WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DONALD HENKE, *Applicant*

vs.

THUMS LONG BEACH COMPANY; CIGA for FREMONT CORPORATION in liquidation; OCCIDENTAL PETROLEUM CORPORATION, insured by NEW HAMPSHIRE INSURANCE COMPANY, adjusted by GALLAGHER BASSETT SERVICES, *Defendants*

Adjudication Numbers: ADJ9800810 (MF), ADJ3318010 (SAC 0360125)
Sacramento District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant New Hampshire Insurance Company (New Hampshire)'s Petition for Reconsideration of the joint Findings and Order (F&O) issued on February 9, 2022, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

The WCJ ordered that the defendant in ADJ9800810, New Hampshire, administer the claim for defendant Fremont Indemnity Company in liquidation, by California Insurance Guarantee Association (CIGA) in ADJ3318010. Both cases are specific injuries.

Defendant New Hampshire contends that there is no overlap between applicant's July 7, 1998 injury in ADJ9800810 and his November 28, 2013 injury in ADJ3318010 so that there is no joint and several liability for "other insurance"; CIGA is contractually bound to administer the November 28, 2013 injury since it entered into the settlement; and alternatively, apportionment of liability is warranted on the issue of CIGA's reimbursement of New Hampshire.

We received an Answer from defendant CIGA. Defendant filed a supplemental petition on March 8, 2022, which we have accepted and reviewed. (Cal. Code Regs., tit. 8, § 10964.)

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[1] Commissioner Lowe, who was on the panel that granted reconsideration, no longer serves on the Appeals Board. A new panel member has been appointed in Commissioner Lowe's place.

The WCJ filed a report and recommendation on petition for reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the supplemental petition, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our decision after reconsideration we rescind the February 9, 2022 F&O and return the matter to the trial level for further proceedings consistent with this decision.

FACTS

As found by the WCJ in the F&O, applicant, while employed on June 7, 1998, sustained injury to the lumbar spine, thoracic spine, and right shoulder in ADJ3318010. Applicant was employed by THUMS Long Beach Company, insured by Fremont, and eventually CIGA in liquidation. They entered into stipulations with request for award, and an award issued on October 18, 2007.

In addition, the WCJ found applicant, while employed on November 28, 2013, sustained injury to the head, neck, upper extremities, hips, psyche, and back in ADJ9800810. Applicant was employed by Occidental Petroleum Corporation, insured by New Hampshire. They entered into stipulations with request for award, and an award issued on July 12, 2019.

For clarity, it is noted that applicant also has claimed a cumulative injury through November 27, 2013, to both ears (hearing loss), in ADJ10794044. This claim is referenced in the record but is not a part of these proceedings.

CIGA filed a petition for change of administrator in both ADJ3318010 and ADJ9800810 seeking to be relieved from administering medical care in ADJ3318010.

The WCJ issued a joint order that "CIGA's Petition for Change of Administrator is granted. New Hampshire Insurance Company/Gallagher Bassett is to take over administration of the Award in ADJ3318010." Defendant New Hampshire seeks reconsideration of this order.

DISCUSSION

Pursuant to California Insurance Code section 1063.2(a), CIGA's fundamental statutory mandate is to pay and discharge the "covered claims" of insolvent insurers. Insurance Code section 1063.1(c)(1) sets forth the general definition of "covered claims," which, as relevant here, includes

"the obligations of an insolvent insurer ... (A) imposed by law and within the coverage of an insurance policy of the insolvent insurer … [and] (F) in the case of a policy of workers' compensation insurance, to provide workers' compensation benefits under the workers' compensation law of this state … ." (See also *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd.* (2004) 117 Cal.App.4th 350, 356 [69 Cal.Comp.Cases 186]; *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd.* (2003) 112 Cal.App.4th 358, 364 [68 Cal.Comp.Cases 1448].)

Insurance Code section 1063.1(c)(9)(A) provides that "'[c]overed claims' [do] not include any claim to the extent it is covered by any other insurance of a class covered by this article available to the claimant or insured." As such, in cases where there is coverage by a solvent insurer, CIGA has no duty to pay and discharge any claims. Case and statutory law make clear that CIGA is not an "insurer" in the ordinary sense as CIGA is not an insurance company, its duties are not co-extensive with the insolvent insurer's obligations, and it does not stand in the shoes of the insolvent insurer. (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 786; *Baxter Healthcare Corp. v. California Ins. Guarantee Assn.* (2000) 85 Cal.App.4th 306, 309-310; *American Nat. Ins. Co. v. Low* (2000) 84 Cal.App.4th 914, 920; *Mercury Ins. Co. v. Enterprise Rent-A-Car Co. of Los Angeles* (2000) 80 Cal.App.4th 41, 51; *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.* (*Garcia*) (1997) 60 Cal.App.4th 548, 556 [62 Cal.Comp.Cases 1661, 1666-1667]; *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (*Conces*) (1992) 10 Cal.App.4th 988, 996- 997 [57 Cal.Comp.Cases 660, 664-666]; *Denny's Inc. v. Workers' Comp. Appeals Bd.* (*Bachman*) (2003) 104 Cal.App.4th 1433, 1438 [68 Cal.Comp.Cases 1, 4].)

