

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

LARRY MALLORY, *Applicant*

vs.

**SAN FRANCISCO 49ERS; ZENITH INSURANCE COMPANY; CALIFORNIA
INSURANCE GUARANTEE ASSOCIATION for HOME INSURANCE, in liquidation,
*Defendants***

**Adjudication Number: ADJ9485144
Santa Ana District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Order of March 20, 2019, the workers' compensation judge (WCJ) found that applicant, while employed as a professional athlete by the San Francisco 49ers during the period August 15, 1979 to August 24, 1979, claims to have sustained an industrial injury to his head, brain, neck, shoulders, upper extremities, back, hips, lower extremities, and to his circulatory, digestive and body systems, that Zenith Insurance Company (Zenith) was the workers' compensation carrier at the time of the claimed injury, that Home Insurance had coverage starting January 1, 1980 but "the cumulative trauma ends August 24, 1979 per the amended application," that the California Insurance Guarantee Association (CIGA) remains a party to this case, that CIGA did not need to file a lien to proceed on its Petition for Reimbursement, and that Insurance Code section 1063.1(c), subparagraphs (3) through (12), "are not germane as there is no liability to CIGA [in] this case." Pursuant to the above findings, the WCJ ordered Zenith to reimburse CIGA the sum of \$33,872.95.

Zenith filed a timely petition for reconsideration of the WCJ's decision. Zenith contends, in substance, that CIGA does not have standing to pursue reimbursement against Zenith, and that the extent of reimbursement claimed by CIGA is unreasonable.

CIGA filed an answer.

We have considered the allegations of Zenith's Petition for Reconsideration and the contents of the Report and Recommendation ("Report") of the WCJ with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate except the sentence/paragraph before the WCJ's Recommendation, we will affirm the Findings and Order of March 20, 2019.

BACKGROUND

The relevant factual background is set forth in the WCJ's Report, as follows:

An Application for Adjudication was filed initially against Home Insurance, who insured the San Francisco 49ers for the period July 15, 1980 through August 31, 1980.

In defending the case, CIGA discovered that the applicant's period of employment with the 49ers was for the period August 15, 1979 through August 24, 1979. The application was amended to reflect the correct date of injury August 15, 1979 through August 24, 1979. Zenith was the correct carrier for the amended cumulative trauma injury.

CIGA was never dismissed as a party defendant. The matter settled by way of Compromise and Release as between applicant and Zenith on August 2, 2018. Counsel for CIGA was served by Zenith with the Declaration of Readiness to Proceed with the hearing scheduled for August 2, 2018 and attended the hearing.

Counsel for CIGA was present when the Compromise and Release was presented and requested a Mandatory Settlement Conference on the issue of reimbursement. Zenith did not object to their right to a hearing on this issue of reimbursement due to a lack of standing.

Zenith had corresponded with CIGA requesting copies of the medical-legal [documents] obtained as well as the depositions. CIGA provided this discovery.

Zenith did not obtain additional medical reports nor did they depose the applicant.

Zenith objects to the claim of reimbursement by CIGA for the amounts paid by CIGA in [investigating and adjusting] this claim.

The [WCJ] found that since CIGA was a party to the case and was never dismissed, that they had standing to claim reimbursement of amounts expended. The Court further found in favor of CIGA even though they did not file a lien and even though there is no finding of joint and several liability. The Court found in favor of CIGA based on the doctrine of unjust enrichment.

The Court further awarded the reimbursement based on Zenith's language in the Compromise and Release regarding payment of the liens in this case.

DISCUSSION

At the outset, we observe that Zenith concedes, “CIGA may sue to obtain reimbursement for amounts it has paid for non-covered claims,” citing Insurance Code section 1063.2 and *Majestic Ins. Co. v. Workers' Compensation Appeals Bd.* (2005) 70 Cal.Comp.Cases 1519 (writ den.). (See Petition for Reconsideration, p. 3:1-4.) However, the instant case involves exactly the circumstance that CIGA, by filing a petition for reimbursement, sued Zenith to obtain reimbursement for amounts CIGA paid to defend a non-covered claim. Since Zenith concedes that CIGA has the right to do so, it appears that Zenith is effectively waiving the point. (Lab. Code, § 5904.) For this reason, and for the additional reasons set forth below, we reject Zenith’s contention that CIGA does not have “standing” to pursue reimbursement.

Zenith also concedes that CIGA is a party in interest under WCAB Rule 10364,¹ but Zenith claims that CIGA failed to “perfect” its interest by filing a lien. (Petition for Reconsideration, 4:25-27.) However, Zenith cites no legal authority that CIGA was obligated to file a lien in order to “perfect” its interest or to “perfect” its standing in this case. Further, in making this argument Zenith relies upon the factually incorrect premise that CIGA was dismissed as a party defendant in this matter. As pointed out by the WCJ, the underlying Application for Adjudication of Claim was amended to reflect the correct date of injury August 15, 1979 through August 24, 1979, with Zenith being the correct carrier for the amended cumulative trauma injury. However, CIGA was never dismissed as a party defendant.

