

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **ALFRED R. LEE, JR. (Deceased),**
4 **VALERIE L. LEE (Widow),**

Case No. LAO 781284

5 *Applicant,*

**OPINION AND ORDER
GRANTING PETITION
FOR REMOVAL AND
DECISION AFTER
REMOVAL**

6 *vs.*

7 **MIRACLE FORD; CALIFORNIA**
8 **INSURANCE GUARANTEE ASSOCIATION,**
9 **administered by INTERCARE INSURANCE**
10 **SERVICES for HIH AMERICA**
11 **COMPENSATION (In Liquidation); WEST**
12 **COVINA TOYOTA; UNIVERSAL**
13 **UNDERWRITERS INSURANCE**
14 **COMPANY/ZURICH NORTH AMERICA,**

15 *Defendants.*

16 Defendant, California Insurance Guarantee Association (“CIGA”), administered by
17 Intercare Insurance Services for HIH America Compensation (“HIH”) in liquidation, seeks
18 removal in response to an interlocutory order issued by the workers’ compensation
19 administrative law judge (WCJ) on August 22, 2002, in which the WCJ submitted this matter
20 for decision and granted applicant’s election against CIGA, noting that CIGA “has the last four
21 months” of applicant’s cumulative trauma claim. In this case, it is alleged that decedent Alfred
22 Lee, while employed as a car salesman/financial manager by Miracle Ford (insured by HIH)
23 during the period February 7, 2000 through June 7, 2000, sustained industrial injury to his
24 cardiovascular and cerebral vascular system on June 7, 2000, resulting in his death on June 11,
25 2000.

26 CIGA contends that (1) pursuant to Insurance Code section 1063.1(c)(9),¹ the applicant
27 may not elect against CIGA because there is a legally-joined, viable insurance carrier, Universal

¹ Insurance Code section 1063.1(c)(9) provides in relevant part: “Covered claims” does not include (i) any claim to the extent it is covered by any other insurance of a class covered by this article available to the claimant or insured...”

1 Underwriters Insurance Company/Zurich North America (“Zurich”) on the risk for the alleged
2 cumulative trauma, and (2) CIGA must be dismissed as a party defendant because there is a
3 viable carrier, Zurich, on the risk for the alleged cumulative trauma, hence there is “other
4 insurance available to the claimant” and no “covered claim” for which CIGA can be held
5 liable.²

6 I. STATEMENT OF THE CASE

7 The decedent was a car salesman/finance manager who worked for several employers
8 with different carriers during the period of one year preceding his death. The issue is whether the
9 WCJ properly allowed applicant to elect against CIGA, where it appears there are other viable
10 carriers on risk during the one-year cumulative trauma period under Labor Code section 5500.5.
11 For the reasons discussed below, we conclude that an applicant may *not* elect against CIGA when
12 there are other viable carriers having liability during the alleged exposure period. Therefore, we
13 will grant removal, rescind the order allowing election against CIGA, and return this matter to
14 the WCJ for further proceedings. We also conclude that it is premature to dismiss CIGA as a
15 party defendant at this point in the proceedings.

16 II. BACKGROUND

17 On June 28, 2000, the applicant, widow Valerie L. Lee, filed an Application for
18 Adjudication of Claim alleging that her husband, decedent Alfred R. Lee Jr., while employed as
19 a finance manager/salesman during the period February 7, 2000 through June 7, 2000, sustained
20 cumulative trauma which hastened and caused his death on June 11, 2000. The application
21 named Miracle Ford as the employer and HIH as the insurance carrier. Defendant HIH denied
22 the injury and subsequently became insolvent in May 2001. Thereafter, CIGA took over defense
23 of the claim. Various preliminary proceedings ensued, and the matter proceeded to trial on July
24 31, 2001. At that time, the WCJ determined that the medical reports of both sides were
25 deficient, and he ordered further development of the medical record in the form of a new

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27 ² CIGA also contends that Zurich should be ordered to administer benefits, but the contention is premature because there has yet to be a finding on whether the decedent’s death arose out of and occurred in the course of employment.

1 opinion from a physician chosen by the WCJ, Dr. Markovitz. (These determinations are not in
2 dispute.) Dr. Markovitz issued a report on December 4, 2001, and he was deposed on May 1,
3 2002.

4 On May 7, 2002, CIGA filed a Petition to Amend Application for Adjudication of Claim
5 According to Proof, alleging that applicant had three employers in the year before he died,
6 namely Mike Miller Toyota from 6/7/99-11/11/99, West Covina Toyota from 10/15/99-1/15/00
7 and Miracle Ford from 2/7/00-6/7/00. (The record is unclear whether the decedent worked for
8 both Mike Miller Toyota and West Covina Toyota during the overlapping period October 15,
9 1999 to November 11, 1999, as alleged in the Petition to Amend.) The petition also alleged that
10 the application should be amended to reflect an alleged date of injury from June 7, 1999 to June
11 7, 2000, because Dr. Markovitz had opined that the decedent's work at all three employers that
12 year had hastened his death.³ Attached to the Petition to Amend was a proposed amended
13 application, which stated that the insurance carriers for Mike Miller Toyota and West Covina
14 Toyota were "under investigation." Applicant filed an objection to the Petition to Amend. On
15 June 27, 2002, the law firm of Tobin & Lucks filed an appearance on behalf of Zurich North
16 America as carrier for West Covina Toyota.

