or a supplemental job displacement benefit, or any other specific "incurred losses". They simply challenge the medical opinions expressed in the reports of Michael Charles, M.D., an Agreed Medical Examiner in the case-in-chief (See Travelers/Prospect Exhibits C, D, E, F and H, and Preferred/Alameda Exhibits E2, E3 and F).

Preferred/Alameda argues that Dr. Charles' opinions do not rise to the level of substantial evidence and thus is an insufficient evidentiary foundation for the award of compensation. This appears to be an argument that is not targeted at any specific species of benefits, but rather at the entirety of the compensation constituting the basis for both the benefits provided prior to and pursuant to the 08/07/2019 Compromise and Release Agreement. Neither co-defendant points to any contrary medical evidence, nor do they appear to have sought to effectuate a Qualified Medical Examination that might have provided some contrary medical evidence of the substantiality that it contends Dr. Charles' opinions lack.

The argument that Travelers/Prospect earlier in the litigation criticized the reporting of Dr. Charles, carries little weight when considering the years of reporting and cross-examination that followed (See Preferred/Alameda Exhibit E).

Further, of the $282,492.50 in controversy, $203,426.00 constituted the amount necessary to fund a structured settlement and Medicare Set-Aside approved by the Center for Medicare Services. This amount is based on an analysis of the MSA vendor (in this case Nuquest/Bridge Pointe, as shown in the CMS documents attached to the Compromise and Release; Travelers/Prospect Exhibit A). This analysis is based not upon the basis of the reporting of any single physician, but rather upon the entire medical record available covering typically the past two years of all treatment. Therefore, as to $203,426.00 of the $282,492.50, a basis for that amount is not based solely upon the opinions of Dr.Charles.

The balance of $79,066.50, was based upon the negotiated value of permanent disability indemnity, as well as a supplemental job displacement benefit, and any non-Medicare covered costs that may have been foreseen.

And, additional payments of medical treatment costs and other appropriate expenses were not necessarily subject to the opinions expressed by Dr. Charles.

Regardless, Dr. Charles' opinions were subject to requests for multiple supplemental reports, as well as cross-examination, over a period of three to fouryears, and served as the basis for a Compromise and Release that met Judge Szeleny's approval as evidenced by the issuance of her Order Approving.

In the absence of any medical evidence challenging the substantiality of Dr. Charles' opinions, I find them to constitute substantial evidence upon which to determine the adequacy and appropriateness of the Compromise and Release as well as other losses sustained.

3. The claimed duty of mitigate through subrogation.

Preferred/Alameda contends that Travelers/Prospect's failure to intervene in a personal injury civil action that occurred within a few months after the end of the section 5500.5 period constitutes a failure to mitigate the amount of the liability for which contribution is sought.

It appears that applicant was involved in a motor vehicle accident subsequent to the section 5500.5 period relevant herein. However, not much more is known about this incident. It appears from Preferred/Alameda's Exhibit L that this civil litigation was settled during mediation.

It is also clear that the subject motor vehicle accident was not the injury in question in this workers' compensation case. And, there is insufficient evidence upon which to determine whether, and if so, to what extent, this motor vehicle accident caused any significant injury to the parts of the body injured in this workers' compensation case.

Therefore, there is insufficient evidence upon which to determine whether or not Travelers/Prospect, under the circumstances, had a legal duty to mitigate its liability by intervening in this matter.

Conclusion

Therefore, I conclude that Travelers/Prospect is entitled to contribution from Preferred/Alameda and Travelers/Alameda for each of their proportionate sharesof the section 5500.5 liability period, as to the amount of the Compromise and Release Agreement of $282,492.50, as well as other payments of medical treatment costs and/or any appropriate costs defined as "incurred losses" as opposed to "expenses" by the California Workers' Compensation Uniform Statistical Reporting Plan, subject to adjustment between the parties with jurisdiction reserved.

Arbitrator's Comments on Reconsideration

As to Alameda/Preferred's arguments regarding the substantiality of the record in terms of the amount of the Compromise and Release, and the question of subrogation, myOpinion on Decision sets forth the basis of my decisions, and I don't believe that further comment is necessary.

However, as to the question of the extent of the contribution owed, the issues raised in these proceedings to date addressed a statute of limitations defense, a substantiality of medical evidence issue and an assertion that a subrogation claim was required. The specific manner of determining the amount of the contribution owed was not specifically raised or addressed and

was left to be adjusted between the parties with jurisdiction reserved. I can understand how Alameda/Preferred may have concluded thatI was awarding contribution on a simple pro rata basis. However, it was left to the partiesto make that adjustment based upon the issues I had addressed and the existing record. If that cannot be accomplished, then jurisdiction is reserved and parties should return to me to further address that and any other issues that may need to be addressed.

RECOMMENDATION

For the foregoing reasons, I recommend that the Petition for Reconsideration filed by defendant Alameda Mortgage Corporation, insured by Preferred Employers Insurance Company, be DENIED.

In the alternative, I recommend that the Petition for Reconsideration filed by defendant Alameda Mortgage Corporation, insured by Preferred Employers Insurance Company, be DENIED, except for the issue of the amounts of contribution owed that should be returned to the undersigned for further development of the record.

Date: March 29, 2021

STEVEN SIEMERS, Arbitrator