WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE CANDIDO, *Applicant*

vs.

CALIFORNIA PIZZA KITCHEN; AMERICAN HOME ASSURANCE COMPANY; administered by AIG CLAIMS, INC.; ZURICH AMERICAN INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ1680248 (LAO 0799493)
Los Angeles District Office

OPINION AND DECISION AFTER 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.

Defendant Zurich American Insurance Company (Zurich) seeks reconsideration of the Findings and Award (F&A) issued on September 22, 2022 by a workers' compensation arbitrator (WCA) wherein the WCA found, in relevant part, that the Petition for Contribution filed by American Home Assurance Company (American) on June 23, 2010, placed Zurich on notice that American "would be claiming contribution on all future benefits" and while the Petition for Contribution was untimely as to the F&A issued on January 2, 2007[1], it was timely as to the Stipulations and Award of October 11, 2012. The WCA further held that the First Amended Petition for Contribution filed by American on May 31, 2017, was timely filed as to the Compromise and Release Agreement between applicant and American, which was approved via an Order Approving Compromise and Release (OACR) on May 23, 2017.

Zurich contends that the WCA erred in holding that medical care following a finding of maximum medical improvement/permanent and stationary (MMI/P&S) status or issuance of an OACR qualifies as a new species of benefits. (Petition for Reconsideration (Petition), p. 3.) Zurich

[1] The date of January 2, 2007 is presumed to be typo referencing an F&A executed by the WCJ on January 12, 2007 and served on January 16, 2007.

further contends that American's original Petition for Contribution, filed on June 23, 2010, is untimely and therefore not applicable to the Stipulation and Award of October 11, 2012, or the Compromise and Release Agreement approved via OACR on May 31, 2017.

We have received an Answer from American. The WCA prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the contents of the Petition, Answer, and Report, and we have reviewed the record in this matter. For the reasons set forth by the WCA in the Report which we adopt and incorporate, as well as the reasons discussed below, we will affirm the WCA's decision.

FACTS

Per the undisputed facts as set forth in the WCA's F&A and Report, applicant sustained three industrial injuries while employed by defendant California Pizza Kitchen (CPK)—a specific injury and two separate periods of continuous trauma. (F&A, p. 2.)

The original claim began as a June 16, 1992 specific injury arising out of and occurring in the course of employment (AOE/COE) to the right wrist. A claim was also filed for an alleged cumulative injury from February 1990 through June 1992 to the bilateral hands, shoulders, and knees, back, and internal systems (rheumatoid arthritis and fibromyalgia). (*Ibid*.)

In July of 1995, applicant and Hartford Underwriters Insurance Company (Hartford) entered into Stipulations with Request for Award for twenty (20) percent permanent disability to the right wrist resulting from the June 16, 1992 specific injury and the cumulative injury of February 1990 through June 1992. The parties further stipulated to dismiss applicant's injury claims to additional body parts for the same period. (Report, p. 7.)

Thereafter, applicant went off work for approximately two years then returned to his usual and customary duties with CPK from 1994 until September 6, 2001. (Opinion on Decision (OOD), p. 21.)

Following his return to work, applicant filed an Application for Adjudication of Claim alleging that while employed as a cook by CPK during the period from approximately June 1, 1992 through September 6, 2001, he sustained injury AOE/COE to the bilateral knees, hands, and shoulders, back, and internal system (rheumatoid arthritis and fibromyalgia). (Joint Exhibit 2, p.

2.) At the time, CPK's workers' compensation carrier was American, which was adjusted by AIG Claims Services (AIG). (*Ibid*.)

The case ultimately proceeded to trial on the issues of new and further injury, temporary disability, and further medical treatment, and on January 16, 2007, the WCJ issued an F&A, which held, in relevant part, that applicant sustained injury AOE/COE to the bilateral knees, hands, and shoulders, back, and internal system (rheumatoid arthritis and fibromyalgia). The WCJ awarded further medical treatment and temporary total disability from September 7, 2001 through the date of the January 16, 2007 F&A, and continuing. (Joint Exhibit 1.)

On June 23, 2010, American filed a Petition for Contribution seeking contribution from Insurance Company of the State of Pennsylvania, Hartford, and Zurich with respect to this claim.

On October 11, 2012, applicant and American entered into a Stipulated Award for resumption of temporary disability as well as payment of $37,343.50 less attorney's fees for retroactive temporary disability relative to the first cumulative injury. (American's Exhibit 1.)

On May 23, 2017, a WCJ approved a Compromise and Release Agreement entered into between applicant and American. (Joint Exhibit 3.)

On May 31, 2017, American filed its First Amended Petition for Contribution seeking contribution and/or reimbursement from Zurich with respect to the Compromise and Release Agreement.

On July 24, 2020, American filed a Declaration of Readiness to Proceed to a Status Conference on the issue of contribution/reimbursement.

Thereafter, the parties proceeded to arbitration, and on September 22, 2022, the WCA issued an F&A which held, in relevant part, that the date of injury pursuant to Labor Code[2] section 5412 is September 7, 2001; per section 5500.5, the liability period is September 6, 2000 through September 6, 2001; American provided workers' compensation coverage for CPK from September 6, 2000 through May 24, 2001 for a period of 260 days or 71% and Zurich provided coverage from May 24, 2001 through September 6, 2001 for a period of 105 days or 29%; the June 23, 2010 Petition for Contribution filed by American was untimely as to the January 2 [sic], 2007 F&A but timely as to the October 1, 2012[3] Stipulation and Award; and the May 23, 2017 First Amended Petition for Contribution filed by American was timely as to the May 31, 2017 OACR. The WCA

[2] All further statutory references are to the Labor Code unless otherwise stated.

ultimately awarded contribution of 29% of the total amount of the C&R as a "new and distinct benefit different from that awarded in the Findings and Award in 2007."

It is from this F&A that Zurich seeks reconsideration.

DISCUSSION

I.

Turning now to the merits of the Petition, section 5500.5(c) addresses the issue of cumulative injury with multiple employers or insurance carriers. It provides, in relevant part that:

> 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.

Pursuant to section 5500.5(c) then, 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.* (1946) 29 Cal.2d 79, 82 [11 Cal.Comp.Cases 226].) An applicant may also choose not to elect against a particular defendant and proceed against all insurers or employers. (*Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.* (1997) 60 Cal.App.4th 548, 554-556 [62 Cal.Comp.Cases 1661].) However, if an applicant elects to proceed against a single insurer, the insurer is entitled under 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 (Appeals Bd. en banc).)

With respect to contribution proceedings, in order to ascribe liability to the correct carriers, the liability period for a cumulative injury must be established pursuant to section 5500.5(a) which states, in relevant part, that "liability for occupational disease or cumulative injury claims … shall

be limited to those employers who employed the employee during a period of [one year] immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first."

