

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

TAMMY SMITH, *Applicant*

vs.

PACIFIC SOUTHWEST CONTAINER; AMERICAN AUTOMOBILE INSURANCE COMPANY adjusted by ALLIANZ RESOLUTION MANAGEMENT; GEORGIA PACIFIC, CHESAPEAKE CORPORATION, INSURANCE COMPANY OF NORTH AMERICA administered by ESIS; *Defendants*

**Adjudication Numbers: ADJ1718407 (FRE 0023386), ADJ1209790 (FRE 0022401),
ADJ1447715 (FRE 0177716)
Fresno District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board previously granted reconsideration to further study the factual and legal issues in this case. This is our Decision After Reconsideration.

Georgia Pacific, permissibly self-insured and American Automobile Insurance Company administered by Allianz (Allianz) each seek reconsideration of the February 28, 2020 Findings, Award and Order wherein the workers' compensation arbitrator found that permanent disability is apportioned "one-third of the liability to the carrier for the first injury and two-thirds to the carrier for the second injury..." (Finding of Fact No. 7 [8]¹.) The arbitrator also found that: "Apportionment does not apply to the temporary disability or medical issues in these cases." (Finding of Fact No. 8 [7].) The arbitrator also found that Georgia Pacific and Insurance Company of North America (ICNA) fully and finally settled all claims for reimbursement. In the Award and Order, the arbitrator found that ICNA is entitled to reimbursement from Allianz of 2/3 of permanent disability, 1/3 of temporary disability and "1/3 of non-allocated administrative claim file costs."

Georgia Pacific contends that the arbitrator erred in relying on the medical-legal reports of the agreed medical evaluator (AME) Fredrick Newton, arguing that the reports were not substantial medical evidence on the issue of apportionment.

¹ The Findings of Fact were misnumbered.

Allianz contends that the arbitrator erred in failing to address issues raised by the parties. Allianz contends that it does not owe additional reimbursement of permanent disability to ICNA because they settled their respective liability in a joint compromise and release. Allianz also contends that ICNA paid temporary disability indemnity to the applicant beyond the amount owed and, therefore, Allianz should not have to reimburse ICNA for those payments. Finally, Allianz contends that Georgia Pacific is liable for 1/3 of permanent disability and medical treatment related to applicant's second cumulative trauma, arguing that the arbitrator is incorrect that you cannot "apportion" or allocate liability for temporary disability and medical treatment.

The Arbitrator prepared a Report and Recommendation on Petition for Reconsideration (Report) in response to both petitions, recommending that the petitions be denied. ICNA filed an Answer. We have considered the Petitions for Reconsideration, the contents of the Reports and the record in this matter. For the reasons discussed below, as our Decision After Reconsideration, we will rescind the February 28, 2020 Findings and Order, and return the matter to the arbitrator for further proceedings and a new decision.

As an initial matter, both petitions are timely. To be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1), former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, former § 10840(a), now § 10940(a) (eff. Jan. 1, 2020).) Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) Section 5315 provides the Appeals Board with 60 days within which to confirm, adopt, modify or set aside the findings, order, decision or award of a workers' compensation administrative law judge. (Lab. Code, § 5315.)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).² In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In*

² The March 16, 2020 DWC Newsline may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-18.html>.

re: *COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc.) The district offices reopened for filing on April 13, 2020.³ Therefore, the petition for reconsideration is deemed filed on April 13, 2020, and the opinion granting the petition for reconsideration issued within the 60 day period.

Our review of this matter is complicated by the absence of a transcript identifying the issues in dispute and the fact that the exhibits were not adequately identified and admitted into evidence as required by *Hamilton, supra*. “The Findings and Orders and Decision of Arbitrator” references a transcript but, it was not filed with the Appeals Board. The arbitrator’s decision must be based on admitted evidence and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952 (d); *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen’s Comp. Appeals Bd. (Garza)* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) A full and complete record allows for a meaningful right of reconsideration. (*Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal. 2d 753.) See also *Hernandez v. Staff Leasing* (2011) 76 Cal.Comp.Cases 343 (Appeals Board Significant Panel Decision). Therefore, we must return this matter to the trial level for parties and arbitrator to create a proper record.

We cannot address the merits of the petition because of the lack of an adequate record. We will briefly address the relevant law so that the parties and the arbitrator may better focus their efforts.