Further, even if CIGA had been dismissed as a party defendant, the weight of authority is that the WCAB would have retained jurisdiction to determine the issue of reimbursement between CIGA and Zenith, the solvent insurer herein. (See *Reafsnyder v. D&D Sec. Res.* (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 535, citing *California Ins. Guarantee Assn v. Workers' Comp. Appeals Bd. (Hernandez)* (2007) 153 Cal.App.4th 524, 532-533 [72 Cal.Comp.Cases 910] [CIGA entitled to sue for reimbursement of amounts paid on non-covered claims]; *Villa v. Chalone Wine Group* (2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 158 [CIGA entitled to reimbursement for bill review expense]; *Marriott International, Inc. v. Workers' Comp. Appeals Bd. (Gonzalez)* (2010) 75 Cal.Comp.Cases 913 (writ den.) [WCAB retained jurisdiction over CIGA’s request for reimbursement from co-defendant following dismissal of injured worker’s claim for lack of

¹ Effective January 1, 2020, former WCAB Rule 10364 was repealed and its substance replaced by current WCAB Rule 10382. (Cal. Code Regs., tit. 8, § 10382 (eff. Jan. 1, 2020).)

prosecution]; *Swift Transportation v. Workers' Comp. Appeals Bd. (Kvenbo)* (2008) 73 Cal.Comp.Cases 1482 (writ den.) [CIGA's right to reimbursement of benefits for which it had no liability was independent of its right to contribution under Lab. Code, § 5500.5].)

Zenith also raises the contention that even if CIGA has standing, its reimbursement should be limited to "applicant's medical-legal charges [because] no other benefits were paid to the injured worker, and...this was not a case of joint and several liability for which CIGA would be entitled to full reimbursement." (Petition for Reconsideration, p. 8:2-6.) In connection with this contention, Zenith also alleges that the WCJ erred in relying upon the equitable doctrine of unjust enrichment, because there is no evidence Zenith "benefited unjustly from CIGA's procurement of defense medical reports." (Petition for Reconsideration, p. 9:6-9.) Again, however, these allegations are undercut by Zenith's concession that "the Board retains continuing jurisdiction and broad authority to both join CIGA and order reimbursement to CIGA for benefits paid by CIGA that arguably should have been paid by Zenith." (Petition for Reconsideration, p. 11:6-8.) Since Zenith admits that the WCJ had authority to order reimbursement to CIGA even in the absence of a finding of unjust enrichment, it appears that the issue of unjust enrichment is a moot point. (Lab. Code, § 5904.)

Even so, Zenith contends that CIGA's reimbursement "should be limited to the costs for applicant's medical-legal liens alone." Again we disagree, noting that Zenith offers no legal authority in support of this contention. Concerning the amount of reimbursement, the WCJ correctly relied upon precedent issued by the WCAB's predecessor, the Industrial Accident Commission. In *Beal v. Belcher* (1940) 5 Cal.Comp.Cases 275, the digest of the Commission's opinion states that the Commission held, "the insurance company which had mistakenly paid compensation benefits for several months was entitled not only to deny coverage, but also to a lien for the expenditures thus made by it against any benefits thereafter due from the proper carrier." Although CIGA did not file a lien in the instant case, we explained above that it does not matter because CIGA has always remained a party defendant. Otherwise, there is no reason to disregard the principle for which *Beal, supra*, stands, i.e., a defendant who mistakenly incurs expenses adjusting a claim may later deny coverage and seek reimbursement from the proper carrier. Such is CIGA's position in the instant case.

In summary, we conclude that the WCJ correctly invoked equitable principles to allow CIGA's reimbursement by Zenith. As the Court of Appeal recently explained in *Truck Ins.*

Exchange v. Workers' Comp. Appeals Bd. (Kwok) (2016) 2 Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685], “[t]he appeals board has broad equitable powers with respect to matters within its jurisdiction.” (Citing *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [59 Cal.Comp.Cases 96].)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of March 20, 2019 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 19, 2021

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

**LARRY MALLORY
CHERNOW AND LIEB (2)
GUILFORD, SARVAS & CARBONARA
NBO LAW**

JTL/bea

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 OF
CALIFORNIA WORKERS' COMPENSATION JUDGE
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

Defendant Zenith Insurance Company has filed a timely verified Petition for Reconsideration. For the reasons set forth below, this Petition should be denied.

II.
STATEMENT OF FACTS

An Application for Adjudication was filed initially against Home Insurance who insured the San Francisco 49ers for the period July 15, 1980 through August 31, 1980.

In defending the case, CIGA discovered that the applicant's period of employment with the 49ers was for the period August 15, 1979 through August 24, 1979. The application was amended to reflect the correct date of injury August 15, 1979 through August 24, 1979. Zenith was the correct carrier for the amended cumulative trauma injury.