The WCAB cannot apportion liability for medical treatment and temporary disability indemnity between CIGA and insurers. (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (*Weitzman*) (2005) 128 Cal.App.4th 307, 318-320 [70 Cal.Comp.Cases 556]; *CIGA v. Workers' Comp. Appeals Board* (*Hooten*) (2005) 128 Cal.App.4th 569, 573 [70 Cal.Comp.Cases 551].) When the need for treatment in a covered claim is from a combination of industrial injuries, which includes an injury for which there is "other insurance," because medical care cannot be apportioned there is joint and several liability for such treatment. This joint and several liability relieves CIGA of liability because there is "other insurance" for the claim. Correspondingly, if it is found there is no "other insurance," CIGA remains liable for treatment.

It appears the clearest statement of record regarding the cause of treatment for the thoracic and lumbar spine is from agreed medical evaluator (AME) Dr. Kasman. It is acknowledged that AME Dr. Kasman later walked back from providing opinions for the orthopedic injuries, however in the October 2015, report he states "Therefore, treatment of the thoracolumbar spine should remain with the June 1998 injury as cogently and correctly noted by Dr. Snook." (Joint Exhibit 1, Report of AME Michael Kasman, M.D., October 2, 2015, page 145.) This statement appears derived from AME Dr. Kasman's medical digest of the September 18, 2014 report of panel qualified medical evaluator (PQME) Dr. Snook.

The actual September 18, 2014, PQME Dr. Snook report regarding future medical care states however, "It would appear to me that the medical record clearly separates *the two pain conditions* and that care and *treatment under the previous injury should continue* as has been agreed to previously and has been provided by Dr. Conard and associates." (Joint Exhibit 2, Report of PQME Lee T. Snook, M.D., September 18, 2014, page 83.) This statement is problematic because PQME Snook provides several diagnoses which include pain: chronic pain due to trauma, chronic pain syndrome, low back pain, pain disorder related to psychological factors, and myalgia/myositis, myofascial pain. Also listed are additional diagnoses that could be reasonably linked to pain conditions. (Joint Exhibit 2, at page 82.) It is not clear which body parts are associated with which condition. It is even more tenuous to try and associate treatment for a body part with an injury date.

The present record does not contain substantial medical opinions regarding causation of treatment for the lumbar spine, thoracic spine, and right shoulder. The medical opinions that do touch on causation of treatment are cursory, stale and primarily focused on apportionment of disability. While often causation of medical treatment will reasonably follow causation of impairment, such connections are not a given. Analysis of treatment causation requires informed medical opinion.

Here the WCJ did not directly address in the decision the cause of the need for medical care for the lumbar spine, thoracic spine, and right shoulder. In reaching the order, the WCJ framed the issue as simply "whether there is joint and several liability for the two injuries." The decision contains discussion of the cause of permanent disability and acknowledges overlapping body parts between the two injuries.

On the existing record it is not possible to establish which injury, or injuries, caused the current need for treatment to the lumbar spine, thoracic spine, and right shoulder. Although medical care was awarded for body parts in both ADJ3318010 and ADJ9800810, it is necessary to determine the current cause of treatment for each body part.

A decision must be based on admitted evidence in the record and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16].) Where the issue in dispute is a medical one, expert medical evidence is ordinarily needed to resolve the issue. (*Insurance Co. of North America v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 905, 912 [176 Cal. Rptr. 365, 46 Cal.Comp.Cases 913]; *Peter Kiewit Sons v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

Further proceedings are necessary to develop the medical record regarding causation of treatment for each body part at issue. Thereafter a determination of the existence of joint and several liability may be made based on the new medical evidence.

Should joint and several liability be found for the treatment of one or more body parts on remand in these cases, the WCJ may consider, as an alternative to ordering change in administrator, an order in ADJ3318010 finding the existence of joint and several liability for treatment of a body part or parts, that CIGA is statutorily not liable for treatment in ADJ3318010 for such treatment as it is covered by the other insurance, and that applicant be directed to seek treatment in

ADJ9800810 (New Hampshire Insurance Company), for the relevant body parts covered by the "other insurance" in that claim.

Accordingly, as our decision after reconsideration we rescind the February 9, 2022, order and return the matter to the trial level for further development of the record.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the order of February 9, 2022, is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 13, 2025

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

DONALD HENKE
LAW OFFICES OF MARCUS, REGALADO, MARCUS & PULLEY, LLP
BENTHALE, MCKIBBIN & MCKNIGHT
LAW OFFICES OF WEITZMAN & ESTES
SEDGWICK CALIFORNIA INSURANCE GUARANTEE ASSOCIATION

PS/oo

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