Although we cannot ascertain precisely what issues were raised without the Arbitration Transcript, it appears that the arbitrator was asked to address issues related to petitions for contribution and reimbursement related to two cumulative trauma injuries (ADJ447715 [CT 05/27/1997-10/21/1998] and ADJ1718407 [CT 06/09/2004-06/09/2005].) ICNA provided coverage in ADJ447715. In ADJ1718407, Georgia Pacific insured the employer for 114 days and American Automobile Association administered by Allianz insured the employer for 251 days. The AME, Fredrick Newton, attributed 1/3 of applicant’s permanent disability to the 1998 CT and 2/3 to the 2005 CT.

³ The April 3, 2020 DWC Newsline regarding reopening the district offices for filing may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-29.html>.

When an employee sustains a cumulative trauma injury, the employee may pursue his or her claim for benefits against any one or more of successive employers that employed the employee during the cumulative trauma. (Lab. Code, § 5500.5.) If there are multiple employers during the 5500.5 liability period, the employers are jointly and severally liable for the entire award and may seek contribution from each other during separate proceedings. (Lab. Code, § 5500.5(e); *Denny's Inc. v. Workers' Comp. Appeals Bd. (Bachman)* (2003) 104 Cal. App. 4th 1433 [68 Cal.Comp.Cases 1].)

An applicant may elect against any defendant who has potential liability for the alleged cumulative injury, and any defendant held liable may proceed against other potentially liable insurers or employers. (*Industrial Indemnity Co. v. Workers' Comp. Appeals Bd. (Garcia)* (1997) 60 Cal.App.4th 548 [62 Cal.Comp.Cases 1661].) If an applicant elects to proceed against a single insurer, the insurer is entitled under Labor Code section 5500.5 to seek contribution for awarded benefits from the remaining insurers in subsequent proceedings. (*See Schrimpf v. Consolidated Film Industries, Inc.* (1977) 42 Cal.Comp.Cases 602 [en banc].) This procedure is intended to promote a prompt determination of an injured worker's entitlement to workers' compensation benefits. (*Rex Club v. Workers' Comp. Appeals Bd. (Oakley-Clyburn)* (1997) 53 Cal.App.4th 1465 [62 Cal.Comp.Cases 441].) Disputes over the right of contribution pursuant to Section 5500.5 are required to be submitted to arbitration and the cost of arbitration is split between the parties. (Lab. Code, §§ 5273, 5275(a).)

Of importance in this case, unless defendants have stipulated to a division of liability, at arbitration, issues of liability among defendants are decided de novo. (*Greenwald v. Carey Dist. Co. (Greenwald)* (1981) 46 Cal.Comp.Cases 703 (Appeals Board en banc).) Furthermore, assuming the California Insurance Guarantee Association is not involved, the fact that all insurers on the risk during a cumulative trauma period are jointly and severally liable does not preclude a division of liability for all benefits, including temporary disability and medical treatment. In a recent Board Panel Decision, *Duenas v. Workforce Solutions* (April 14, 2021) ADJ8375307, 2021 Cal. Wrk. Comp. P.D. Lexis 83, the panel clarified that an arbitrator may also make a division of liability between insurers of certain medical cost containment expenses.⁴

⁴ The arbitrator's award of "non-allocated administrative file costs" does not describe these cost-containment expenses. "Non-allocated administrative file costs" is a vague term and it is unclear what the arbitrator meant by this phrase.

In this case, it appears that the arbitrator erroneously believed that because insurers are jointly and severally liable for certain benefits, he could not apportion liability for those benefits in a contribution proceeding. In fact, the reason contribution proceedings exist is to allow an applicant to receive prompt payment of benefits from an elected insurer by allowing the elected insurer to promptly recover from other insurers after the applicant's case is resolved. By assigning 1/3 liability for certain benefits to each insurer rather than addressing the proportional liability of each insurer, the arbitrator did not address the contribution issues submitted to him.

For the reasons discussed above, we are unable to render a decision based on this record and must return the matter to the arbitrator to create an adequate record and to determine all issues raised by the parties. (Cal. Code Regs, tit. 8, §10914.)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 28, 2020 Findings and Order is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings and a new decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 20, 2022

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

**BENTHALE MCKIBBIN & MCKNIGHT
COLE FISHER COLE & O'KEEFE
DAVID PARKER
GOLDMAN MAGDALIN & KRIKES
HANNA BROPHY MACLEAN MCALEER & JENSEN
TAMMY SMITH**

MWH/oo

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