Section 5412 states, in relevant part, that the date of injury for cumulative injury and occupational disease cases is the "date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.) Thus, to determine the date of applicant's cumulative injury, there must exist a concurrence of disability and knowledge that it was caused by employment. Disability means either compensable temporary disability or permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579].) Pursuant to *City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53], "[w]hether an employee knew or should have known his disability was industrially caused is a question of fact." The employer has the burden of proving that the employee knew or should have known their disability was industrially caused. (*Johnson*, *supra*, at p. 471, citing *Chambers v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 556, 559 [33 Cal.Comp.Cases 722].) That burden is not met merely by showing the employee knew they had some symptoms. (*Ibid*.) Generally speaking, an employee is not charged with knowledge that their disability is job-related without medical advice to that effect, unless given "the nature of the disability and the applicant's training, intelligence and qualifications," they should have recognized the relationship. (*Johnson*, *supra*, at p. 473; *Newton v. Workers' Comp. Appeals Bd.* (1993) 17 Cal.App.4th 147, 156, fn. 16 [58 Cal.Comp.Cases 395].) "The medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*Peter Kiewit Sons v. Industrial Acc. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188].) "Thus, the determination of knowledge is an inherently fact-based inquiry, requiring an individualized analysis in each case." (*Raya v. County of Riverside* (2024) 89 Cal.Comp.Cases 993, 1006.)

Here, the WCA determined that for the cumulative injury of June 1, 1992 through September 6, 2001, the section 5412 injury date is September 7, 2001, and the last date of injurious exposure is September 6, 2001. (F&A, p. 3.) Accordingly, the last year of injurious exposure for

the purposes of section 5500.5(a) is the period from September 6, 2000 through September 6, 2001. (*Ibid*.) These dates are not in dispute. Further, as stipulated by the parties, American provided workers' compensation coverage from May 9, 2000 through May 24, 2001 and Zurich provided coverage from May 24, 2001 through September 6, 2001. (*Id*. at p. 9.) Taking these coverage periods into account, the WCA held that American had 260 days of coverage or 71% liability and Zurich had 105 days of coverage or 29% liability. (*Id*. at p. 6.) These percentages are also not in dispute. Based upon these percentages, the WCA found Zurich responsible for 29% of the Compromise and Release Agreement and 29% of the October 11, 2012 Stipulated Award. (*Id*. at p. 7.)

Zurich contends that American's Petition for Contribution filed on June 23, 2010 is untimely and therefore not applicable to either the Stipulation and Award of October 11, 2012 or the Compromise and Release Agreement approved via OACR on May 31, 2017. As noted above, in his F&A issued on September 22, 2022, the WCA held that the original Petition for Contribution filed on June 23, 2010 placed Zurich on notice that American "would be claiming contribution on all future benefits." We agree and therefore conclude that the Petition for Contribution was timely as to both the October 11, 2012 Stipulation and Award and the Compromise and Release Agreement approved via OACR on May 31, 2017. We also agree that the First Amended Petition for Contribution filed by American on May 31, 2017 was timely as to the Compromise and Release Agreement.

Zurich further argues that medical care following a finding of MMI/P&S status or issuance of an OACR does not qualify as a new species of benefits. (Petition, p. 3.) We disagree. Whereas incurred medical treatment expenses require ongoing reimbursement, future medical expenses typically require a one-time lump sum payment for purposes of reimbursement and/contribution. Particularly in settlements via Compromise and Release, the issuance of an OACR is akin to an award. Such awards are subject to contribution proceedings under section 5500.5(e), which states, in relevant part, that:

> At any time within one year after the appeals board has made an award for compensation benefits in connection with an occupational disease or cumulative injury, any employer held liable under the award may institute proceedings before the appeals board for the purpose of determining an apportionment of liability or right of contribution. The proceeding shall not diminish, restrict, or alter in any way the recovery previously allowed the employee or his or her dependents, but shall be limited to a determination of the respective contribution rights, interest or

> liabilities of all the employers joined in the proceeding, either initially or supplementally; provided, however, if the appeals board finds on supplemental proceedings for the purpose of determining an apportionment of liability or of a right of contribution that an employer previously held liable in fact has no liability, it may dismiss the employer and amend its original award in such manner as may be required.

We agree with the WCA that pursuant to the case of *Rex Club v. Workers' Comp. Appeals Bd.* (*Oakley-Clyburn*) (1997) 53 Cal.App.4th 1465 [62 Cal.Comp.Cases 441, the one-year statute of limitations outlined under section 5500.5(e) applies to any award of compensation benefits, not only final awards. Thus, even if American was untimely with respect to the original F&A issued on January 16, 2007, the existence of that F&A has no bearing on American's reimbursement and/or contribution rights with respect to the Compromise and Release Agreement approved via OACR on May 31, 2017. As outlined above, American timely sought reimbursement and/or contribution for the Compromise and Release Agreement via their First Amended Petition for Contribution filed on the same date.

Accordingly, we affirm the September 22, 2022 decision by the WCA.

For the foregoing reasons,

IT IS ORDERED that as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Findings and Award issued by the workers' compensation arbitrator on September 22, 2022, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 6, 2026

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

JOSE CANDIDO
KEGEL, TOBIN & TRUCE, APC
LAUGHLIN, FALBO, LEVY & MORESI
RO & YOU LLP
MARK L. KAHN, ARBITRATOR

RL/*cs*

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

RECOMMENDATION ON RECONSIDERATION

I.

INTRODUCTION

The above-captioned was set for Arbitration on June 23, 2022, before Mark L. Kahn, Arbitrator, on the issue of contribution, the parties reached Stipulations, Issues and admitted Exhibits into evidence and agreed to submit the matter on the present record.

On September 22, 2022, the Arbitrator issued the Findings and Award as set forth below:

FINDINGS

1. The Arbitrator found that Zurich American Insurance Company did not waive their right to raise date of injury, pursuant to Labor Code §5412, or liability period, pursuant to Labor Code §5412, in these contribution proceedings.

2. The Arbitrator found that the applicant sustained a specific injury and two separate periods of continuous traumas. The Arbitrator finds the applicant sustained a specific injury while employed by California Pizza Kitchen as a cook on June 16, 1992. The Arbitrator finds the applicant sustained a first continuous trauma injury during the period February 1990 through June 1992, while employed by California Pizza Kitchen as a cook resulting in a Stipulations with Request for Award for 20% disability for an injury to the right wrist based on the aggravation of the applicant's underlying degenerative changes in the right wrist and traumatic arthritis to the right wrist.

The Arbitrator found the applicant sustained a second cumulative trauma injury from June 1, 1992 through September 6, 2001, while applicant was employed as a cook for California Pizza Kitchen, resulting in injury to various body parts aggravating applicant's pre-existing rheumatoid arthritis and the rheumatoid arthritis caused fibromyalgia.