17 After several interim conferences, the matter was again set for trial on August 22, 2002.
18 On that day, CIGA filed a Petition for Dismissal and a Petition for Order Joining Party
19 Defendant, and it re-filed its Petition to Amend Application for Adjudication of Claim
20 According to Proof, this time submitting a proposed amended application identifying Zurich as
21 the carrier for West Covina Toyota. The Petition for Joinder alleged that during the last year of
22 exposure, the decedent had been employed with West Covina Toyota from November 13, 1999
23 through January 9, 2000, and that "per the response from the WCIRB dated 5/16/02, the
24 workers' compensation carrier for West Covina Toyota during that time period was Universal
25 Underwriters Insurance Company/Zurich." The Petition for Dismissal alleged, in substance, that

26 ³ CIGA's petition for removal essentially concedes that Dr. Markovitz has found an industrial basis for the
27 decedent's death. We express no opinion on the point, as it would be premature and unnecessary to determine the
issues presented here.

1 since Dr. Markovitz had opined that the three employments during the last year of decedent's
2 life had contributed to his death, and there was a solvent carrier, Zurich, on the risk at that time,
3 there was no "covered claim" against CIGA because there was "other insurance available to the
4 claimant" under Insurance Code section 1063.1(c)(9). CIGA cited *Industrial Indemnity v.*
5 *Workers' Comp. Appeals Bd. (Garcia)* (1997) 60 Cal.App.4th 548 [62 Cal.Comp.Cases 1661] in
6 support of its Petition for Dismissal. In response, the WCJ joined Zurich as a party defendant.
7 However, the WCJ also issued the rulings disputed here, approving applicant's election against
8 CIGA and submitting this matter for decision.

9 III. DISCUSSION

10 A. APPLICANT MAY NOT ELECT AGAINST CIGA

11 Based on the facts set forth above, it appears that CIGA's insolvent carrier, HIH, had the
12 last four months of coverage, while a viable carrier, Zurich, had coverage during some portion
13 of the first eight months of the one-year period of alleged injurious exposure under Labor Code
14 section 5500.5.⁴ The WCJ points out that all the injurious exposure may have occurred during
15 CIGA's period of liability. We note, however, that if the election against CIGA is allowed and
16 it turns out that even a day of injurious exposure occurred during Zurich's coverage, CIGA
17 would be forced to initiate supplemental proceedings to avoid liability.

18 For this reason, we conclude that an applicant should not be allowed to elect against
19 CIGA in a single cumulative injury case absent special circumstances. CIGA is presently
20 working with very limited resources that are being severely strained in view of the number of
21 carriers that have become insolvent. Where other solvent carriers are potentially on the risk
22 during the alleged cumulative injury period, and because supplemental proceedings may become

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24 ⁴ We note that the petition for removal alleges that "it was also learned from the WCIRB that the carrier for the
25 employer prior to West Covina Toyota, Mike Miller Toyota, was also a CIGA case due to the insolvency of that
26 carrier." However, no documents from the WCIRB are in the Board's file. The Minutes of Hearing of July 31, 2001
27 indicate that the only stipulations in the record as to periods of employment and coverage are that Miracle Ford
employed the decedent and was covered by HIH from February 7, 2000 through June 7, 2000. Although West
Covina Toyota and its carrier Zurich have appeared and have been joined by order of the WCJ, their period of
employment/coverage and that of any other employers and carriers between June 7, 1999 to June 7, 2000 should be
clarified by the parties and WCJ in further proceedings.

1 necessary if an election against CIGA has been allowed, a WCJ should not ordinarily accept the
2 election against CIGA alone, absent special circumstances showing that the injurious exposure
3 would be solely limited to CIGA's period of risk. In other words, CIGA should not be required
4 to bear the costs of initially defending the claim where there is a great potential for an award
5 against CIGA to be rescinded and other viable carriers to be made jointly and severally liable
6 under the principles of *Industrial Indemnity v. Workers' Comp. Appeals Bd. (Garcia)* (1997) 60
7 Cal.App.4th 548 [62 Cal.Comp.Cases 1661].⁵ (See also *Denny's Inc. v. Workers' Comp.*
8 *Appeals Bd. (Bachman)* (2003) 104 Cal.App.4th 1433 [68 Cal.Comp.Cases 1].)

9 **B. CIGA MAY NOT BE DISMISSED**

10 In the significant panel decision of *Manzano v. Flavurence Corporation* (2002) 67 Cal.
11 Comp. Cases 914 at 915, the Board held that CIGA should not be dismissed from a case until a
12 determination is made on the issue of the date of injury, or period of injurious exposure, or other
13 underlying issue which if adversely decided against CIGA would result in its liability. In the
14 present case, no determination has been made on the date of injury, or period of injurious
15 exposure, or on any other underlying issue which if adversely decided against CIGA would
16 result in its liability. Therefore, CIGA should not be dismissed as a party defendant at this point.
17 In this connection, the parties and the WCJ should be careful to delineate the date of injury and
18 appropriate defendants. (See footnote 4, *infra*.)

19 For the foregoing reasons,

20 **IT IS ORDERED**, that the petition for removal filed by CIGA is hereby **GRANTED**,
21 and that this matter is **REMOVED** to the Appeals Board.

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25 ⁵ In *Garcia*, the Court held that the Board properly rescinded an award against CIGA and substituted a joint and
26 several award against two other solvent carriers, where the applicant elected against the three carriers, the award was
27 joint and several against all of them, and each carrier, including CIGA's insolvent carrier, was fully liable for the
entire disability during the cumulative injury period. In those circumstances, "other insurance" is available in the
form of the other solvent carriers on risk during the cumulative injury period, hence the remaining solvent carriers
will be liable for all benefits.

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IT IS FURTHER ORDERED, that it is the Appeals Board's Decision After Removal that the WCJ's orders granting applicant's election against CIGA and submitting this matter for decision are **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Frank M. Brass

I CONCUR,

/s/ William K. O'Brien

/s/ Merle S. Rabine

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

2/18/03

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD EXCEPT LIEN CLAIMANTS.

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