

1 Petitioner characterizes the relationship of Reliance to Compuware as a carrier with "a high self-
2 insured retention." Petitioner requests that the Award be amended *nunc pro tunc* to reflect the
3 proper defendant entity, Reliance. Petitioner asserts that the error was due to "excusable error"
4 which was brought to the WCJ's attention upon discovery. Petitioner states that the amendment
5 would not prejudice applicant.

6 After granting reconsideration, because of the important legal issue presented, and in order
7 to secure uniformity of decision in the future, the Chairman of the Board, upon a majority vote of
8 its members, has reassigned this case to the board as a whole for an en banc decision. (Lab. Code,
9 §115.)²

10 In this case we hold that where an employer's liability for workers' compensation benefits is
11 adjusted by a third-party administrator, the administrator must disclose to the Workers'
12 Compensation Appeals Board, to the other parties in any proceeding in which it is a party, and to
13 its own counsel the identity of its client, whether a self-insured employer or insurance carrier.³ If
14 the client is an insurance carrier, the administrator must disclose whether the policy includes a
15 "high self-insured retention," a large deductible, or any other provision that affects the identity of
16 the entity actually liable for the payment of compensation. Failure of the administrator to disclose
17 the identity of its client may subject it to sanctions pursuant to Labor Code section 5813.

18 In this case the third-party administrator failed to disclose the true identity of its client until
19 more than six years after the date of the injury. On our own motion, we will issue notice that
20 sanctions may be ordered against the third-party administrator. We will schedule a Commissioner's
21 Conference for clarification of the relationship between Compuware and Reliance, and whether
22 sanctions should be imposed. The merits of defendant's petition for reconsideration will be dealt
23 with in our decision after reconsideration.

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26 ² The Board's en banc decision are binding precedent on all Board panels and WCJs.
(WCAB/DWC Policy & Procedure Manual, Index No. 6.16.1.)

27 ³ Labor Code section 3700 enumerates the various ways by which employers must secure
payment of workers' compensation benefits, including insurance and self-insurance.

1 **I. BACKGROUND**

2 At all times prior to September 5, 2001, all participants before the Board identified the
3 defendant Compuware as the *permissibly self-insured* employer of applicant at the time of her
4 industrial injury. This is reflected in the Application for Adjudication filed by applicant on January
5 6, 1996 at the Santa Rosa office of the Workers' Compensation Appeals Board, by petitioner's
6 Declaration of Readiness filed on October 19, 1998, as well as in subsequent documents of the
7 petitioner filed at the Santa Rosa Board in this matter.⁴

8 Indeed, at the Mandatory Settlement Conference (MSC) held on March 2, 1999,⁵ the parties
9 submitted signed stipulations in which it was stipulated that applicant, born October 6, 1955, while
10 employed on January 13, 1995, as a sales person, at Alameda, California, by "Compuware Corp."
11 sustained industrial injury to her neck and back and claims to have sustained right shoulder, right
12 upper extremity injury, and at the time of injury the employer was "permissibly self-insured." At
13 trial on May 3, 1999, this stipulation remained unchanged.

14 On August 31, 1999, the WCJ issued Findings and Award in which, among other things,
15 the WCJ followed the stipulations of the parties and adopted them as true including the stipulation
16 that applicant at the time of her industrial injury was employed by "Compuware, permissibly self-
17 insured." Accordingly, benefits were awarded against that entity. Subsequently, petitioner filed a
18 petition for reconsideration in which various issues were raised but there was no challenge to the
19 identity of the employer as being permissibly self-insured. On October 6, 1999 the WCJ ordered
20 the August 31, 1999 Findings and Award rescinded pursuant to WCAB Rule 10859 (Cal. Code
21 Regs., tit. 8, § 10859). By conference held November 2, 1999, the matter was resubmitted with no
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24 ⁴ For example, see defendant's Pretrial Brief dated May 3, 1999 indicating Gallagher Bassett
25 Services, Inc. as adjusting agent for the defendant employer; defendant counsel's letters to the
26 WCJ dated 3/4/99, 3/3/99, 2/1/99, and 11/9/98 identifying the "Carrier" as Gallagher Bassett
27 Services for the employer Compuware Corporation.

⁵ WCAB 10563 (Cal. Code Regs., tit. 8, § 10563) requires that the defendant shall have
settlement authority at the MSC but the person with that authority need not be present if such
authority is available by telephone. There is a question as to what entity gave the underlying
settlement authority in this case for meaningful settlement discussions at the MSC.

1 mention of changing the identity of the employer from designating it as being permissibly self-
2 insured.

3 After other procedural matters, the WCJ requested that the parties supplement the record by
4 examination of Dr. Feinberg, and the case once again was taken under submission for decision on
5 March 8, 2001. The Minutes of that proceeding reflect no change to the previous stipulations. The
6 Findings and Award now being challenged by petitioner issued on August 31, 2001 in which the
7 WCJ again followed and adopted as true the stipulations of the parties, including that the employer
8 against whom the award issued was permissibly self-insured.