3. The Arbitrator found that the date of injury, pursuant to Labor Code §5412, is 18 September 7, 2001, for the second continuous trauma injury.

4. The Arbitrator found that the period of injurious exposure is June 1, 1992 through September 6, 2001, while employed by California Pizza Kitchen as a cook for his injury consisting of injury to his bilateral hands, bilateral knees, bilateral shoulders, back, internal system rheumatoid arthritis and fibromyalgia.

5. The Arbitrator found the period of injurious exposure for the rheumatoid arthritis being permanently aggravated by applicant's employment at California Pizza Kitchen and the rheumatoid arthritis causing applicant to develop fibromyalgia and diabetes associated with Prednisone use for his primary conditions of rheumatoid arthritis, is the period 1994 through 27 September 6, 2001.

6. The Arbitrator found that the date of injury, pursuant to Labor Code §5412, is September 7, 2001, and the last injurious exposure is found to be September 6, 2001.

7. The Arbitrator found that the date of injury, pursuant to Labor Code §5500.5, is September 6, 2000 through September 6, 2001.

8. The Arbitrator found that American Home Assurance Company had coverage for the liability period from September 6, 2000 through May 24, 2001 or 260 days or 71% of the liability. Zurich American Insurance Company has coverage from May 24, 2001 through September 6, 2001 or 105 days or 29% of the liability.

9. The Arbitrator found that American Home Assurance Company first filed a Petition for Contribution on June 23, 2010.

10. The Arbitrator found that the Petition of Contribution filed on June 23, 2010 was untimely as to the Findings and Award of January 12, 2007, as American Home Assurance Company had to file the Petition for Contribution by January 12, 2008, and the Petition was not filed until June 23, 2010, making it not timely filed.

11. The Arbitrator found that on October 11, 2012, American Home Assurance Company and the applicant agreed on a Stipulation and Award whereby defendant agreed to resume temporary disability beginning October 11, 2012.

12. The Arbitrator found that the Petition for Contribution filed on June 23, 2010 by American Home Assurance Company put Zurich American Insurance Company on notice that American Home Assurance Company would be claiming contribution on all future benefits and, therefore, the Petition filed on June 23, 2010, in the opinion of the Arbitrator, can be filed prior to the payment of benefits and, therefore, the Petition filed on June 23, 2010 would be timely as to the Stipulated Award of October 1, 2012.

13. The Arbitrator found that on March 31, 2017, applicant and defendant, American Home Assurance Company, entered into a Compromise and Release Agreement settling case ADJ1680248, a continuous trauma injury from June 1992 through September 6, 2001, while

applicant was employed as a cook by California Pizza Kitchen with injury to applicant's back, bilateral knees, bilateral shoulders, bilateral hands, diabetes, vision, rheumatoid arthritis, jaw, fibromyalgia, psyche, hernia, bilateral elbows, fingers, bilateral ankles, bilateral feet, bilateral hips, toes, hypertension and internal. The Compromise and Release was in the amount of $1,115,000, less $81,336 as seed money for Medicare Set Aside to applicant, $62,947 to applicant as front money cash, $22,053 to the Los Angeles County Child Support per agreement, with $539,445.06 to purchase an annuity for allocation for Medicare Set Aside per the structure, $241,968.94 to purchase an annuity for non-covered expenses per the structure and $167,250 requested as applicant's attorney fee. Defendant agreed to adjust or litigate or pay liens of record. The Compromise and Release Agreement was approved on May 23, 2017.

14. The Arbitrator found that on May 31, 2017, American Home Assurance Company, administered by AIG Claims, Inc., filed a First Amended Petition for Contribution. The Petition for Contribution indicated that the parties entered into a Compromise and Release fully settling all claims by the applicant for benefits arising from this case. The Compromise and Release was approved by an Order issued on May 23, 2017. As a result of that, defendant will submit an accounting to Zurich American Insurance Company for the amount claimed in contribution. American Home Assurance Company indicated they would, according to proof, seek a proportional share of total amounts paid by American Home Assurance Company. A Proof of Service was attached to the First Amended Petition for Contribution. The Proof of Service shows service on the WCAB and Zurich American Insurance Company, among others. The Arbitrator finds that the Proof of Service attached to the Petition for Contribution establishes that the Petition for Contribution was filed on the Appeals Board and served on Zurich American Insurance Company on May 31, 2017.

15. The Arbitrator found the Amended Petition for Contribution filed on May 31, 2017, having been filed and served within one year of the Order Approving Compromise and Release on 24 May 31, 2017, was timely filed.

16. The Arbitrator found that the facts of this case establish that American Home Assurance Company did not file a timely Petition for Contribution from the Findings and Award of January 12, 2007. The facts establish that American Home Assurance Company did file a timely Petition for Contribution from the Stipulated Award of October 11, 2012. The facts establish that

American Home Assurance Company timely filed a Petition for Contribution from the Order Approving Compromise and Release dated May 31, 2017.

17. The Arbitrator found that where a supplemental Award is issued awarding a new and distinct class of benefits, a Petition for Contribution filed within one year of the supplemental Award is timely as to that Award, even though more than one year has passed since the issuance of the original Award. (*MB. Neves Trucking Employee Benefits Insurance Company, Petitioners v. Workers' Compensation Appeals Board, Gold State Express, Zenith Insurance Company, Larry Homan Respondents*).

18. The Arbitrator found that because the original Findings and Award of2007 did not award permanent disability and the Compromise and Release Agreement settled permanent disability, the Compromise and Release Agreement is for a new and different benefit.

19. The Arbitrator found that medical treatment to cure or relieve the injured worker from the effects of injury is different than lifetime medical treatment awarded after the applicant i4 is MMI. The Arbitrator found that lifetime medical treatment and medical treatment to cure or relieve the effects of the injury are not the same benefit. The Arbitrator finds that converting further medical treatment into a lump sum by way of Compromise and Release is also a new and distinct benefit.

20. The Arbitrator found that the Compromise and Release settled future medical treatment and permanent disability because both are new and distinct benefits. Contribution is allowed even though there was no timely Petition from the original Award in 2007.

21. The Arbitrator found that the failure to timely file a Petition for Contribution from the 2007 Award bars any recovery for temporary disability from the date of that Award to the second Stipulation which awarded new temporary disability which is a new and distinct benefit, in the opinion the Arbitrator.

22. The Arbitrator found that all medical treatment prior to the Compromise and Release Agreement being approved cannot be recovered in contribution by the failure to timely file the Petition for Contribution from the Findings and Award in 2007.

23. The Arbitrator found that contribution is allowed to 29% of the total amount of the Compromise and Release Agreement as the Compromise and Release Agreement is a new and distinct benefit different from that awarded in the Findings and Award in 2007.

