

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

**LUIS HERNANDEZ, *Applicant***

**vs.**

**QUALITY PLUMBING ASSOCIATES, INC., ARGONAUT INSURANCE;  
GUIDEONE MUTUAL INSURANCE; J.R. PIERCE PLUMBING COMPANY, INC.,  
and CYPRESS INSURANCE, *Defendants***

**Adjudication Number: ADJ12619855  
Salinas District Office**

**OPINION AND DECISION AFTER FOR RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.<sup>1</sup>

Defendants GuideOne Mutual Insurance and Argonaut Insurance, the workers' compensation carriers for Quality Plumbing, seek reconsideration of the Findings and Order (F&O) issued on February 24, 2022, wherein the workers' compensation administrative law judge (WCJ) found that the finding and order issued on June 18, 2021 does not absolve Quality Plumbing from potential liability for workers' compensation benefits. The WCJ ordered that applicant may litigate his cumulative injury claim against Quality Plumbing.

Defendants contend that (1) the WCJ lacks authority under Labor Code section 5500.5 to adjudicate applicant's claim against Quality Plumbing; and (2) applicant's claim is otherwise precluded by the doctrines of res judicata and collateral estoppel.

We received an Answer from applicant.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petitions be denied.

We have reviewed the contents of the Petitions, the Answer, and the Report. Based upon our review of the record, and for the reasons stated below, we will affirm the F&O.

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<sup>1</sup> Commissioners Sweeney and Lowe, who previously served as panelists in this matter, no longer serve on the Appeals Board. Commissioner Capurro and Deputy Commissioner Sussman have been assigned in their place.

## FACTUAL BACKGROUND

On January 14, 2020, applicant filed an amended application for adjudication, alleging that while employed as a plumber by Quality Plumbing during a period ending on August 8, 2019, he sustained cumulative injury to the low back. (Amended Application for Adjudication, January 14, 2020, pp. 1-6.) The application identified J. R. Pierce Plumbing as an additional employer during the period of alleged cumulative injury. (*Id.*, p. 7.)

On July 14, 2020, the matter proceeded to trial of the issues of injury and temporary disability for the period of August 8, 2019 to the present and continuing. (Minutes of Hearing and Summary of Evidence, July 14, 2020, p. 2:19-21.)

The parties stipulated that applicant claimed injury while employed by J. R. Pierce Plumbing and elected to proceed against its workers' compensation carrier, Cypress Insurance, pursuant to Labor Code section 5500.5. (*Id.*, p. 2:2-14.)

On August 7, 2020, the WCJ found that applicant sustained cumulative injury to his low back while employed as a plumber by J. R. Pierce Plumbing during a period ending on August 8, 2019, that at the time of injury J. R. Pierce Plumbing's workers' compensation carrier was Cypress Insurance, and that applicant elected to proceed against Cypress Insurance pursuant to Labor Code section 5500.5. (Findings and Award, August 7, 2020, p. 1.) The WCJ stated:

Based on the credible testimony of applicant and the report of Dr. Whitelaw, I find that applicant sustained cumulative injury to his lumbar spine arising out of and occurring in the course of employment by, among other possible employers, JR Pierce Plumbing.  
(Opinion on Decision, August 7, 2020, p. 3.)

On September 8, 2020, the WCJ rescinded his findings and ordered further development of the record on the issue of whether applicant's work during his month of employment with J. R. Pierce caused cumulative injury. (Order Rescinding Findings & Award and Ordering Further Development of the Record, September 8, 2020.)

On June 18, 2021, the WCJ found that applicant did not sustain cumulative injury while employed by J. R. Pierce Plumbing and ordered that he "take nothing by reason of the claim in this case." (Findings and Order, June 18, 2021, p. 1.) The WCJ stated:

I find that the doctor's factual basis and his postulating injury at Pierce as "possible" fall short of these standards. I am satisfied that applicant's very brief employment at Pierce did not significantly alter his condition. I interpret the events at Pierce to reflect at most a temporary exacerbation of

the problems and disabilities applicant brought with him to Pierce from Quality Plumbing.  
(Opinion on Decision, June 18, 2021, p. 3.)

In the Report, the WCJ states:

[O]n 5/6/20, a Mandatory Settlement Conference was held after Applicant filed a Declaration of Readiness to Proceed, in which the only employer listed was Quality Plumbing.

...

The trial took place on 7/14/20, with testimony from Applicant and from an employer witness. By reason of the election against it, the only employer appearing and taking part at that trial, through its carrier, was J.R. Pierce, insured by Cypress.