9 By letter to the WCJ dated September 5, 2001, petitioner's attorney for the first time
10 disclosed that Compuware was insured by Reliance National Insurance, adjusted by Gallagher
11 Bassett Services, Inc. The letter stated, in pertinent part:

12 "In reviewing this matter with our client, we learned that there had been an error made a
13 few years ago at the MSC Conference. At that time, defendants indicated that
14 Compuware Corporation was permissibly self-insured, by and through Gallagher Bassett
15 Services, Inc. We now understand that for the date of the injury, Compuware was insured
16 by Reliance National Insurance, adjusted by Gallagher Bassett Services, Inc., as its
17 adjusting agent.

18 "We respectfully request that the Award be amended to note Compuware as insured by
19 Reliance National Insurance Company and that the finding be made against them."

20 Apparently after hearing nothing from the WCJ, the petitioner on September 24, 2001 filed
21 the instant petition for reconsideration in which it requested that Reliance be identified as insuring
22 Compuware and that the Award of August 31, 2001 be amended to show that benefits are awarded
23 against Reliance. In her answer to the petition for reconsideration, applicant requests that the
24 petition be denied because the award was based on written stipulations signed by the parties which
25 identified Compuware as permissibly self-insured. Applicant also points out that the petitioner
26 admitted at the Mandatory Settlement Conference held in March of 1999 that Compuware was
27 permissibly self-insured and that this is confirmed by numerous documents and recitations in open
court by petitioner. Contrary to petitioner's assertion, applicant claims that she would be prejudiced
by this late and untimely joinder of a new defendant since Reliance is insolvent.

1 In her October 10, 2001 Report and Recommendation on the petition for reconsideration,
2 the WCJ recommends that the petition be denied for the following reasons, in part:

3 "At no time either by the original letter [dated September 5, 2001] or by the Petition for
4 Reconsideration, does defendant offer any evidence in support of their excusable error. It
5 is simply a statement by the attorney that some unnamed person at Gallaher Bassett
6 [adjusting agent] has indicated that some unnamed broker gave instructions, presumably
7 based on agreement with an employer representative, which were not followed. For more
8 than five years, this case has been proceeding with information that Compuware was
9 self-insured and adjusted by Gallagher Bassett. Indeed, the original Findings and Award
10 [of August 31, 1999] is two years old. While that decision was rescinded [on October 6,
11 1999], at no time up until the present was there ever any indication that Compuware was
12 ever anything but self-insured. Now, we are asked to change the designation of proper
13 defendant, without any evidence or verified affidavits, documents, bankruptcy petitions,
14 etc. being filed. We are being asked to accept third hand hearsay of what the broker did
15 with the employer."

16 Defendant's petition raises questions regarding the meaning of "high self-insured retention,"
17 whether a "deductible" exists in the context of worker's compensation insurance policies. Is the
18 alleged policy with Reliance an insurance policy that contains limitations which provide for
19 employer primary liability at the outset up to a certain amount of liability, with the carrier
20 thereafter responsible, or with potential reinsurance or excess insurance taking over at a different
21 and higher level of liability? Is the employer's liability to the carrier in the form of essentially an
22 indemnification agreement, with the carrier billing the employer directly for sums expended and
23 requesting reimbursement, or some other deductible type approach? There is a question of who is
24 the primary liable entity, the carrier or the employer, or both. These and other questions will be the
25 subject of a Commissioner's Conference in this case as well as whether sanctions should be
26 imposed as previously identified. Subsequent to the proceeding and final submission of the case for
27 determination, a decision after reconsideration will issue.

22 II. DISCUSSION

23 Labor Code section 5813 provides, in relevant part:

24 "The . . . appeals board may order a party, the party's attorney, or both, to pay any
25 reasonable expenses, including attorney's fees and costs, incurred by another party as a
26 result of bad-faith actions or tactics that are frivolous or solely intended to cause
27 unnecessary delay. In addition, . . . the appeals board, in its sole discretion, may order
additional sanctions not to exceed two thousand five hundred dollars (\$2,500) to be
transmitted to the General Fund."

1 WCAB Rule 10561 (Cal. Code of Regs., tit. 8, § 10561) provides, in relevant part:

2 "On its own motion . . . , the Workers' Compensation Appeals Board may order payment
3 of reasonable expenses, including attorney's fees and costs and, in addition, sanctions as
4 provided in Labor Code section 5813. Before issuing such an order, the alleged
5 offending party or attorney must be given notice and an opportunity to be heard. In no
6 event shall the Appeals Board, . . . impose a monetary sanction pursuant to Labor Code
7 section 5813 where the one subject to the sanction acted with reasonable justification or
8 other circumstances make imposition of the sanction unjust.