24. The Arbitrator found, based on the medical report of the Agreed Medical Evaluator, the value of future medical treatment, the MSA and approval by CMS and the fact the AME found applicant's rheumatoid arthritis to various body parts was aggravated by his employment at California Pizza Kitchen and applicant's fibromyalgia was aggravated by his employment at California Pizza Kitchen, the Arbitrator finds the amount of the settlement is reasonable.

25. The Arbitrator found that American Home Assurance Company did not fail to file a timely Petition for Contribution against Hartford because Hartford had no liability for the second different continuous trauma injury.

26. The Arbitrator, based on the findings above, found that Zurich American Insurance Company is responsible for 29% of the amount of the Compromise and Release Agreement and 29% of the Stipulated Award of temporary disability.

27. The Arbitrator found that Zurich American Insurance Company is entitled to a credit for the sums they paid to the applicant in an amount to be adjusted between the parties with the Arbitrator retaining jurisdiction in case of a dispute. That credit is limited by the fact they are responsible for 29% of that amount paid and, therefore, the credit is 71% of the amount that they paid.

28. The Arbitrator further found that the Petition for Contribution filed by American Home Assurance Company is granted as set forth above in an amount to be adjusted between the parties, based on the findings in this decision, with the Arbitrator retaining jurisdiction in case of a dispute.

AWARD

Award was made in favor of American Home Assurance Company for contribution against Zurich American Insurance Company in an amount to be adjusted between the parties, based on the findings above in this decision, with the Arbitrator retaining jurisdiction in case of a dispute.

On October 12, 2022, defendant, Zurich American Insurance Company, administered by Zurich Los Angeles, filed a Petition for Reconsideration on the following grounds:

1. The Arbitrator erred in finding that medical care following a Compromise and Release or a Maximum Medical Improvement finding qualifies as a new and distinct specie of benefits.

2. The Arbitrator erred in finding that a prior Petition for Contribution may be applicable to subsequent Awards and Orders.

3. The petitioner contends that the Petition for Contribution is untimely. Even if the Petition was properly filed, Petitioner contends that any contribution must be limited to any new and distinct specie of benefits.

II.

FACTS FOUND BY ARBITRATOR BASED ON ADMITTED EVIDENCE

The applicant was employed as a cook for California Pizza Kitchen from February 1990 through September 6, 2001.

The applicant continued to work until June 25, 1992, when he had to stop work due to the pam. The applicant was off work for approximately two years, returning in 1994 to his usual and customary duties.

The applicant, on July 14, 1995, entered into a Stipulations with Request for Award for 20% permanent disability for the right wrist for an injury occurring on June 16, 1992, and during the period February 1990 through June 1992, while applicant was employed by California Pizza Kitchen. An Award was issued by the Appeals Board on July 14, 1995. Injury was found to the right wrist. It was also stipulated that applicant's claim of injury to the psyche, internal, fingers, arms, shoulders, neck, spine, and legs had been dismissed.

The applicant continued to be employed by California Pizza Kitchen from 1994 until September 6, 2001.

The applicant, Jose Candido Diaz, filed an Application for Adjudication of Claim alleging a cumulative trauma injury from June 1, 1992 through September 6, 2001, while applicant was employed as a cook for California Pizza Kitchen.

Insurance coverage for California Pizza Kitchen was as follows:

American Home Assurance Company, administered by AIG Claims, Inc., had insurance coverage for the period May 9, 2000 through May 24, 2001.

Zurich American Insurance Company had insurance coverage for the period from May 24, 2001 through September 6, 2001.

On January 12 2007 a Findings and Award issued against elected defendant American Home Assurance Company administered by AIG Claims, Inc. finding applicant sustained a cumulative trauma injury from approximately June 1, 1992 through September 6, 2001 to applicant's bilateral hands, bilateral knees, bilateral shoulders, back, internal system (rheumatoid arthritis and fibromyalgia) arising out of and occurring in the course of employment as a cook by

California Pizza Kitchen, workers' compensation carrier was American Home Assurance Company, administered by AIG Claims, Inc.

The Findings and Award awarded temporary disability beginning September 7, 2001 to present and continuing.

The Findings and Award found future medical treatment was required to cure or relieve the injured worker from the effects of the injury as set forth in the reports by the Agreed Medical Evaluator, Stuart Silverman, M.D.

Based on the finding on temporary disability, the Employment Development Department was entitled to recover the sum of $17,160 from the temporary disability monies awarded to the applicant.

The defendant was allowed credit against temporary disability owed to the applicant for monies awarded to the Employment Development Department.

The reasonable value of applicant's attorney was found to be 15% of the retroactive temporary disability benefits obtained through the efforts of applicant's attorney and awarded less the offset for the monies awarded to the Employment Development Department.

On February 5, 2007, defendant, American Home Assurance Company, filed a Petition for Reconsideration on various grounds from the Findings and Award that issued on January 12, 2007.

The Workers' Compensation Judge issued a Report and Recommendation Petition for Reconsideration recommending reconsideration be denied.

On March 13, 2007, the Workers' Compensation Appeals Board issued an Order Denying Reconsideration.

On June 23, 2010, American Home Assurance Company filed a Petition for Contribution. The Petition for Contribution is dated June 23, 2010. The Petition for Contribution, according to the date stamp, was received by the Appeals Board on June 28, 2010.

The Petition for Contribution indicates it is for the Findings and Award of January 12, 2007. The Petition also indicates that American Home Assurance Company seeks contribution from Insurance Company of the State of Pennsylvania Hartford and Zurich American Insurance Company in amount undetermined currently. The amount of contribution will be specified upon closure of the case.

On October 11, 2012, American Home Assurance Company and the applicant agreed on a Stipulations with Request for Award whereby defendant agreed to resume temporary disability beginning October 11, 2012.

Applicant agreed to accept $37,343.50 to resolve all accrued claims of temporary total disability to date.

Defendant was to convert permanent disability advances of $22,240 as of October 2, 2012 to temporary total disability.

Defendant was to pay that amount of $37,343.50, less attorney fees of 15%, or $5,226.52, less permanent disability advances through October 2, 2012 of $22,240, less attorney fees of $2,500. Net to the applicant will be $7,376.78.

Net permanent disability advances after this Award would be zero, unless defendant makes additional permanent disability advances.

On March 31, 2017, applicant and defendant, American Horne Assurance Company, entered into a Compromise and Release Agreement settling case ADJ1680248, a continuous trauma injury from June 1992 through September 6, 2001, while applicant was employed as a cook by California Pizza Kitchen with injury to applicant's back, bilateral knees, bilateral shoulders, bilateral hands, diabetes, vision, rheumatoid arthritis, jaw, fibromyalgia, psyche, hernia, bilateral elbows, fingers, bilateral ankles, bilateral feet, bilateral hips, toes, hypertension, and internal.