Applicant testified (pp. 4-5, MOH/SOE) that he was hired at J.R. Pierce Plumbing on 7/9/19. He agreed he had permanent restrictions for his back when he started there and that he only worked one month there. He last worked there 8/9/19 or 8/10/19, stopping because of pain. For his specific injury in 2013 at Quality Plumbing, he was under treatment for several years, including injections in his back. He settled that claim in March of 2017 by Compromise and Release. Following the settlement, he stopped treatment for the 2013 injury; however, he still had back pain. He was having severe back pain when he stopped working at Quality Plumbing, and he took some days off for back pain towards the end of that job. At Pierce, he found he could no longer lift the cement and mortar bags. The pain that he had in his back remained the same at Pierce as he had experienced before. And he agreed that he just wanted more time off because of his pain, so he stopped working there.

...

Findings & Award were filed 8/7/2020 . . .

...

I rescinded the Findings & Award on 9/1/2020 . . .

...

[T]he sole issue at trial was whether the 6/18/2021 decision absolved all employers within the period of alleged cumulative trauma, or absolved only J.R. Pierce . . .

In the Findings & Order of 2/24/22, I found that Petitioners' liability was not determined when J.R. Pierce was found not liable for Applicant's cumulative injury. I explained:

...

*All that was decided in the Findings and Order of 6/18/21 was that J.R. Pierce's employment did not cause cumulative trauma. There was no determination that Applicant did not sustain cumulative injury at all, only that the brief employment at Pierce did not cause it. Res judicata bars proceeding against the same party against whom a prior claim was made*

*and adjudicated. The related doctrine of collateral estoppel prevents re-litigation of a previously decided issue involving the same party. Quality Plumbing was not a party to the proceedings, after Applicant elected to proceed against J.R. Pierce.*

...

The two doctrines of res judicata and collateral estoppel have a similar purpose, which is to protect a party against whom the same cause of action or same issue was presented from being exposed to the vexation of facing more litigation on the same claim or issue. [*Azadigian v. WCAB (992) 57 CCC 391*] Here, Quality Plumbing did not defend the claim previously, because they were elected out, so they are not exposed to defending the claim a second time. While they were technically a party in the cumulative trauma case, as a practical matter, they were a “party” in name only, certainly not in the sense that the term is used when the courts have dealt with the purpose of these two doctrines.

(Report, pp. 1-5.)

## DISCUSSION

Defendants contend that the WCJ lacks authority under Labor Code section 5500.5 to adjudicate applicant’s claim against Quality Plumbing.

Labor Code section 5500.5(c) provides:

In any case involving a claim of occupational disease or cumulative injury occurring as a result of more than one employment within the appropriate time period set forth in subdivision (a), the employee making the claim, or his or her dependents, may elect *to proceed against any one or more of the employers*. Where such an election is made, the employee must successfully prove his or her claim *against any one of the employers named*, and any award which the appeals board shall issue awarding compensation benefits shall be a joint and several award as against any two or more employers who may be held liable for compensation benefits. If, during the pendency of any claim wherein the employee or his or her dependents has made an election to proceed against one or more employers, it should appear that there is another proper party not yet joined, the additional party shall be joined as a defendant by the appeals board on the motion of any party in interest, but the *liability of the employer shall not be determined until supplemental proceedings are instituted*. Any employer joined as a defendant subsequent to the first hearing or subsequent to the election provided herein shall not be entitled to participate in any of the proceedings prior to the appeal board’s final decision, nor to any continuance or further proceedings, but may be permitted to ascertain from the employee or his or her dependents such information as will enable the employer to determine the time, place, and duration of the alleged employment. *On supplemental proceedings, however, the right of the employer to full and complete examination or cross-examination shall not be restricted.*

(Lab. Code, § 5500(c) [Emphasis added].)

Thus, an "employee may obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer chosen or during the period covered by the insurance even though the particular employment is not the sole cause of the disability." (*Colonial Ins. Co. v. Industrial Acc. Com. (Pedroza)* (1946) 29 Cal.2d 79, 82 [172 P.2d 884, 11 Cal.Comp.Cases 226].)

In this case, applicant alleged claims against Quality Plumbing and J. R. Pierce Plumbing but elected to proceed against Cypress Insurance, the carrier for J. R. Pierce Plumbing, pursuant to Labor Code section 5500.5(c). (Amended Application for Adjudication, January 14, 2020, pp. 1-7; Report, pp. 1-2; Findings and Award, August 7, 2020, p. 1.) The WCJ found that applicant sustained cumulative injury to his low back during a period ending on August 8, 2019 while employed by J. R. Pierce Plumbing, insured by Cypress Insurance, among other possible employers. (Findings and Award, August 7, 2020, p. 1; Opinion on Decision, August 7, 2020, p. 3.) However, the WCJ subsequently determined that applicant did not sustain cumulative injury while employed by J. R. Pierce Plumbing and rescinded the finding of liability on the part of its insurer based upon "the . . . disabilities applicant brought with him to Pierce from Quality Plumbing" and ordered that applicant "take nothing by reason of the claim in this case." (Findings and Order, June 18, 2021, p. 1; Opinion on Decision, June 18, 2021, p. 3.)