9 "A bad faith action or tactic is one which results from a willfull failure to comply with a
10 statutory or regulatory obligation or from a willful intent to disrupt or delay the
11 proceedings of the Workers' Compensation Appeals Board."

12 Fundamental to the establishment of workers' compensation liability and the prompt
13 delivery of benefits awarded to eligible injured workers is the designation of the responsible and
14 liable entity. The responsible entity must be divulged at the earliest opportunity, and certainly no
15 later than the commencement of the litigation process and formal proceedings. More specifically a
16 third-party administrator must inform the Board and its counsel, if any, no later than at least the
17 commencement of any litigation in the case, who the third-party administrator's client is, whether a
18 self-insured employer or an insurance carrier. In this manner, no confusion can result as to the
19 liable entity, against whom an award for benefits will be made. It avoids unnecessary delays in the
20 prompt delivery of benefits awarded.

21 The importance of the prompt designation of the liable entity is underscored in the instant
22 case where it appears that the now disclosed carrier is in liquidation and the California Insurance
23 Guarantee Association (CIGA) may have liability. (Ins. Code § 1063, *et seq.*) For over six years, in
24 the present case, it appears Gallagher Bassett Services, Inc.⁶ failed to disclose the correct entity for
25 whom it administered applicant's claim. Such behavior is unacceptable and appears to provide a
26 basis for the imposition of sanctions. Accordingly, a notice of intention to sanction Gallagher
27 Bassett Services, Inc. will issue whereby the adjusting agent will be afforded an opportunity to
provide good cause why sanctions should not be imposed under Labor Code section 5813.

26 ⁶ By letter from defendant's attorney dated December 31, 2001, the Board is advised that
27 effective November 26, 2001, Fleming & Associates of Glendale, California, has become the new
adjusting agent for the further administration of claims.

1 In addition, a notice of intention will issue to hold a Commissioner's Conference with the
2 parties at the Santa Rosa office of the Workers' Compensation Appeals Board for clarification of
3 the basis for the arrangement between Compuware and Reliance, and whether compliance with the
4 provisions of the Insurance Code have been met (Ins. Code §§ 11650 *et seq.*, particularly §§ 11657,
5 11659, and 11660.). The conference is necessary to give the Board a complete understanding of the
6 arrangement between the entities, whether sanctions should be imposed, and to enable us to issue a
7 just and reasoned decision after reconsideration on the issue raised by the petition for
8 reconsideration.

9 For the foregoing reasons,

10 **NOTICE IS HEREBY GIVEN** that this matter is set for a COMMISSIONER'S
11 CONFERENCE before James C. Cuneo, Commissioner, at the Santa Rosa local office of the
12 Workers' Compensation Appeals Board, 50 "D" Street, #420, Santa Rosa, CA 95404-4760, on
13 APRIL 18, 2002, at 10:00 A.M. (one hour), and for such further proceedings deem appropriate.

14 **FURTHER NOTICE IS HEREBY GIVEN** that absent demonstration of good cause to
15 the contrary at the COMMISSIONER'S CONFERENCE identified above, the Worker's
16 Compensation Appeals Board will order Gallagher Bassett Services, Inc. to pay SANCTIONS of
17 \$1,500 to Dennis J. Hannigan, Secretary, Workers' Compensation Appeals Board, at P.O. Box

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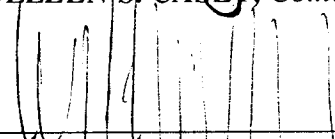
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429459, San Francisco, CA 94141, ATTENTION: Reconsideration Unit, for transmission to the General Fund, pursuant to Labor Code section 5813.

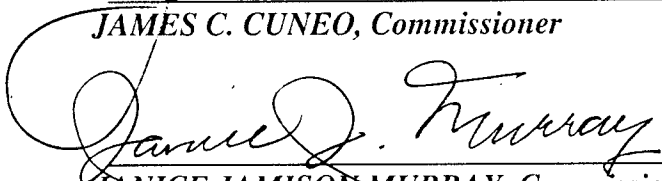
WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

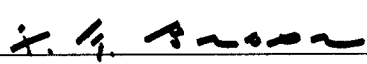

MERLE C. RABINE, Chairman

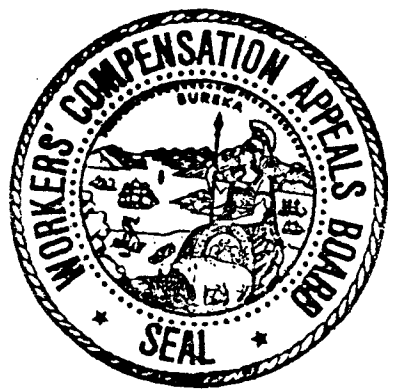

COLLEEN S. CASEY, Commissioner


WILLIAM K. O'BRIEN, Commissioner


JAMES C. CUNEO, Commissioner


JANICE JAMISON MURRAY, Commissioner


FRANK M. BRASS, Commissioner



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 20 2002

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD

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