The Compromise and Release was in the settlement amount of$1,115,000, less $81,336 as seed money for Medicare Set aside to applicant, $62,947 to applicant as front money cash, $22,053 to the Los Angeles County Child Support per agreement, with $539,445.06 to purchase an annuity for allocation for Medicare Set Aside per the structure, $241,968.94 to purchase an annuity for non-covered expenses per the structure and $167,250 requested as applicant's attorney fee.

Defendant agreed to adjust or litigate or pay liens of record.

The Compromise and Release Agreement was approved by the Appeals Board on May 23, 10 2017.

All amounts above were subtracted from the $1,115,000 gross Compromise and Release amount.

On May 31, 2017, American Home Assurance Company, administered by AIG Claims, Inc., filed a First Amended Petition for Contribution.

The Petition for Contribution indicated that the parties entered into a Compromise and Release fully settling all claims by the applicant for benefits arising from this case. The Compromise and Release was approved by the Appeal Board and an Order issued on May 23, 2017. Following the filing of a First Amended Petition for Reconsideration, defendant, American Home Assurance Company will submit an accounting to Zurich American Insurance Company. American Home Assurance Company will seek contribution against Zurich American Insurance Company in an amount which will be determined according to proof. They will seek a proportional share of total amounts paid by American Home Assurance Company. A Proof of Service was attached to the First Amended Petition for Contribution. The Proof of Service shows service on the WCAB and Zurich American Insurance Company, among others.

On May 6, 2022, American Home Assurance Company filed an Amended Petition for Contribution requesting contribution/reimbursement from Zurich American Insurance Company for 29% of benefits paid. Attached to the Amended Petition for Contribution was a benefit printout.

The above-captioned was set for Arbitration on June 23, 2022, before Mark L. Kahn, Arbitrator, on the issue of contribution and the parties reached Stipulations, Issues and admitted Exhibits into evidence and agreed to submit the matter on the present record.

On September 22, 2022, the Arbitrator issued the Findings and Award which is now subject to the Petition for Reconsideration filed by Zurich American Insurance Company on the grounds set forth above.

III.

DISCUSSION

A.

Findings made by Arbitrator on issues submitted at Arbitration and not subject to defendant, Zurich American Insurance Company's, Petition for Reconsideration.

1.

The Arbitrator found that Zurich American Insurance Company did not waive their right to dispute date of injury pursuant to Labor Code §5412.

This issue is not a subject of the Petition for Reconsideration by defendant Zurich American Insurance Company.

2.

The Arbitrator found two separate continuous trauma injuries and a specific injury.

The Arbitrator then found that the applicant sustained an industrial specific injury on June 16, 1992 to the applicant's right wrist.

The Arbitrator found that the applicant sustained a continuous trauma injury while employed as a cook for California Pizza Kitchen from February 1990 through June 16, 1992, to the right wrist.

Both of these cases were settled on July 14, 1995 by way of a Stipulation with Request for Award for 20% permanent disability for the right wrist for an injury occurring on June 16, 1992, and during the period February 1990 through June 1992, while applicant was employed by California Pizza Kitchen. An Award was issued by the Appeals Board on July 14, 1995. Injury was found to the right wrist. It was also stipulated that applicant's claim of injury to the psyche, internal, fingers, arms, shoulders, neck, spine, and legs had been dismissed.

The applicant was off work for approximately two years, returning in 1994 to his usual and customary duties.

Following the entering into the Stipulations with Request for Award, the applicant returned to work and continued to be employed by California Pizza Kitchen from 1994 until September 6, 2001. The applicant then was employed by California Pizza Kitchen from 1994 until September 6, 2001.

The Arbitrator found the applicant sustained a second continuous trauma injury from 1994 through September 6, 2001, resulting in a permanent aggravation of applicant's non-industrial rheumatoid arthritis to multiple body parts while working as a cook for California Pizza Kitchen from when he returned to work for California Pizza Kitchen following the specific injury and first continuous trauma injury.

These issues are not a subject of the Petition for Reconsideration by defendant, Zurich American Insurance Company.

3.

The Arbitrator found that the date of injury for the second continuous trauma, pursuant to Labor Code §5412, was September 7, 2001.

This issue is not a subject of the Petition for Reconsideration by defendant, Zurich American Insurance Company.

4.

The Arbitrator found that the liability period, pursuant to Labor Code §5500.5, was September 6, 2000 through September 6, 2001 for the second continuous trauma injury, based on the fact September 6, 2001 was the last date of injurious exposure, which was earlier than the date of injury, pursuant to Labor Code §5412.

This issue is not a subject of the Petition for Reconsideration by defendant, Zurich American Insurance Company.

5.

The Arbitrator calculated liability between defendants for the liability period, pursuant to Labor Code §55005, of September 6, 2000 through September 6, 2001 as follows:

American Home Assurance Company had coverage for the liability period form September 6, 2000 through May 24, 2001 or 260 days or 71% of the liability.

Zurich American Insurance Company had coverage from May 24, 2001 through September 6, 2001 or 105 days or 29% of the liability.

This issue is not a subject of the Petition for Reconsideration by defendant, Zurich American Insurance Company.

6.

The Arbitrator found that Zurich American Insurance Company did not meet their burden of proof that the total amount of the Compromjse and Release was unteasonable.

The Arbitrator found that the amount of the settlement was reasonable.

This issue is not a subject of the Petition for Reconsideration by defendant, Zurich American Insurance Company.

7.

Zurich American Insurance Company argued that any reimbursement made by Zurich American Insurance Company must be diminished by any potential contribution from Hartford.

Hartford had insurance coverage from January 1, 1992 through April 1, 1993, during which applicant suffered severe injuries to his right wrist among other body parts. The injuries resulted in wrist surgery, and a Joint Stipulations with Request for Award which did note 20% permanent disability.

As a result, it was necessary that American Home Assurance Company include Hartford in any Petition for Contribution for apportionment considerations.

The Arbitrator found, based on Labor Code §5500.5, a liability period of September 6, 2000 through September 6, 2001.

Therefore, Hartford had no liability for this separate continuous trauma.

The Arbitrator finds that Hartford was not involved in this case and no Petition for Contribution should be filed against them.

The Arbitrator finds American Home Assurance Company did not fail to file a timely Petition for Contribution against Hartford because Hartford had no liability for the second different continuous trauma injury.

This issue is not a subject of the Petition for Reconsideration by defendant, Zurich American Insurance Company.

B.

Timeliness of Petition for Contribution filed by American Home Assurance Insurance against Zurich American Insurance Company.

The Arbitrator made the following decision on the issue of the timeliness of the Petition for Contribution filed by American Home Assurance Company, administered by AIG Claims, Inc., against Zurich American Insurance Company.

1.