Since Labor Code section 5500.5(c) requires the WCJ to determine whether applicant sustained cumulative injury during the claimed period while employed by "any" of the potential defendants, and since the WCJ determined that applicant did not sustain injury while employed by J. R. Pierce without making a finding on the issue of whether applicant sustained injury while employed by the other potentially liable employer, Quality Plumbing, we conclude that the WCJ's June 18, 2021 findings and order failed to abide by the election procedure provided by Labor Code section 5500.5(c).

Although the WCJ did not issue a finding on the issue of whether applicant sustained injury while employed by Quality Plumbing, he did conclude that applicant had "disabilities" which he brought from Quality Plumbing to J. R. Pierce Plumbing. (Opinion on Decision, June 18, 2021, p. 3; Findings and Order, June 18, 2021, p. 1.) In consequence, we do not read the order that applicant "take nothing by reason of the claim in this case" as precluding applicant from

proceeding against Quality Plumbing by way of its insurers GuideOne Mutual Insurance and Argonaut Insurance.

It follows that the F&O's determination that the June 18, 2021 findings and order does not absolve Quality Plumbing from potential liability for workers' compensation benefits and permits applicant to litigate his cumulative injury claim against Quality Plumbing was issued not in error but to clarify the record pursuant to the requirements of Labor Code section 5500.5(c).

Furthermore, contrary to defendant's reading of Labor Code section 5500.5(c), nothing in that statute's language or legislative history suggests that an applicant's election thereunder may preclude litigation against any other potentially liable employer.

Specifically, Labor Code section 5500.5 contains no provision barring an applicant from pursuing a claim against one or more potentially liable employers in the event that his or her claim against an elected-against employer is unsuccessful. And the purpose of the election procedure is to mitigate the delay, expense, and hardship that an applicant may incur where there are multiple employers or insurance carriers involved. (See *Rex Club v. Workers' Comp. Appeals Bd. (Oakley-Clyburn)* (1997) 53 Cal. App. 4th 1465 [62 Cal. Rptr. 2d 393, 62 Cal. Comp. Cases 441].)

Accordingly, we are unable to discern support for defendants' contention that the WCJ lacks authority under Labor Code section 5500.5 to adjudicate applicant's claim against Quality Plumbing.

Next, we address defendants' contention that the F&O violates the doctrines of res judicata and collateral estoppel.

Res judicata, or claim preclusion, prevents re-litigation of the same cause of action in a second suit between the same parties or parties in privity with them. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal. 4th 888.) Collateral estoppel, or issue preclusion, precludes re-litigation of issues argued and decided in prior proceedings. (*Id.*)

Here, as the WCJ states in the Report, applicant's claim against defendants has not previously been adjudicated and no prior proceedings have determined any issue by and between applicant and defendants. (Report, pp. 4-5.) Thus there are no grounds for application of the doctrines of res judicata and collateral estoppel.

In addition, a decision or settlement in the case in chief between the applicant and the elected-against insurer is not res judicata, and issues of liability among the defendants are decided de novo. (See *Greenwald v. Carey Dist. Co.* (1981) 46 Cal.Comp.Cases 703, 708 (Appeals Bd.

en banc); Lab. Code § 5500(c) (providing that proof of liability against any one of the potentially liable employers shall result in a joint and several award as "as against any two or more employers who may be held liable for compensation benefits," but that the "liability of such employer shall not be determined until supplemental proceedings are instituted ... [during which] the right of the employer to full and complete examination or cross-examination shall not be restricted".)

Accordingly, we are unable to discern support for defendants' contention that applicant's claim is barred by the doctrines of res judicata and collateral estoppel.

Accordingly, as our Decision After Reconsideration, we will affirm the Findings and Order issued on February 24, 2022.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order issued on February 24, 2022 is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**NOVEMBER 19, 2024**

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

**LUIS HERNANDEZ  
RUCKA O'BOYLE MONTEREY  
GUIDEONE LEGAL  
LAUGHLIN, FALBO, LEVY & MORESI  
HAWORTH, BRADSHAW**

**SRO/cs**

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