CIGA was never dismissed as a party defendant. The matter settled by way of Compromise and Release as between applicant and Zenith on August 2, 2018. Counsel for CIGA was served by Zenith with the Declaration of Readiness to Proceed with the hearing scheduled for August 2, 2018 and attended the hearing.

Counsel for CIGA was present when the Compromise and Release was presented and requested a Mandatory Settlement Conference on the issue of reimbursement. Zenith did not object to their right to a hearing on this issue of reimbursement due to a lack of standing.

Zenith had corresponded with CIGA requesting copies of the medical legal obtained as well as the depositions. CIGA provided this discovery.

Zenith did not obtain additional medical reports nor did they depose the applicant.

Zenith objects to the claim of reimbursement by CIGA for the amounts paid by CIGA in adjudicating this claim.

The Court found that since CIGA was a party to the case and was never dismissed, that they had standing to claim reimbursement of amounts expended. The Court further found infavor of CIGA even though they did not file a lien and even though there is no finding of joint and several liability. The Court found in favor of CIGA based on the doctrine of unjust enrichment.

The Court further awarded the reimbursement based on Zenith's language in the Compromise and Release regarding payment of the liens in this case.

It is from these findings that Zenith has petitioned for reconsideration.

III. **CIGA STANDING TO SEEK REIMBURSEMENT**

Zenith asserts that insofar as the application was amended to reflect a different date of injury wherein CIGA had no liability, that they do not have standing to petition for relief by this Court. This Court disagrees with this.

CIGA remained a party to this case as they were never dismissed from this cause of action. Furthermore, they have a constructive lien for amounts paid for medical legal expenses aswell as benefits paid in defending the claim. Petitioner concedes per Board Rule 10364, CIGA meets the definition of a party in interest.

Additionally, Zenith filed a Declaration of Readiness to Proceed on December 5, 2017. Zenith served counsel for CIGA with the Declaration of Readiness to Proceed. If Zenith did not think CIGA was a party, why did they serve them with the Declaration of Readiness to Proceed?

The hearing on August 1, 2018 was attended by CIGA's counsel Diane Springer. The parties presented a Compromise and Release.

At that point, CIGA's counsel requested a Mandatory Settlement Conference on the issueof reimbursement. There was no objection by Zenith's counsel raising the issue of standing nor the fact that CIGA did not file a lien. The matter immediately proceeded to Mandatory Settlement Conference on reimbursement.

Had the Court known that Zenith would raise standing and non-responsibility for any reimbursement, the Court would not have approved the Compromise and Release and wouldhave set the matter on all issues.

CIGA need not be joined as a party in interest as they were already a party. Defendant Zenith's actions in this case in serving CIGA with the Declaration of Readiness to Proceed is inconsistent with this argument that CIGA does not have standing.

IV.
THE EXTENT TO WHICH REIMBURSEMENT TO CIGA IS
REASONABLE

The Court is well aware that there is no joint and several liability as between CIGA and Zenith. Zenith however absolutely benefited from the discovery and medical legal obtained by CIGA. In fact, Zenith requested this discovery and CIGA provided it.

Zenith did not obtain a medical legal report or depose the applicant. Equity is equity, it would be grossly unfair to allow Zenith to utilize the discovery by CIGA to present a Compromise and Release (with CIGA present) without disclosing their objection to standing or any liability for sums paid. Zenith listed liens in the Compromise and Release that were paid by CIGA.

CIGA was acting in good faith. The Compromise and Release approved in this case reflects that liens of ARS and Orthopedic Surgery; liens are to be adjusted by the defendant with jurisdiction reserved. There is an affidavit regarding liens attached to the Compromise and Release. There are 10 lien claimants listed.

There is a letter from Zenith to applicant's attorney indicating that Zenith would submit into evidence the deposition transcript from the deposition taken by CIGA as well as the medical reports obtained while CIGA was on the case. There is also a deposition from Richard Berthelsen.

CIGA also paid many of the providers in this case that are listed on the lien affidavit by Zenith. The Compromise and Release presented to the Court indicates that defendant Zenith would adjust the liens of the providers paid by CIGA.

Again fair is fair, Zenith should not benefit from the discovery efforts and payments to providers by CIGA and attempt to escape liability. Zenith should have objected to the setting on the reimbursement issue and made the Court and counsel for CIGA aware of their intent to contest standing and responsibility for payments

made by CIGA to lien claimants listed in Zenith's Compromise and Release.

To find that Zenith is not responsible for the payments made by CIGA for discovery utilized by Zenith would result in unjust enrichment.

V.

RECOMMENDATION

In light of the forgoing, it is respectfully recommended that the Petition for Reconsideration filed by Zenith be denied.

DATE: APRIL 9, 2019

SERVED: APRIL 10, 2019

PAMELLA A. STONE

Workers' Compensation Judge