On the issue of did defendant, American Home Assurance Company, file a timely Petition for Contribution against Zurich American Insurance Company from the Findings and Award of January 12, 2007, the Arbitrator found the following:

On January 12 2007 a Findings and Award issued against elected defendant American Home Assurance Company administered by A1G Claims, Inc. finding applicant sustained a cumulative trauma injury from approximately June 1, 1992 through September 6, 2001 to applicant's bilateral hands, bilateral knees, bilateral shoulders, back, internal system (rheumatoid arthritis and fibromyalgia) arising out of and occurring during the course of employment as a cook by California Pizza Kitchen, workers' compensation carrier was American Horne Assurance Company, administered by AIG Claims, Inc.The Findings and Award awarded temporary disability beginning September 7, 2001, to present and continuing. Further medical treatment was found required to cure or relieve the injured worker from the effects of the injury as prescribed by the Agreed Medical Evaluator, Stuart Silverman, M.D. Based on the finding on temporary

disability, the Employment Development Department was entitled to recover the sum of $17,160 from the temporary disability monies awarded to the applicant.

On February 5, 2007, defendant, American Home Assurance Company, filed a Petition for Reconsideration from the Findings and Award that issued on January 12, 2007.

On March 13, 2007, the Workers' Compensation Appeals Board issued an Order Denying Reconsideration.

The time to file a Petition fm Contribution is one year from the issuance of the Findings and Award and the time is not extended by the reconsideration process.

Pursuant to Labor Code §5500.5(e), a Petition for Contribution shall be filed any time within one year after the Appeals Board has made an Award for compensation benefits in connection with an occupational disease or cumulative injury.

Pursuant to the case of *Republic Indemnity Co. of America v. WCAB (Johnson)* (1981) 46 CCC 88, the time to file is not extended by the reconsideration process.

Therefore, American Home Assurance Company had until January 12, 2008 to file a Petition for Contribution from the Findings and Award of January 12, 2007.

On June 23, 2010, American Home Assurance Company filed a Petition for Contribution.

The Petition for Contribution is dated June 23, 2010. The Petition for Contribution, according to the date stamp, was received by the Appeals Board on June 28, 2010.

The Petition for Contribution indicates it is for the Findings and Award of January 12, 20 2007.

The Petition also indicates that American Home Assurance Company seeks contribution from Insurance Company of the State of Pennsylvania, Hartford and Zurich American Insurance Company in amount undetermined currently. The amount of contribution will be specified upon closure of the case.

Based on these facts, the Arbitrator found as follows:

On January 12, 2007, a Findings and Award issued against elected defendant, American Home Assurance Company, administered by AIG Claims, Inc., finding injury, awarding temporary disability and need for medical treatment.

American Home Assurance Company first filed a Petition for Contribution on June 23, 2010, from that Findings and Award.

The Arbitrator found that the Petition of Contribution was untimely as to the Findings and Award of January 12, 2007, as American Home Assurance Company had to file the Petition for Contribution by January 12, 2008, and the Petition was not filed until June 23, 2010, making it not timely filed.

2.

On October 11, 2012, American Home Assurance Company and the applicant agreed on a Stipulation and Award whereby defendant agreed to resume temporary disability beginning October 11, 2012.

In the opinion of the Arbitrator, the Petition for Contribution filed on June 23 2010 by American Home Assurance Company put Zurich American Insurance Company on notice that American Home Assurance Company would be claiming contribution on all future benefits and, therefore, the Petition filed on June 23, 2010, in the opinion of the Arbitrator, can be filed prior to the payment of benefits and, therefore, the Petition filed on June 23, 2010 would be timely as to the Stipulated Award of October 11, 2012.

The Petition for Contribution indicates it is filed regarding the January 12, 2007 Findings and Award and, in addition, indicates that American Home Assurance Company seeks contribution from Insurance Company of the State of Pennsylvania, Hartford and Zurich American Insurance Company in amount undetermined currently. The amount of contribution will be specified upon closure of the case.

This language indicates the Petition was also as to future benefits as well as the Findings and Award.

The Petition for Contribution, although not timely filed, was filed after the Award in 2007 and indicated the Petition was filed for contribution for the Award in 2007 as well as continuing benefits.

Therefore, in the opinion of the Arbitrator, this Petition is timely as to benefits paid after the filing of the Petition and not related to the January 12, 2007 Findings and Award.

3.

On March 31, 2017, applicant and defendant, American Home Assurance Company, entered into a Compromise and Release Agreement settling case ADJ1680248, a continuous trauma injury from June 1992 through September 6, 2001, while applicant was employed as a cook by California Pizza Kitchen with injury to applicant's back, bilateral knees, bilateral shoulders,

bilateral hands, diabetes, vision, rheumatoid arthritis, jaw, fibromyalgia, psyche, hernia, bilateral elbows, fingers, bilateral ankles, bilateral feet, bilateral hips, toes, hypertension and internal.

The Compromise and Release was in the settlement amount of$1,115,000, less $81,336 as seed money for Medicare Set Aside to applicant, $62,947 to applicant as front money cash, $22,053 to the Los Angeles County Child Support per agreement, with $539,445.06 to purchase an annuity for allocation for Medicare Set Aside per the structure, $241,968.94 to purchase an annuity for non-covered expenses per the structure and $167,250 requested as applicant's attorney fee.

Defendant agreed to adjust or litigate or pay liens of record.

The Compromise and Release Agreement was approved on May 23, 2017.

All amounts above were subtracted from the $1,115,000 gross Compromise and Release amount.

On May 31, 2017, American Home Assurance Company, administered by AIG Claims, Inc., filed a First Amended Petition for Contribution.

The Petition for Contribution indicated that the parties entered into a Compromise and Release fully settling all claims by the applicant for benefits arising from this case. The Compromise and Release was approved by an Order issued on May 23, 2017. As a result of that, defendant will submit an accounting to Zurich American Insurance Company for the amount claimed in contribution. American Home Assurance Company indicated they would, according to proof, seek a proportional share of total amounts paid by American Home Assurance Company. A Proof of Service was attached to the First Amended Petition for Contribution. The Proof of Service shows service on the WCAB and Zurich American Insurance Company, among others.

The Arbitrator found that the Proof of Service attached to the Petition for Contribution establishes that the Petition for Contribution was filed on the Appeals Board and served on Zurich American Insurance Company on May 31, 2017.

The Arbitrator found the Amended Petition for Contribution filed on May 31, 2017, having been filed and served within 1 year of the Order Approving Compromise and Release on May 31, 2017, was timely filed.

If for any reason it was found that Petition for Contribution filed on May 31, 2017 was not timely filed, in the opinion of the Arbitrator, the Petition for Contribution filed on June 23, 2010 put Zurich American Insurance Company on notice that American Home Assurance Company

would be claiming contribution on all future benefits and, therefore, the Petition filed on June 23, 2010, in the opinion of the Arbitrator, can be filed prior to the payment of benefits and, therefore, the Petition filed on June 23, 2010 would be timely as to the Compromise and Release Agreement.

C.

1.

Basis for Zurich American Insurance Company's Petition for Reconsideration.

Zurich American Insurance Company, administered by Zurich Los Angeles, filed a Petition for Reconsideration on the following grounds:

1. The Arbitrator erred in finding that medical care following a Compromise and Release or a Maximum Medical Improvement finding qualifies as a new and distinct specie of benefits.

2. The Arbitrator erred in finding that a prior Petition for Contribution may be applicable to subsequent Awards and Orders.

3. The petitioner contends that the Petition for Contribution is untimely. Even if the Petition was properly filed, Petitioner contends that any contribution must be limited to any new and distinct species of benefits.

Basically, the issue presented on reconsideration is whether contribution is limited to permanent disability.

Zurich American Insurance Company argues that based the fact the Petition for Contribution was not timely filed by American Home Assurance form the Findings and Award of January 12, 2017, they cannot recover in contribution on the amount paid for lifetime medical treatment in the Compromise and Release Agreement between the applicant and American Home Assurance.

Zurich further argues that American Home Assurance cannot recover for Temporary disability paid based on the October 11, 2012, Stipulation with Request for Award whereby defendant American Home Assurance agreed to resume temporary disability beginning October 11, 2012, because the Petition for Contribution was not timely filed because it was filed after the Award in 2007 and prior to this award of additional temporary disability.

2.

Right to recover contribution on Award of additional temporary disability on October 11, 2012.

On October 11, 2012, American Home Assurance Company and the applicant agreed on a Stipulation and Award whereby defendant agreed to resume temporary disability beginning October 11, 2012.

The Arbitrator found that where a supplemental Award is issued awarding a new and distinct class of benefits, a Petition for Contribution filed within one year of the supplemental Award is timely as to that Award, even though more than one year has passed since the issuance of the original Award. (*M.B. Neves Trucking Employee Benefits Insurance Company, Petitioners v. Workers' Compensation Appeals Board, Gold State Express, Zenith Insurance Company, Larry Homan Respondents*).

In this case on October 11, 2012, the parties agreed to a Stipulation and Award whereby defendant American Home Assurance agreed to resume temporary disability beginning October 11, 2012.

In the opinion of the Arbitrator this was a supplemental award, awarding a new and district class of benefits, that of resuming the payment of temporary disability.

This conclusion is not disputed by Zurich in their Petition for Reconsideration. Zurich American Insurance Company argues that contribution cannot be allowed for this Award because the Petition was not timely as it was filed prior to the date of this Award.

In the opinion of the Arbitrator, the Petition for Contribution filed on June 23, 2010 by American Home Assurance Company, which was prior to the October 11, 2012 Stipulation of the parties on resuming temporary disability, was timely because the Petition was filed after an Award (2007 Award) and put Zurich American Insurance Company on notice that American Home Assurance Company would be claiming contribution on all future benefits and, therefore, the Petition filed on June 23, 2010, in the opinion of the Arbitrator, can be filed prior to the payment of benefits and, therefore, the Petition filed on June 23, 2010 would be timely as to the Stipulated Award of October 11, 2012.

The Petition for Contribution indicates it is filed regarding the January 12, 2007 Findings and Award and, in addition, indicates that American Home Assurance Company seeks contribution from Insurance Company of the State of Pennsylvania, Hartford and Zurich American Insurance Company in amount undetem1ined currently. The amount of contribution will be specified upon closure of the case.

This language indicates the Petition was also as to future benefits as well as the Findings and Award.

Therefore, in the opinion of the Arbitrator, this Petition is timely as to benefits paid after the filing of the Petition and not related to the January 12, 2007 Findings and Award

3.

Contribution regarding settlement of lifetime medical settled in the Compromise and Release Agreement.

The facts of this case establish that American Home Assurance Company did not file a timely Petition for Contribution from the Findings and Award of January 12, 2007.

The facts establish that American Home Assurance Company did timely file a Petition for Contribution from the Order Approving Compromise and Release dated May 31, 2017.

The issue now becomes what is the effect on the amount of contribution by the facts that American Home Assurance Company did not file a timely Petition for Contribution from the original Findings and Award of January 12, 2007 and did file a timely Petition for Contribution from the subsequent Award of temporary disability and the Order Approving the Compromise and Release Agreement.

The one year Statute of Limitations of Labor Code §5500.5(e) applies to any Award for compensation benefits, not just the final Award. (*Rex Club v. WCAB (Oakley-Clyburn) (Court of Appeal)* (62 CCC 441).

Where a supplemental Award issues awarding a new and distinct class of benefits, a Petition for Contribution filed within one year of the supplemental Award is timely as to that Award, even though more than one year has passed since the issuance of the original Award. (*Rex Club v. WCAB*)

An Order Approving Compromise and Release is equivalent to an Award of compensation. (*Greenwald v. Carey Distributing Company* (46 CCC 703)

In this case, the Petition for Contribution filed from the Compromise and Release Agreement was found timely filed within one year of the Order Approving Compromise and Release Agreement.

The Arbitrator found that an Order Approving Compromise and Release was equivalent to a new Award of compensation.

A Petition for Contribution filed within one year of the supplemental Award is timely as to that Award, even though more than one year has passed since the issuance of the original Award.

Therefore, the Petition for Contribution was timely filed as to the Compromise and Release Agreement.

Where a supplemental Award is issued awarding a new and distinct class of benefits, a Petition for Contribution filed within one year of the supplemental Award is timely as to that Award, even though more than one year has passed since the issuance of the original Award. (*MB. Neves Trucking Employee Benefits Insurance Company, Petitioners v. Workers' Compensation Appeals Board, Gold State Express, Zenith Insurance Company, Larry Homan Respondents*).

Therefore, the next question presented is did the Compromise and Release settle a new and distinct class of benefits from the Findings and Award in 2007, which contribution is barred by the one-year Statute of Limitations.

The original Findings and Award m 2007 found injury and awarded the applicant temporary disability and medical treatment.

The Compromise and Release Agreement settled permanent disability and lifetime medical treatment.

The Arbitrator found that because the original Findings and Award of 2007 did not award permanent disability and the Compromise and Release Agreement settled permanent disability, the Compromise and Release Agreement is for a new and different benefit, permanent disability.

The Compromise and Release Agreement also settled lifetime medical treatment and included an MSA.

The more difficult issue is that the Findings and Award in 2007 awarded medical treatment.

The Compromise and Release Agreement settled lifetime medical treatment.

The question presented is the medical treatment awarded in 2007 the same benefit as lifetime medical.

In the opinion of the Arbitrator, the Findings and Award of 2007 found injury and awarded temporary disability and medical treatment.

That medical treatment was to cure or relieve the injured worker from effects of injury.

In the opinion of the Arbitrator, medical treatment to cure or relieve the injured worker from the effects of injury is a different benefit than lifetime medical treatment awarded after the applicant is MMI and is awarded with permanent disability.

In the opinion of the Arbitrator, medical treatment in 2007 was awarded to cure or relieve the applicant's injury until the applicant reaches MMI status.

When the applicant becomes MMI, in the opinion of the Arbitrator, that is the point when it is determined if the applicant is entitled to lifetime medical treatment.

In the opinion the Arbitrator, the fact an applicant can be awarded medical treatment to cure or relieve from the effects of an injury and later in the case, after the applicant has reached MMI status, it can be found the applicant does not need lifetime medical treatment establishes that medical treatment to cure or relieve from the effects of the injury to get the applicant to MMI status and an award of lifetime medical treatment are different.

In this case, if the applicant's rheumatoid arthritis was found to be only temporarily aggravated by his employment, the applicant would receive lifetime medical treatment even though the applicant was already awarded medical treatment to cure or relieve the injured worker from the effects of the injury to bring him back to his pre-injury status in 2007.

Even though in most cases, when there is a finding of permanent disability, there is a finding of lifetime medical treatment. However, that is not automatic as set forth above.

Another example is an injury in the form of a hernia. The applicant would be entitled to medical treatment to cure or relieve from the effects of the injury including hernia surgery. After the surgery, the applicant could be found to be fully recovered and not in need of lifetime medical treatment.

In the opinion of the Arbitrator, these examples show that lifetime medical treatment and medical treatment to cure or relieve the injured worker from the effects of the injury are not the same benefit.

In addition, the Arbitrator is of the opinion that converting lifetime medical treatment into a lump sum by way of a Compromise and Release is also a new and distinct benefit.

In the opinion of the Arbitrator because the Compromise and Release settled lifetime medical treatment in a lump sum through an MSA, converting lifetime medical to a lump sum Compromise and Release Agreement is a new and distinct benefit and, therefore, contribution is allowed even though there was no timely Petition from the original Award in 2007, which awarded further medical treatment to cure or relieve from the effects of the injury when applicant had not achieved MMI status.

The failure to timely file a Petition for Contribution from the 2007 Award bars any recovery for temporary disability from the date of that Award through the second Stipulation which awarded new temporary disability which is a new and distinct benefit, in the opinion of the Arbitrator.

In the opinion of the Arbitrator, all medical treatment prior to the Compromise and Release Agreement cannot be covered in this contribution by the failure to timely file the Petition for Contribution from the Findings and Award in 2007.

Therefore, the Arbitrator found that contribution is allowed to 29% of the total amount of the Compromise and Release Agreement as the Compromise and Release Agreement is a new and distinct benefit different from that awarded in the Findings and Award in 2007.

The Arbitrator found that contribution is allowed from the supplemental Award of temporary disability in 2011.

The Arbitrator found that contribution is denied for all medical treatment from 2007 through the date of approval of the Compromise and Release Agreement.

The Arbitrator finds that contribution is denied for all temporary disability awarded in 2007 until the supplemental Award of temporary disability from which contribution is allowed.

D.

Zurich American Insurance Company first Petitions for Reconsideration on the grounds that lifetime medical treatment settled by way Compromise and Release with an MSA or after Maximum Medical Improvement is not a new and distinct species of benefits and/or distinct class of benefits from an interim award of temporary disability and a need for medical treatment.

Zurich American Insurance Company argues the fact that an award for temporary disability and medical treatment that was issued including reimbursement for self-procured medical treatment in the Findings and Award in 2007 means that settling of lifetime medical treatment and permanent disability settled in an Compromise and Release Agreement in May 2017 with an MSA, the medical treatment is not a separate class of benefits then the medical treatment awarded in 2007 to cure and relieve from the effects of the injury.

1. In the opinion of the Arbitrator, for the reasons set forth above, medical treatment awarded to cure or relieve from the effects of an injury along with temporary disability is an interim Findings and Award and only awarded medical treatment to cure or relieve from the effects of an injury until the applicant reaches MMI status. The issue of lifetime medical is a separate award

after the applicant is found MMI. It does not follow the applicant has to awarded lifetime medical treatment because there was an interim award of medical treatment to cure and relive.

In the opinion of the Arbitrator, lifetime medical awards are a different species of benefits from an interim award of temporary disability and medical treatment to cure or relieve from the effects of an injury. The interim award of medical treatment is only for medical treatment until the applicant reaches MMI. When the applicant is MMI, the decision is made on lifetime medical treatment. The fact that an interim award of medical treatment is made does not entitle the applicant to a lifetime medical award until the applicant has reached MMI status. Despite the fact an interim award of medical treatment issues does not mean the applicant will be awarded lifetime medical treatment.

The case cited by Zurich American Insurance Company is distinguishable from the facts in this case.

In the case cited by Zurich American Insurance Company, there was a Stipulations with Request for Award for permanent disability and lifetime medical treatment that was then converted to a Compromise and Release Agreement. That is not the case here where lifetime future medical treatment was not determined until the time of the Compromise and Release Agreement.

In the opinion of the Arbitrator, an award of temporary disability and medical treatment that is partial and then is followed by a new stipulation to a new period temporary disability, followed by a settlement of the lifetime medical treatment, in the opinion of the Arbitrator, makes the new period awarded of temporary disability and lifetime medical treatment new and distinct classes and species of benefits.

Zurich American Insurance Company argues that the Petition for Contribution filed by American Home Assurance Company after the Award in 2007 and prior to the prior award of temporary was entered into was not timely because it had to be filed subsequent to the Award.

In this case, the Petition was filed after the first Findings and Award, however, late.

The Petition for Contribution sought not only contribution for the prior Award, but also contribution for benefits that were ongoing and being paid.

In the opinion of the Arbitrator, for the reasons discussed above, a Petition for Contribution filed after the initial Findings and Award can be used as a Petition for benefits that were paid after the Findings and Award if defendant was put on notice the Petition was also for future and ongoing benefits being paid. The Petition was filed after the first Award.

IV.

RECOMMENDATION

For the foregoing reasons, it is recommended that reconsideration be denied.

In the opinion of the Arbitrator, based on the facts of this case, contribution is not limited to permanent disability as argued by Zurich American Insurance Company. Based on the facts of this case, contribution is allowable for temporary disability awarded after the original Findings and Award and medical treatment for the life of the applicant included in the Compromise and Release Agreement as they are separate species of benefits.

DATED: October 28, 2022

Respectfully submitted,
ALTMAN & BLITSTEIN
MARK L. KAHN, ARBITRATOR